

# RULE MAKING ACTIVITIES

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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.

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## Department of Civil Service

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

#### **Attendance Rules, Extension of Supplemental Military Leave with Pay, Leave at Reduced Pay and Annual Grants of Training Leave at Reduced Pay**

**I.D. No.** CVS-03-05-00005-P

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

**Proposed action:** This is a consensus rule making to amend sections 21.15 and 28-1.17 of Title 4 NYCRR.

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

**Subject:** Attendance rules for employees in New York State departments and institutions.

**Purpose:** To extend the availability of supplemental military leave with pay, leave at reduced pay and annual grants of training leave at reduced pay for eligible New York State employees, through Dec. 31, 2006.

**Substance of proposed rule (Full text is not posted on a State website):** The proposed rule amends sections 21.15 and 28-1.17 of the Attendance Rules for Employees in New York State Departments and Institutions to continue the availability of the single grant of supplemental military leave with pay and further leave at reduced pay through December 31, 2006, and to provide for separate grants of the greater of 22 working days or 30 calendar days of training leave at reduced pay during each of the calendar

years 2005 and 2006. Union represented employees already receive these benefits pursuant to memoranda of understanding (MOUs) negotiated with the Governor's Office of Employee Relations (GOER). The proposed rule merely amends section 21.15 of the Attendance Rules consistent with the current MOUs, and amends section 28-1.17 to extend equivalent benefits to employees serving in positions designated managerial or confidential (m/c).

Under current statute, section 242 of the New York State Military Law provides that public officers and employees who are members of the organized militia or any reserve force or reserve component of the armed forces of the United States may receive the greater of 22 working days or 30 calendar days of leave with pay to perform ordered military duty in the service of New York State or the United States during each calendar year or any continuous period of absence.

Following the events of September 11, 2001, certain State employees were ordered to extended active military duty, or frequent periods of intermittent active military duty. These employees faced the loss of State salary, with attendant loss of benefits for their dependents, upon exhaustion of the annual grant of Military Law paid leave. Accordingly, supplemental military leave, leave at reduced pay and training leave at reduced pay were made available to such employees pursuant to MOUs negotiated with the employee unions. Corresponding amendments to the Attendance Rules were adopted extending equivalent military leave benefits to employees in m/c designated positions. While these benefits are intended to expire upon a date certain, the benefits described herein have been repeatedly renewed in the wake of the continuing war on terror, including homeland security activities, and the armed conflicts in Afghanistan and Iraq.

With respect to supplemental military leave, eligible State employees federally ordered, or ordered by the Governor, to active military duty (other than for training) in response to the war on terror receive a single, non-renewable grant of the greater of 22 working days or 30 calendar days of supplemental military leave with full pay. Currently, the availability of supplemental military leave pursuant to the Attendance Rules will cease on December 31, 2004.

With respect to military leave at reduced pay, upon exhaustion of the military leave benefit conferred by the Military Law, and the single grant of supplemental military leave with pay, and any available accruals (other than sick leave) which an employee elects to use, employees who continue to perform qualifying military duty are eligible to receive military leave at reduced pay. Compensation for such leave is based upon the employee's regular State salary as of his/her last day in full pay status (defined as base pay, plus location pay, plus geographic differential) reduced by military pay (defined as base pay, plus food and housing allowances) received from the United States or New York State for military service, if the former exceeded the latter. While in leave at reduced pay status, employees are eligible to receive leave days due upon his/her personal leave anniversary if such anniversary date falls during a period of military leave at reduced pay, and can accumulate biweekly vacation and sick leave credits for any pay period in which they remain in full pay status for at least seven out of ten days (or a proportionate number of days for employees with work weeks of less than 10 days per bi-weekly pay period.) These leave benefits are available even for employees who do not receive supplemental pay because their military salaries (as defined) exceed their regular State pay. Unless extended, the availability of leave at reduced pay under the Attendance Rules expires on December 31, 2004.

With respect to training leave at reduced pay, many employees ordered to military duty in response to the war on terror also continue to perform

other required military service unrelated to the war on terror. To support employees performing other military duty, including mandatory summer and weekend training and other activation, a new category of leave was established, entitled "training leave at reduced pay." Eligible employees receive the greater of 22 work days or 30 calendar days of training leave at reduced pay following qualifying military duty in response to the war on terror, and after depleting the annual Military Law grant of leave with pay and any leave credits (other than sick leave) that they elect to use. Training leave at reduced pay may then be used for any ordered military duty during the calendar year that is not related to the war on terror. Employees who have already utilized leave at reduced pay receive the same compensation for any periods of training leave at reduced pay. Employees who have not used leave at reduced pay prior to their initial use of training leave at reduced pay are paid according to the employee's regular State salary as of his or her last day in full pay status reduced by military pay received from the United States or New York State for military service, if the former exceeds the latter. Employees on training leave at reduced pay retain the same leave accrual benefits as apply to leave at reduced pay. Eligibility for training leave at reduced pay pursuant to the Attendance Rules is scheduled to expire on December 31, 2004.

The proposed rule extends the availability of supplemental military leave with pay and leave at reduced pay through December 31, 2006, and provides for separate grants of the greater of 22 work days or 30 calendar days of training leave at reduced pay for calendar years 2005 and 2006. Employees must establish eligibility for supplemental military leave (provided they have not already depleted the single grant of such leave), leave at reduced pay and training leave at reduced pay during 2005 and 2006 by performing qualifying military service. Unused training leave at reduced pay earned during year 2005 cannot be carried forward into year 2006.

Employees on leave at reduced pay or training leave at reduced pay on January 1, 2005, have their rate of pay calculated from their base State pay as of January 1, 2005, reduced by the military pay rate applied to their most recent period in either reduced pay category prior to 2005. For employees who have used leave at reduced pay or training leave at reduced pay prior to year 2005, their pay for either type of reduced pay leave at point between January 1, 2005 and December 31, 2006, will be calculated from their base State pay as of their last day in full pay status after January 1, 2005, prior to their initial use of leave of reduced pay or training leave at reduced pay, offset by the rate of military pay from their most recent period of reduced pay leave, prior to 2005. Employees whose initial use of either reduced pay leave category occurs during 2005 or 2006 will have their pay rate determined by their base State pay on their last day of full pay status, minus military pay. For all employees receiving leave at reduced pay or training leave at reduced pay in 2005 or 2006, the initial pay calculation will apply to all subsequent periods of reduced pay leave.

The proposed amendment provides that in no event shall supplemental military leave, leave at reduced pay or training leave at reduced pay be granted for military service performed after December 31, 2006, nor shall such leaves be available to employees who have voluntarily separated from State service or who are terminated for cause.

**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:** John F. Barr, Executive Deputy Commissioner, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6212, e-mail: jxb25@cs.state.ny.us

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

#### **Consensus Rule Making Determination**

Section 6(1) of the Civil Service Law authorizes the State Civil Service Commission to prescribe and amend suitable rules and regulations concerning leaves of absence for employees in the Classified Service of the State.

Following September 11, 2001, certain State employees were federally ordered, or ordered by the Governor, to active military duty. The New York State Military Law provides for the greater of 22 working days or 30 calendar days of military leave at full (State) pay for ordered service during each calendar year or continuous period of absence. Employees ordered to prolonged active duty, or repeatedly ordered to intermittent periods of active duty, faced exhaustion of the Military Law leave with pay benefit. Further periods of military service would then subject these employees to economic hardship from the loss of their regular State salaries and deprive their dependents of needed benefits derived from State employment.

To support State employees called to military duty after September 11, 2001, the Governor's Office of Employee Relations (GOER) executed

memoranda of understanding (MOUs) with the employee unions to provide for a supplemental grant of military leave with pay and leave at reduced pay. Subsequent MOUs established a new benefit entitled training leave at reduced pay. These military leave benefits have been repeatedly renewed in the wake of the ongoing war on terrorism, including homeland security activities and military actions in Afghanistan and Iraq.

Upon depletion of the Military Law paid leave benefit, employees federally ordered, or ordered by the Governor, to active military duty in response to the war on terror receive a single grant of the greater of 22 work days or 30 calendar days of military leave with pay. Employees who continue to perform active duty in response to the war on terror and have exhausted their paid Military Law leave and supplemental military leave with pay, and any available leave credits (other than sick leave), which they elect to use, become eligible for leave at reduced pay. Leave at reduced pay provides eligible employees with the difference between their regular State salaries (defined as base pay, plus location pay, plus geographic differential) and their pay for military service (defined as base pay plus food and housing allowances), if the former exceeds the latter. Individuals in leave at reduced pay status also retain certain other leave benefits, even if they do not receive additional salary.

Members of the Reserves and National Guard may also continue to perform duty unrelated to the war on terror, including mandatory weekend and summer training or other activation. Following any military service related to the war on terror, and exhaustion of the annual Military Law paid leave benefit, plus any available leave credits (other than sick leave) that an employee elects to use, eligible employees can use up to 22 work days or 30 calendar days of training leave at reduced pay for any ordered military service that is not in response to the war on terror. Salary computations for training leave at reduced pay are substantially derived from the calculations for leave at reduced pay. Without further amendment, the availability of supplemental military leave, leave at reduced pay and training leave at reduced pay under the Attendance Rules will expire on December 31, 2004.

The Governor's Office of Employee Relations has executed new MOUs with the Classified Service employee unions extending the availability of the single grant of supplemental military leave with pay and leave at reduced pay through December 31, 2006, and providing for separate grants of the greater of 22 work days or 30 calendar days of training leave at reduced pay for each of the calendar years 2005 and 2006. Unused training leave at reduced pay from 2005 cannot be carried forward into 2006. The State Civil Service Commission shall amend the Attendance Rules in accordance with the MOUs and extend equivalent benefits to employees serving in m/c designated positions.

No person or entity is likely to object to the rule as written, because it conforms the Attendance Rules to the current, approved MOUs negotiated with the employee unions and provides equivalent benefits to employees serving in m/c positions. Cost estimates are expected to remain consistent with the \$2-5 million per annum cost estimates prepared before prior adoptions of the military leave benefits described herein. These cost projections include both the anticipated full and partial State salary payments for employees on all categories of additional military leave and the cost of any replacement staffing for mission-critical State positions. Most eligible employees are expected to have already utilized the sole grant of supplemental military leave at full pay, so direct leave costs for calendar years 2005 and 2006 may be slightly lower than projected. Estimates cannot anticipate sudden changes in global conditions or homeland security needs. No new compliance costs or implementation difficulties are associated with the extension of the subject benefits.

The Civil Service Commission received no public comments after publication of the amendments to the Attendance Rules establishing or re-authorizing the benefits now put forward for renewal. A previous re-adoption of the proposed amendments was proposed and adopted as a consensus rule. As no person is likely to object to the rule as written, the proposed rule is advanced as a consensus rule pursuant to State Administrative Procedure Act (SAPA) § 202(1)(b)(i).

#### **Job Impact Statement**

By modifying Title 4 of the NYCRR to extend the availability of supplemental military leave, leave at reduced pay and training leave at reduced pay for eligible employees subject to the Attendance Rules for Employees in New York State Departments and Institutions, these rules will positively impact jobs or employment opportunities for eligible employees, as set forth in section 201-a(2)(a) of the State Administrative Procedure Act (SAPA). Therefore, a Job Impact Statement (JIS) is not required by section 201-a of such Act.

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

**Jurisdictional Classification**

**I.D. No.** CVS-03-05-00009-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 Insurance 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 Insurance Department, by increasing the number of positions of Supervising Risk Management Specialist from 6 to 7.

**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:** John F. Barr, Executive Deputy Commissioner, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6212, e-mail: jxb25@cs.state.ny.us

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

**Consolidated Regulatory Impact Statement**

1. Statutory Authority: The New York State Civil Service Commission is authorized to promulgate rules for the jurisdictional classification of offices within the classified service of the State by Section 6 of the Civil Service Law. In so doing, it is guided by the requirements of Sections 41, 42 and 43 of this same law.

2. Legislative Objectives: These rule changes are in accord with the statutory authority delegated to the Civil Service Commission to prescribe rules for the jurisdictional classification of the offices and positions in the classified service of the State.

3. Needs and Benefits: Article V, Section 6, of the New York State Constitution requires that, wherever practicable, appointments and promotions in the civil service of the State, including all its civil divisions, are to be made according to merit and fitness. It also requires that competitive examinations be used, as far as practicable, as a basis for establishing this eligibility. This requirement is intended to provide protection for those individuals appointed or seeking appointment to civil service positions while, at the same time, protecting the public by securing for it the services of employees with greater merit and ability. However, as the language suggests, the framers of the Constitution realized it would not always be possible, nor indeed feasible, to fill every position through the competitive process. This point was also recognized by the Legislature for, when it enacted the Civil Service Law to implement this constitutional mandate, it provided basic guidelines for determining which positions were to be outside of the competitive class. These guidelines are contained in Section 41, which provides for the exempt class; 42, the non-competitive class and 43, the labor class. Thus, there are four jurisdictional classes within the classified service of the civil service and any movement between them is termed a jurisdictional reclassification.

The Legislature further established a Civil Service Department to administer this Law and a Civil Service Commission to serve primarily as an appellant body. The Commission has also been given rulemaking responsibility in such areas as the jurisdictional classification of offices within the classified service of the State (Civil Service Law Section 6). In exercising this rule-making responsibility, the Commission has chosen to provide appendices to its rules, known as Rules for the Classified Service, to list those positions in the classified service which are in the exempt class (Appendix 1), non-competitive class (Appendix 2), and labor class (Appendix 3).

In effect, all positions, upon creation at least, are, by constitutional mandate, a part of the competitive class and remain so until removed by the Civil Service Commission, through an amendment of its rules upon showing of impracticability in accordance with the guidelines provided by the Legislature. The guidelines are as follows. The exempt class is to include those positions specifically placed there by the Legislature, together with all other subordinate positions for which there is no requirement that the person appointed pass a civil service examination. Instead, appointments rest in the discretion of the person who, by law, has determined the position's qualifications and whether the persons to be appointed possess

those qualifications. The non-competitive class is to be comprised of those positions which are not in the exempt or labor classes and for which the Civil Service Commission has found it impracticable to determine an applicant's merit and fitness through a competitive examination. The qualifications of those candidates selected are to be determined by an examination which is sufficient to insure selection of proper and competent employees. The labor class is to be made up of all unskilled laborers in the service of the State and its civil divisions, except those which can be examined for competitively.

4. Costs: The removal of a position from one jurisdictional class and placement in another is descriptive of the proper placement of the position in question in the classified service, and has no appreciable economic impact for the State or local governments.

5. Local Government Mandates: These amendments have no impact on local governments. They pertain only to the jurisdictional classification of positions in the State service.

6. Paperwork: There are no new reporting requirements imposed on applicants by these rules.

7. Duplication: These rules are not duplicative of State or Federal requirements.

8. Alternatives: Within the statutory constraints of the New York State Civil Service Commission, it is not believed there is a viable alternative to the jurisdictional classification chosen.

9. Federal Standards: There are no parallel Federal standards and, therefore, this is not applicable.

10. Compliance Schedule: No action is required by the subject State agencies and, therefore, no estimated time period is required.

**Consolidated Regulatory Flexibility Analysis**

The proposal does not affect or impact upon small businesses or local governments, as defined by Section 102(8) of the State Administrative Procedure Act, and, therefore, a regulatory flexibility analysis for small businesses is not required by Section 202-b of such act. In light of the fact that this proposal only affects jurisdictional classifications of State employees, it will not have any adverse impact on small businesses or local governments.

**Consolidated Rural Area Flexibility Analysis**

The proposal does not affect or impact upon rural areas as defined by Section 102(13) of the State Administrative Procedure Act and Section 481(7) of the Executive Law, and, therefore, a rural area flexibility analysis is not required by Section 202-bb of such act. In light of the fact that this proposal only affects jurisdictional classifications of State employees, it will not have any adverse impact on rural areas.

**Consolidated Job Impact Statement**

The proposal has no impact on jobs and employment opportunities. This proposal only affects the jurisdictional classification of positions in the Classified Civil Service.

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

**Jurisdictional Classification**

**I.D. No.** CVS-03-05-00010-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 a position in the non-competitive class in the Insurance 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 Insurance Department, by increasing the number of positions of Principal Insurance Frauds Investigator 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:** John F. Barr, Executive Deputy Commissioner, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6212, e-mail: jxb25@cs.state.ny.us

**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-03-05-00011-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) 2 of Title 4 NYCRR.

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

**Subject:** Jurisdictional classification.

**Purpose:** To delete a position from and redesignate 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 deleting therefrom the position of Secretary 2 (1) and by redesignating a position of Secretary 2 (1) to Secretary 2 (1). Such redesignation shall be retroactive to May 27, 1998.

**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:** John F. Barr, Executive Deputy Commissioner, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6212, e-mail: jxb25@cs.state.ny.us

**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-03-05-00012-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 delete a position from and classify a position in the non-competitive class in the Department of State.

**Text of proposed rule:** Amend Appendix(es) 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of State, by deleting therefrom the position of Associate Counsel (1) (Until 12/31/97) and by adding thereto the position of Associate Counsel (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:** John F. Barr, Executive Deputy Commissioner, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6212, e-mail: jxb25@cs.state.ny.us

**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-03-05-00013-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 delete a position from and classify a position in the non-competitive class in the Department of Family Assistance.

**Text of proposed rule:** Amend Appendix(es) 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Family Assistance under the subheading "Office of Temporary and Disability Assistance," by deleting therefrom the position of Computer Programmer Analyst (1) and by adding thereto the position of Information Technology Specialist 1 (Programming) (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:** John F. Barr, Executive Deputy Commissioner, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6212, e-mail: jxb25@cs.state.ny.us

**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.

**New York State Energy  
Research and Development  
Authority**

**NOTICE OF CONTINUATION  
NO HEARING(S) SCHEDULED**

**Minimum Energy Efficiency Standards**

**I.D. No.** ERD-35-04-00011-C

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

**The notice of proposed rule making,** I.D. No. ERD-35-04-00011-P was published in the *State Register* on September 1, 2004.

**Subject:** Minimum energy efficiency standards for energy using products purchased by or for the State and State agencies.

**Purpose:** To establish minimum energy efficiency standards.

**Substance of rule:** Section 506.4 Minimum Energy Efficiency Standards defines the various energy using products and sets the minimum efficiency standards.

Electric motors are defined and standards are set for open and totally enclosed fan cooled (TEFC) electric motors. At varying specified levels of horsepower from 1 to 500, the minimum nominal full load efficiency for open motors at 3600 rpm ranges from 77.0 to 95.8, at 1800 rpm ranges from 85.5 to 96.2, and at 1200 rpm ranges from 82.5 to 96.2 and for TEFC motors at 3600 rpm ranges from 77.0 to 95.8, at 1800 rpm ranges from 85.5 to 96.2, and at 1200 rpm ranges from 82.5 to 95.8. These levels are the same levels identified in the NEMA Premium™ Efficiency Electric Motors Program. The efficiency of electric motors are determined in accordance with the procedures set forth in 10 Code of Federal Regulations (CFR) Part 431, Subpart B, Section 431.24.

Residential water heaters are defined and standards are set for electric storage water heaters, gas-fired storage water heaters, oil-fired water

heaters, and gas-fired instantaneous water heaters. The minimum energy factor for electric storage water heaters is  $0.97 - 0.00132 \times \text{Volume}$ ; gas-fired storage water heaters is  $0.67 - 0.0019 \times \text{Volume}$ ; oil-fired water heaters is  $0.59 - 0.0019 \times \text{Volume}$ ; and gas-fired instantaneous water heaters is  $0.62 - 0.0019 \times \text{Volume}$ . The minimum efficiency standards for residential water heaters are determined in accordance with the test procedures set forth in 10 Code of Federal Regulations (CFR) part 430, Subpart B, Appendix E.

Commercial water heaters are defined and standards are set for electric storage water heaters, gas-fired storage water heaters, oil-fired water heaters, and gas instantaneous water heaters and oil instantaneous water heaters. The standards for thermal efficiency and standby losses are as follows: electric storage water heaters maximum standby loss is  $0.3 + 27/V$ ; gas-fired storage water heaters minimum thermal efficiency is 80% and maximum standby loss is  $Q/800+110 (\text{sqrt}Vr)$ ; oil-fired water heaters minimum thermal efficiency is 78% and maximum standby loss is  $Q/800+110 (\text{sqrt}Vr)$ ; gas-fired instantaneous water heaters with storage capacity of less than 10 gallons minimum thermal efficiency is 80% and storage capacity of equal to or greater than 10 gallons minimum thermal efficiency is 80% and maximum standby loss is  $Q/800+110 (\text{sqrt}Vr)$ ; and oil instantaneous water heaters with volume size of less than 10 gallons minimum thermal efficiency is 80% and volume size equal to or greater than 10 gallons minimum thermal efficiency is 80% and maximum standby loss is  $Q/800+100 (\text{sqrt}Vr)$ . The minimum efficiency standards for commercial water heaters are determined in accordance with the test procedures set forth in ANSI Z21.10.3-1998.

Residential refrigerators and refrigerator-freezers which volume does not exceed 39 cubic feet (1104 liters) and freezers which total refrigerated volume does not exceed 30 cubic feet (850 liters) are defined and standards are set for automatic defrost units and compact refrigerators. The maximum annual energy use in kWh/yr for automatic defrost units with top-mounted and side-mounted freezer with and without Through-The-Door (TTD) ice and different defrost systems for compact refrigerators is determined by formulas and ranges from  $0.90 (10.7 AV + 299)$  to  $0.90 (10.1 AV + 406)$ , where AV stands for adjusted volume. The minimum efficiency standards for residential refrigerator-freezers are determined in accordance with the test procedures set forth in 10 Code of Federal Regulations (CFR) part 430, Subpart B, Appendix A1 and B1.

Commercial refrigeration is defined and standards are set for reach-in cabinet freezers and reach-in refrigerators. The maximum annual energy use in kWh/day for reach-in cabinet freezer is determined by the formula  $0.40V + 1.38$  and reach-in refrigerator is determined by the formula  $0.10V + 2.04$ , where V stands for volume. The minimum efficiency standards for commercial refrigerators and freezers are determined in accordance with the test procedures set forth in ASHRAE 117.

Luminaire is defined and standards are set for recessed, plastic wrap-around, strip lights, and industrial types. The minimum luminaire efficacy ratings (LER) for 1, 2, 3, or 4 lamps range from 41 to 70. The LER are determined in accordance with the test procedures set forth in NEMA LE5-2001.

Compact fluorescent lamp (CFL) is defined and standards are set for bare bulbs, covered lamp with no reflectors, and reflector type. The minimum lumens per Watt (LPW) range from 33 to 60. The minimum efficiency standards for compact fluorescent lamps are determined in accordance with the test procedures set forth in 10 Code of Federal Regulations (CFR) part 430, Subpart B, Appendix R.

Mercury vapor luminaires and lamps are defined and are prohibited from being purchased.

Section 506.6 lists the materials referenced in the additional regulations and indicates where copies of the references may be found.

**Changes to rule:** No substantive changes.

**Expiration date:** September 1, 2005.

**Text of proposed rule and changes, if any, may be obtained from:** Mitchell Khosrova, Associate Counsel, New York State Energy Research and Development Authority, 17 Columbia Circle, Albany, NY 12203, (518) 862-1090, ext. 3380, e-mail: mk2@nyserda.org

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

## Office of General Services

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

#### Parking Regulations for Office of General Services Parking Facilities

**I.D. No.** GNS-03-05-00007-P

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

**Proposed action:** Amendment of Part 296 of Title 9 NYCRR.

**Statutory authority:** Executive Law, section 200

**Subject:** Parking regulations for Office of General Services (OGS) parking facilities.

**Purpose:** To provide specific guidance concerning what is expected of a person who parks a vehicle in an OGS controlled parking lot.

**Text of proposed rule:** SECTION 296-1.1 PARKING IN OGS [PAID] PARKING FACILITIES.

(a) Any State employee desiring to park in an OGS [paid] parking facility in the Albany area must register for such privilege with their agency employer and/or the OGS Bureau of Parking Services. Those State employees outside of the Albany area should contact the OGS building superintendent or the equivalent. [Registered employee permit holders must properly affix and display any issued tag/decals.] A registered State employee must conspicuously display his or her valid permit, tag, and/or decal in the vehicle as directed by the issuing office.

(b) The term State "employee" shall include all persons employed in State buildings, all persons employed by any State department, commission, board, office, authority or other State agency, State legislators, judges and their designated assistants, clerks and other administrative personnel. In addition, certain other individuals may, in the discretion of the commissioner or his designee, be deemed State employees for the purposes of this Part, where such individuals continuously and regularly conduct business or have dealings with the State of New York. Every employee shall be identified by State employee identification cards which they must possess at all times and which must be produced upon request.

Section 296-1.8 Permit sales.

(a) Each permit holder will be issued a permanent parking permit tag and decal(s) for their authorized vehicle(s). Payment for the permit will either be by voluntary automatic payroll deduction, or through periodic billing to the permit holder except where other arrangements are made with the Bureau of Parking Services. A Parking Permit Registration form must be submitted prior to the issuance of the permit tag and decal(s).

(b) Permit holders are required to submit a Parking Permit Update form for any of the following reasons:

- (1) name change;
- (2) agency change;
- (3) change of office phone;
- (4) change of office address for those eligible for payroll deduction;
- (5) change of home or office address for those ineligible for payroll deduction;
- (6) change/add/delete permit holders license plate number;
- (7) change/add/delete car pool member; [or]
- (8) assignment of a new or replacement employee identification card; or
- [(8)](9) cancel payroll deduction.

Completed forms must be returned to the parking lot attendant or to the Bureau of Parking Services. Registration and update forms are available from [parking attendants] the OGS web site, the Bureau's Central Office or the agency Parking Coordinator. All forms must be submitted through the Bureau's [c]Central [o]Office.

(c) The permit holder will be assessed a replacement fee of \$10.00 if it becomes necessary to issue an additional tag or Empire State Plaza access card due to the negligence or fault of the permit holder.

(d) The Bureau of Parking Services reserves the right to refuse to accept personal checks from any permit holder who issues two or more checks which are returned for insufficient funds. In addition, a permit holder will be assessed a \$20.00 fee for any dishonored checks returned to OGS.

Section 296-1.10 State Employee Parking.

(a) State employees may park their vehicles in assigned parking areas provided that such vehicles are first registered with the OGS Bureau of Parking Services or other agency as provided in this section and section 302 and a valid parking permit for such vehicle has been issued. State employees may not park in areas other than those top which they are specifically assigned without the authorization of the OGS Bureau of Parking Services, i.e., parking areas that have been designated for visitors, handicapped employees or in pre-designated spaces marked by official signs.

(b) Whenever a vehicle is parked in an area set aside for State employees, a valid permit for such area must be conspicuously displayed in the vehicle as directed by the Office of General Services.

#### Section 296-1.[11]I2 Violations of rules: parking

(a) The owner and/or operator of any vehicle found in violation of this Part or the parking rules of the Division of Facilities Planning and Operation in Chapter IV, Subchapter B of this Subtitle will receive a parking citation for parking violation. [In addition, the procedures and penalties prescribed in Chapter IV, Subchapter B, section 302.4 of this Subtitle, shall be applicable to any violator of said rules.]

(b) [In addition to the instances prescribed in Chapter IV, Subchapter B, section 302.4, subdivision (c) of this Title,] Any vehicle that does not display a valid permit to park in an assigned permit area shall be subject to the installation of a "booting" device by the Office of General Services, in accordance with the following procedures:

(1) Upon the first violation, vehicle owners will be given written notice placed in a conspicuous location on the vehicle that the vehicle is not authorized to park in such area and that any future violation will result in the imposition of fines, the installation of a booting device, and towing of the vehicle without further notice.

(2) Any vehicle that has been the subject of a previous written notice of violation shall have a booting device installed on the vehicle, until such time as the vehicle can be later towed. If the vehicle operator arrives before the tow operator arrives, the OGS representative will remove the boot only upon payment of a \$50.00 service charge and any outstanding parking fees owed to the OGS.

(c) [t]The towing of vehicles is permissible when a vehicle is found park[ing] ed in a [paid] parking facility other than the one for which it has a permit (unless prior approval has been received from the Bureau of Parking Services).

(1) A vehicle may be removed to a garage, automobile pound or other place of safety under the following circumstances:

- (i) when a vehicle is found unattended which constitutes an obstruction to traffic; or
- (ii) when a vehicle is found stopped, standing or parked in violation of this Part; or
- (iii) when a vehicle is found parked displaying an altered parking permit; or
- (iv) when a vehicle is under suspension and found in violation of such suspension.

[(1)](2) The contents of all vehicles towed away by or on behalf of the appropriate OGS officials may be inventoried, and any contraband material found in the vehicle will be confiscated. The list of the contents of the vehicle will be signed by the tow-truck operator and the OGS official.

[(i)] Valuable items may be removed and secured and will be returned upon presentation of proper identification by the driver.]

[(ii)] Any contraband material found in the vehicle will be confiscated.]

[(2)](3) The owner or other person lawfully entitled to the possession of such vehicle may be charged a reasonable cost for its removal and storage, payable before the vehicle is released.

(d) Suspension of parking privileges (applicable to administrative citations only.)

(1) Persons who receive three citations for parking violations within a six-month period shall have their parking privileges suspended for a period not to exceed 30 calendar days.

(2) Any suspension will begin three days after service of a notice of suspension.

(3) Persons found in violation of suspension will receive a citation of parking violation and have their vehicle towed from the parking facility as described under section 296-1.12(c).

(4) If, after the completion of a 30-day suspension period, a person receives three or more citations within a six-month period, that person will be suspended for a 45-day period.

(5) Any person subject to a third suspension within an 18-month period shall be considered a habitual violator and will be suspended for 60 days for such suspension and 60 days for all subsequent suspensions.

When a vehicle is found parked displaying an altered parking permit, the permit holder and/or operator of the vehicle shall have their parking privileges suspended for a period of 60 days beginning on the day the vehicle is found in violation. An altered parking permit is defined as any authorized parking permit which has been duplicated, or a portion of which has been altered, erased, obliterated, removed or covered in order to conceal its original design and purpose.

[(c)](e) For administrative citations or suspensions issued at OGS [paid] parking facilities, appeals may be made to the following officials in this order:

(1) In the Albany area, the supervisor of parking operations; outside the Albany area the OGS building superintendent or equivalent.

(2) Chief of parking services.

(3) Director, Division of Support Services.

#### Section 296-1.[12]I3 Parking permits for the disabled.

(a) Employees who are disabled and require special parking considerations due to their condition must take the following steps in order to obtain a special permit:

(1) The employee must complete the "Application for Medical Parking Permit" and the "Employee Health Service Release of Medical Information for Parking Eligibility."

[(1)](2) The employee must obtain a physician's statement outlining the disability.

[(2)](3) The employee must request his/her [personnel office] agency parking coordinator to arrange for an examination with the Employee Health Service.

[(3)](4) The employee must submit the physician's statement to the Employee Health Service at the examination.

(b) The Employee Health Service will then supply copies of their recommendation to the applicant's personnel office and the Bureau of Parking Services. If the Employee Health Service recommends special parking arrangements and the employer agency approves the application, the [Bureau of Parking Services] agency parking coordinator will contact the employee to coordinate the appropriate arrangements.

#### SUBPART 296-2 VISITOR PARKING AT [PAID] PARKING FACILITIES

##### Section 296-2.1 Visitor parking in OGS [paid] parking facilities

(a) Parking areas for visitors are maintained by OGS at the Empire State Plaza in Albany and other locations throughout the State. Visitors may park only in areas designated specifically as visitor parking. In most instances there will be hourly or daily fees assessed for visitor parking. Fees will be conspicuously posted at the entrance of all visitor-parking areas. Use of the paid parking facilities operated by OGS is by invitation and temporary revocable permit, which may be rescinded or withheld, where an individual operator violates any applicable rule or fails to promptly remit payment of those fees imposed by OGS.

(b) In the case of special visitors and/or group visitors (workshop participants, etc.) appropriate arrangements must be made for temporary parking privileges. Applications must be made in advance with the OGS Bureau of Parking Services.

##### Section 296-2.3 Payment of daytime visitor parking fees.

(a) Where a visitor has not left the visitor area at the time the lot is closed, a pay envelope will be left on their vehicle, specifying the amount owed and giving directions for payment.

(b) Accounts that are unpaid for more than seven days are referred for collection. If an account [includes fees for three or more separate visits] remains unpaid, the vehicle registrant may be subject to having their vehicle immobilized and impounded if found in any OGS parking facility, prior to payment of the outstanding account.

(c) Once a vehicle has been immobilized, it will not be released to the owner or any other person until all sums due and owing have been paid, either in cash or by bank check.

(d) Where payment of visitor parking fees is made by personal check, any returned check will subject the visitor [patron] to an additional fee of \$20.00. In addition, the Bureau of Parking Services reserves the right to refuse to accept personal checks from persons issuing two or more checks, which are returned for insufficient funds.

**Text of proposed rule and any required statements and analyses may be obtained from:** Benjamin T. Garry, Office of General Services, 41st Fl., Corning Tower, Empire State Plaza, Albany, NY 12242, (518) 474-0571, e-mail: benjamin.garry@ogs.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**

**STATUTORY AUTHORITY:**

Executive Law Section 200 allows the Office of General Services, to adopt, amend or rescind rules and regulations.

**LEGISLATIVE OBJECTIVES:**

The proposed amendment is consistent with the statutory authority conferred by the above statute and will assist the agency in its responsibility to control motor vehicle activity on state parking areas.

**NEEDS AND BENEFITS:**

Section 296 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("NYCRR") provides for the safe and efficient usage of agency controlled parking facilities. These regulations describe in a detailed, yet clear manner, the parking procedures and responsibilities for employees and visitors who park their vehicles in agency controlled parking areas and also to assist agency employees who are assigned to monitor agency parking areas. The current regulations have been revised in order to provide specific guidance concerning what is expected of a person who parks his or her vehicle in an agency controlled parking area. Certain changes ensure that this regulation is also applicable to non-paid parking lots.

The regulations make clear that there are certain procedures necessary to register a vehicle with the agency for purposes of obtaining a valid parking permit. The regulations also remind employees that use of agency controlled parking areas is a privilege that can be lost if an employee does not adhere to agency parking policies.

**COSTS:**

(A) Cost to state government: The proposed amendment will not impose any additional cost on State government, including the Office of General Services.

(B) Cost to local government: The proposed amendment will not impose any costs on local government.

(C) Cost to private regulated parties: The proposed amendment will not impose any additional costs on private regulated parties.

(D) Cost to the regulatory agency: As stated above in Costs to State Government, the amendment does not impose additional costs on the Office of General Services.

**LOCAL GOVERNMENT MANDATES:**

The proposed amendment does not impose any program, service duty or responsibility upon local government.

**PAPERWORK:**

The proposed amendment will not increase paperwork requirements for regulated parties.

**DUPLICATION:**

The proposed amendment does not duplicate other existing Federal or State requirements.

**ALTERNATIVES:**

There are no alternatives.

**FEDERAL STANDARDS:**

The rules are consistent with Federal requirements.

**COMPLIANCE SCHEDULE:**

It is anticipated that the regulated persons will be able to comply with the rule immediately.

**Regulatory Flexibility Analysis**

The proposed amendment will not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on small businesses or local governments as the amendment relates only to the parking regulations enforced by the Office of General Services at agency controlled parking areas. No additional documents will need to be created. It is evident from the nature of the regulation that it does not affect small businesses, nor does this require any action on the part of local governments, and, therefore, no further steps were needed to ascertain any impact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses and local governments is not required and one has not been prepared.

**Rural Area Flexibility Analysis**

This action will not impose any adverse impact, reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. The regulations simply require State employees and visitors to conduct themselves appropriately while using OGS controlled parking areas, and these regulations are neither burdensome, time consuming or costly to any private entity. Because it was evident from the nature of the regulation that it does not affect public or private entities in rural areas, no further steps were needed to ascertain that fact and none were taken.

Accordingly, a rural area flexibility analysis is not required and one has not been prepared.

**Job Impact Statement**

The Office of General Services projects there will be no substantial adverse impact on jobs or employment opportunities in the State of New York as a result of this rule. The regulation is being amended to further clarify the agency's parking rules for State employees and visitors who utilize parking areas managed by the agency. There will be no change in the number of agency employees as a result of these regulations. Since nothing in the proposed regulations will increase or decrease the number of jobs in New York State, have an adverse impact on any specific region in New York State, and no adverse impact is anticipated on jobs in New York State, no further steps were needed to ascertain these facts and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

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## Department of Health

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### EMERGENCY RULE MAKING

**Cytotechnologists Work Standards**

**I.D. No.** HLT-03-05-00002-E

**Filing No.** 1498

**Filing date:** Dec. 29, 2004

**Effective date:** Dec. 29, 2004

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

**Action taken:** Amendment of section 58-1.12(b)(7) of Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 576-a

**Finding of necessity for emergency rule:** Preservation of public health.

**Specific reasons underlying the finding of necessity:** New York Public Health Law Section 576-a establishes work standards for cytotechnologists who examine cytology slides at clinical laboratories. After initial enactment of Section 576-a, the Department adopted the first regulations in the United States establishing cytotechnologist workload limits, a registration process for cytotechnologists, quality standards for cytology slides, as well as operational standards for clinical laboratories performing cytopathology testing. Since that time, the Department has worked closely with 285 clinical laboratories holding permits in the category of cytology (and which employ approximately 1,100 registered cytotechnologists full-time and part-time). The Department has gained significant experience in applying workload standards at these clinical laboratories.

Public Health Law Section 576-a also authorizes the Department to promulgate regulations to increase the maximum number of cytology slides that may be examined in a workday by cytotechnologists who use cytology slide examination or preparation technologies approved by the federal Food and Drug Administration (FDA). The Department has become aware of recent advances in cytology slide preparation and examination technology, which, according to recent studies conducted with the involvement of the technology manufacturers, significantly improve detection of serious diseases (*i.e.*, cervical cancers). These new technologies also vastly increase the rate at which cytotechnologists can effectively examine slides. The Department has closely researched these new technologies and has considered the potential impact that they could have on public health and welfare.

The vast majority of New York permitted clinical laboratories are not acquiring and using these costly new slide examination technologies. Use of these technologies by cytotechnologists at workload levels currently authorized by New York law is not cost effective. Increased workload standards are essential to ensure that clinical laboratories can afford, and immediately acquire and use these important, potentially life saving technologies. Therefore, the Department must immediately authorize, pursuant to this proposed emergency rulemaking, clinical laboratories to increase the workload limits for its cytotechnologists who use this new technology. This proposed rule making allows needed flexibility in increasing workload limits for cytotechnologists using FDA approved slide preparation

and/or examination devices, as soon as they become commercially available for use by clinical laboratories.

The Department is committed to ensuring that New York residents and laboratories promptly benefit from new technologies with potential to improve gynecological cytology test methods without adding significantly to health care costs. This proposed rule making, once adopted, will promote use of new technologies that hold promise for more accurate, efficient and effective cervical cancer diagnosis, without compromising accuracy and reliability.

For the foregoing reasons, the Department 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 and welfare. The alternative — to promulgate this proposed rulemaking pursuant to SAPA section 202(1) would unreasonably delay and hinder the Department's ability encourage appropriate use of new, and perhaps better, technology. To avoid unnecessary and potentially detrimental delay in the Department's implementation of appropriate work standards for cytotechnologists using new technologies for cervical cancer detection and diagnosis, the amendment to 10 NYCRR Section 58-1.12(b) is hereby proposed for adoption by emergency promulgation.

**Subject:** Cytotechnologists work standard.

**Purpose:** To provide flexibility to the department in establishing work standards that consider new technologies for pap smear screening.

**Text of emergency rule:** Pursuant to the authority vested in the Commissioner of Health by Section 576-a of the Public Health Law, existing paragraph (7) of Section 58-1.12(b) of Title 10 (Health) of the Official Compilation of Codes, Rules and Regulations of the State of New York (NYCRR) is amended, and new subparagraph (iv) is added, to be effective upon filing with the Secretary of State, as follows:

58-1.12(b)(7) Exceptions. (i) Each laboratory [must] *shall* evaluate the performance of each cytotechnologist *providing services to it*, and establish an appropriate examination volume limitation based on *the cytotechnologist's* experience, documented accuracy[,] and performance in proficiency testing, or [for]on other reasons, including false-negative or false-positive interpretations [reports]. Under no circumstances [should] *shall* this volume be exceeded, even if it is [less] *lower* than the maximum work standard.

(ii) A cytotechnologist may exceed the work standard by [10] *twenty* (20) percent, with the written approval of the department. The laboratory director may request such approval based on each cytotechnologist's experience, documented accuracy, including false-negative or false-positive [reports] *interpretations*, and a performance *score* in proficiency testing of not more than two (2) errors. Documentation of [this] *department* approval [must] *shall* be available in the laboratory, and may be revoked by the department with prior notice to the laboratory, based on a cytotechnologist's performance in proficiency testing or other evidence that the cytotechnologist's accuracy is [less] *other* than acceptable. The laboratory director [must] *shall* monitor the performance of each cytotechnologist and advise the department [when the] *whenever the* approval is to be revoked based on on-the-job performance.

(iii) Cytotechnologists who qualify as supervisors under section 58-1.4 of this Subpart may re-examine up to [20] *twenty* (20) slides per day [separate from] *in addition to* the workload standard, *provided the combined total number of slides does not exceed one-hundred (100)*, as part of the [quality control-] quality assurance program of the laboratory, with the prior approval of the department, based on documented accuracy, including [false negative or positive reports] *false-negative and false-positive interpretations*, and performance in proficiency testing. Such approval may be revoked, with prior notice to the laboratory, based on proficiency testing performance or other evidence that the cytotechnologist's accuracy is [less] *other* than acceptable. Records [must] *shall* be maintained to document the *examination* volume and hours worked by each cytotechnologist.

(iv) *The department may increase the cytotechnologist work standard beyond the level already authorized elsewhere in this section for cytotechnologists using a federal Food and Drug Administration (FDA)-approved device in the preparation or examination of cytology slides:*

*(a) in determining whether to increase the cytotechnologist work standard with respect to a particular device, the department shall consider the following: the FDA's approved use of the device; studies of the accuracy, reliability and appropriate use of the device; input from clinical laboratories using the device; recommendations of experts in the field of cytology and/or cytotechnology; and other relevant information as appropriate;*

*(b)(1) the department may require a clinical laboratory wishing to exceed the cytotechnologist work standard set forth elsewhere in this section to request in writing the department's approval. The department may also require the applicant laboratory to provide, in a form acceptable to the department, some or all of the following information regarding the device in use at the laboratory: the device manufacturer's recommendations, if any, regarding the quantity (i.e., slide volume), speed or manner of slide examination, and the basis for such recommendations; documentation of training for each cytotechnologist using the device; each cytotechnologist's experience using the device, including false-negative and false-positive interpretations, workload, and number of hours spent examining slides; each cytotechnologist's performance on proficiency testing; as well as any other information as determined appropriate by the department to assess device capacity and user capability; and*

*(2) the department shall provide written notice of the authorized work standard established pursuant to this subparagraph. The department may set a work standard in writing that applies to one or more cytotechnologists.*

*(c) laboratories shall maintain documentation of approval pursuant to this subparagraph for a minimum of two (2) years after use of the device is discontinued;*

*(d) if the department determines that a cytotechnologist work standard authorized pursuant to this subparagraph increases the rate of errors or compromises the reliability of results, the department shall adjust the standard as it deems appropriate and shall notify the affected clinical laboratories in writing of such change. Clinical laboratories that find the adjustment unacceptable may only request in writing that the department reconsider its determination; and*

*(e) notwithstanding the foregoing, any cytotechnologist work standard authorized by the department pursuant to this subparagraph shall be at least as stringent as the federal standards promulgated under the federal clinical laboratory improvement amendments of nineteen hundred and eighty-eight (1988) and/or other applicable law(s).*

**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 March 28, 2005.

**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: regsqna@health.state.ny.us

#### **Regulatory Impact Statement**

Statutory Authority:

Public Health Law Section 576-a was enacted as Chapter 539 of the Laws of 1988. The statute established standards for cytotechnologists' workload, a registration requirement for individuals engaged in initial examination of slides, and quality standards for preparing and examining the slides. Regulations adopted as 10 N.Y.C.R.R. Sections 58-1.12 and 58-1.13 pursuant to that legislation have been in effect since 1989. Public Health Law, Article 5, Title V was amended by Chapter 436 of the Laws of 1993. Section 576-a of that legislation modified the state's cytotechnologist work standard, (i.e., a numeric limitation on the cytology slides, including Pap smears, that a cytotechnologist may examine during a work day) to effect parity with federal standards in the Clinical Laboratory Improvement Amendments of 1988 (CLIA '88). Section 576-a also includes a provision authorizing the Department to increase the cytotechnologist work standard in response to technological advances in instrumentation and devices for assisted examination of cytology slides.

Legislative Objectives:

In 1988, media reports made the public aware of problems associated with inordinate cytotechnologist workloads in clinical laboratories examining gynecologic slides (Pap smears) for evidence of cervical cancer. At that time, New York was the only state with a comprehensive program of oversight of these laboratories, including review of cytotechnologist qualifications, and on-site assessment of laboratory operations and proficiency testing. While excessive testing volumes had not been reported in New York State, the Legislature determined that additional steps were required to protect women residents of the State, and Public Health Law Section 576-a was enacted as Chapter 539 of the Laws of 1988. The legislation established a work standard for initial examination of cytologic specimens (i.e., a numeric limitation on the cytology slides, including Pap smears, that a cytotechnologist or pathologist may examine during a work day), a registration requirement for individuals engaged in slide examination, and quality standards for the slides. Chapter 436 of the Laws of 1993 modified

the State's cytotechnologist work standard for parity with federal standards in CLIA '88; specifically, the Legislature enacted an increase of 20 percent above the limit of 80 gynecologic slides, or 96 slides per work day, from the previous limit of 10 percent above the 80-slide limit, or 88 slides.

#### Needs and Benefits:

After initial enactment of Section 576-a, the Department adopted the first regulations in the country establishing cytotechnologist workload standards, a registration process for cytotechnologists, requirements for the quality of slides, as well as general standards for operation of cytopathology laboratories. The Department has not revised these regulations since their promulgation in 1990. During that time, the Department has gained significant experience in applying workload standards for 285 clinical laboratories with a permit in the cytology testing category that employ more than 1,200 registered cytotechnologists full-time and part-time.

The Food and Drug Administration has approved for marketing cytology slide screening devices that increase the number of slides a cytologist can accurately and reliably examine per day. The Department needs to consider, on a case by case basis and in the most expeditious manner possible, establishment of a cytotechnologist workload limit other than that set earlier to promote accurate and reliable slide examination by the conventional (manual) method. The Department must now ensure that New York residents and laboratories benefit from new technologies with the potential to improve gynecological cytology test methods without adding significantly to health care costs. To this end, it is proposed to amend existing regulations, and allow needed flexibility for increasing workload limits for cytotechnologists using automated slide preparation and/or examination methods as new methods are approved by the federal Food and Drug Administration (FDA) and become available for use by clinical laboratories.

Technological advances have permitted automation to make inroads in the discipline of cytology, a field of laboratory medicine that historically has relied solely on the joint expertise of cytotechnologists and pathologists for accurate and reliable diagnosis of cancers and other abnormalities detectable at the cellular level. Slides for cervical cancer screening, once prepared in the physician's office, can now be produced in the laboratory as a clean preparation of target cells, free of any obscuring blood or inflammation debris, deposited on a glass slide in a single layer, well-separated and with little or no overlap of cells to interfere with a cytotechnologist's ability to locate and identify aberrant cell types indicative of cervical cancer and other abnormalities. The FDA's approval of several automated systems for cytology slide preparation (*i.e.*, fix-and-stain material on microscopic slides) as in-vitro diagnostic devices, and overwhelming acceptance of the devices by the clinical laboratory industry and women's health practitioners and advocates have opened the door to further advances in the science of cytology, specifically, development of computerized algorithms for detection of cells not meeting criteria as normal. The purported advantage of this new technology is that it allows cytotechnologists to focus on accurate interpretation, resulting not only in increased productivity but, more importantly, the potential to improve diagnostic performance.

During conventional (manual) slide examination, the cytotechnologist must use locator skills to detect cells that are abnormal according to pre-established criteria for nuclear density and other factors, such as the relative size of the cell nucleus compared to the rest of the cell. Several device manufacturers have programmed a computer with an algorithm similar to that used by cytotechnologists to identify abnormal cells, thereby allowing a computer to take over the tiresome task of scanning numerous slides to look for the usually rare abnormal cell. The algorithms are sophisticated, but, as yet, are not capable of definitively classifying cells as pre-cancerous or indicative of malignancy. Devices that locate and mark suspect cells, guiding the cytotechnologist to them for interpretation, have already received FDA approval. Another device, which may soon be approved by the FDA, classifies as within normal limits slides with no to very low probability of an abnormal finding, allowing up to 25 percent of gynecologic specimens to be reported as within normal limits without human review.

New slide preparation and screening technologies are changing the way laboratories diagnose cervical cancer and other malignant diseases detectable at the cellular level. Clinical trial data and preliminary data from laboratories using location guidance devices for detection of cancerous cells may increase by 50 percent or more the number of slides a cytotechnologist may reliably examine during a given time period. More importantly, evidence is emerging that this technology can increase the probability that no truly abnormal cell, however rare, would be missed due

to human factors, such as fatigue and momentary lapses in vigilance, which have been widely recognized as capable of compromising result reliability. Manufacturers' claims that this technology can better locate cells typical of low- and high-grade squamous intraepithelial lesions (LSIL and HSIL, respectively), the most clinically important findings other than squamous cell carcinoma, are of particular interest to the Department in fulfilling its mandate to promote and protect the public health, because such claims, if proved correct, signal the potential to reduce morbidity in women who are routinely screened for cervical cancer.

Moreover, the Department has been informed that laboratories are reluctant to purchase automated devices for cytology examinations if the instrumentation cannot be utilized to near-full potential or in an otherwise cost-effective manner. This proposed rulemaking to increase workload limits would enable the laboratory's to acquire new technology, which hold promise for more efficient and effective cervical cancer diagnosis without compromising safety, accuracy and reliability.

In addition to allowing flexibility to change cytology workload standards without repetitive rulemaking, the proposed regulation would also provide affected parties with Department criteria for setting such standards, and make clear that, at the Department's discretion, laboratories may be required to request and be granted device-specific approval to examine Pap smears applying a workload standard other than that in place for conventional (manual) examination methods. Moreover, the proposed amendment establishes the Department's authority to make an immediate adjustment to any work standard pursuant to the rule upon a determination that error rates have increased or the reliability of results has been compromised following approval of an increased work standard.

The proposed amendment would also make the regulation consistent with its authorizing statute as modified by Chapter 436 of the Laws of 1993, which provided for an increase in the work standard of 20 percent above the limit of 80 gynecologic slides, or 96 slides per work day. Existing regulation must be changed, as it set the previous restriction as 10 percent above the 80-slide limit, or 88 slides, and, as such, does not accurately reflect the Department's practice of authorizing up to 96 slides to be examined per work day.

Several housekeeping modifications were also proposed to facilitate compliance. The Department has received numerous inquiries related to the allowance for cytotechnologists' qualified supervisors to examine up to 20 slides beyond the work standard, and finds it necessary to clarify that the combined total number of slides may not exceed 100. In three instances, the term "reports" has been changed to "interpretations" to make clear that the Department considers all errors as relevant to approval (*i.e.*, false-negatives and false-positives), including errors in the cytotechnologist's interpretation, regardless whether corrected during re-examination or slide review by a pathologist prior to reporting - and not only erroneous results (typically false-negatives) reported to medical practitioners and discovered through retrospective review following a finding of HSIL or an equivalent, or malignancy.

#### Costs:

##### Costs to private regulated parties:

Since the proposed rulemaking does not require purchase or use of any devices for preparation and/or examination of cytology slides, this proposed rulemaking does not require private affect parties to incur costs. However, several clinical laboratories operating in New York State, and using or considering use of new technology for examination of slides have conveyed to the Department their desire to have cytotechnologist work standards specific to such devices in place as soon as practicable so that specimen throughput may be increased, which, in turn, would allow for increased reimbursement for cytopathology services and potentially increased profits.

##### Costs for implementation and administration of the rule:

##### Costs to State government:

State government is not expected to incur costs attributable to this proposed amendment.

##### Costs to the department:

The Department is not expected to incur costs attributable to this proposed amendment. A system is already in place for review of laboratories' requests for qualified cytotechnologists to exceed the existing workload limit by 20 percent, and it is expected that the few additional requests submitted as a direct result of this amendment would be able to be processed under the same system and using the same personnel.

##### Costs to local government:

Local government-operated clinical laboratories would have the opportunity to increase reimbursement and profits by increasing throughput of

cytology examination specimens under the provisions of this proposal, as described for private regulated parties.

**Paperwork:**

The Department may experience a minimal increase in paperwork from the intermittent need to communicate new standards to affected laboratories in writing. The Department already has an established system for review of laboratories' requests for qualified cytotechnologists to exceed the workload limit by 20 percent, and expects few additional requests as a direct result of this amendment.

**Local Government Mandates:**

The proposed regulation imposes no new mandates on any county, city, town or village government; or school, fire or other special district.

**Duplication:**

These rules do not duplicate any other law, rule or regulation.

**Alternative Approaches:**

In drafting this proposed rule, the Department has considered the diversity of technological approaches to automating Pap smear examinations already in place and those known to be in development. The only consistent feature of these devices appears to be generalized use of a computerized algorithm to simulate human decision-making. The Department believes it is not feasible to arrive at a single, universally applicable work standard that could be set forth in regulation for all existing and future Pap examination technologies. The alternative — promulgation of revised regulations to establish workload limits each time a device is granted FDA approval — would be unacceptably burdensome to the Department, and would possibly delay the use of technology in New York, that could more effectively identify cancerous and precancerous cells.

**Federal Standards:**

Federal workload standards for cytotechnologists performing conventional (manual) examination of cytology slides have been promulgated under CLIA '88. Both the FDA and U.S. Centers for Medicaid and Medicare Services (CMS) have declined to set in federal regulation standards specific to any current commercial automated slide examination device. This proposed amendment contains a provision that any cytotechnologist work standard authorized by the Department pursuant to the amendment must be at least as stringent as the respective federal standards.

**Compliance Schedule:**

The Department has been engaged in ongoing communication with several device manufacturers, and has responded to many letters from women's health organizations and laboratories stating its intent to ensure that safe, efficient and effective tests for cervical cancer are available to New York's women. These interested parties include: National Association of Nurse Practitioners in Women's Health; National Black Women's Health Imperative; Center for Women Policy Studies; National Partnership for Women and Families; National Family Planning & Reproductive Health Association; Memorial Hospital for Cancer & Allied Diseases, Department of Pathology; Memorial Sloan-Kettering Cancer Center; Albany Cytopath Labs, Inc.; Centrex Clinical Laboratories, Inc.; ACM Medical Laboratory, Inc.; ClearPath Diagnostics; University of Rochester-Strong Memorial Hospital Clinical Laboratories; and Sunrise Medical Laboratories, Inc.

The Department is not aware of any opposition to increasing workload limits for cytotechnologists using automated devices, and there appears to be no potential for organized opposition. Regulated parties should be able to comply with these amendments as of their effective date, upon filing with the Secretary of State.

**Regulatory Flexibility Analysis**

**Effect on Small Businesses and Local Governments:**

This proposed amendment to allow needed flexibility to increase workload limits for cytotechnologists using automated slide preparation and/or examination methods would affect clinical laboratories operated as small businesses or by local government, provided such facilities hold or are seeking a permit in the category of cytology, and opt to use U.S. Food and Drug Administration (FDA)-approved devices for automated slide preparation and/or examination. Of the 253 clinical laboratories holding a Department permit in cytology, 44 have declared themselves to be small businesses in permit applications submitted to the Department, and local governments, including the City of New York, operate seven such laboratories.

**Compliance Requirements:**

The Department expects that affected clinical laboratories operated as small businesses or by local governments would experience minimal impact from this proposal's adoption. Most of these facilities engaged in the examination of cytologic material, including Pap smears, do not process the high number or type of specimens. However, any laboratory that has

purchased automated devices for preparation and/or examination of cytology slides would benefit from the flexibility this amendment would afford.

The Department has a system already established for review of laboratories' requests for qualified cytotechnologists to exceed the workload limit by 20 percent, and anticipates few, if any, additional requests as a direct result of this amendment from laboratories operated as small businesses or by a local government. Therefore, the Department expects that this small segment of the affected regulated parties would be able to comply with these regulations as of their effective date, upon filing with the Secretary of State.

**Professional Services:**

No need for additional professional services is anticipated.

**Compliance Costs:**

This rulemaking does not impose any additional costs on clinical laboratories operating as small businesses or by a local government since it does not require purchase or use of automated devices for preparation and/or examination of cytology slides. To the contrary, several clinical laboratories operating in New York State, and using or considering use of such devices have conveyed to the Department their desire to have cytotechnologist work standards specific to such devices in place as soon as practicable so that they may increase specimen throughput, in turn allowing for increased reimbursement for cytopathology services and potentially increased profits. This potential benefit may also apply to any small business or local government laboratory operator opting to use automated devices for cytologic material examination.

**Economic and Technological Feasibility:**

The proposed regulation would present no economic or technological difficulties to any small businesses or local governments that operate clinical laboratories affected by this amendment. This proposal does not impose a requirement for purchase or use of new technologies, *i.e.*, automated devices for cytologic material examination.

**Minimizing Adverse Impact:**

These amendments will not have an adverse impact on the ability of regulated parties that are small businesses or operated by local governments to comply with Department requirements for cytotechnologist work standards.

**Small Business and Local Government Participation:**

This amendment is being proposed as an emergency rule. Notifying small businesses or local government affected parties about its provisions and requirements in accordance with the State Administrative Procedures Act (SAPA) process would incur unnecessary and potentially detrimental delay in establishing new and expanded work standards for cytotechnologists using automated devices for slide preparation and/or examination. All laboratories holding a permit in the category of cytology, including those operated as small businesses or by local government, are being notified of the provisions of this amendment, and, following its adoption, will be invited to provide comments and otherwise participate in the development of standards for workload limits.

**Compliance Schedule:**

The director of the Department's Wadsworth Center and his staff, including the director for Regulatory Affairs, held discussions with representatives of the Governor's Office, the Commissioner of Health's Office, firms that manufacture and/or distribute automated devices for cytological examinations, and regulated parties (*i.e.*, clinical laboratories) currently using such devices. Various Department groups, including the Office of Medicaid Management and the Office of Managed Care, have been working together in an ongoing effort to ensure adequate reimbursement for cytological examinations, including Pap smears, newly approved FDA cytological screening.

This amendment does not impose any new or more stringent requirements on regulated clinical laboratories; rather, it affords flexibility to laboratories that handle medium- to high-volumes of cytology specimens, and wish to use automated devices to examine increased numbers of slides without compromising testing accuracy and reliability. Strong support for the amendment is expected from clinical laboratories holding or seeking a permit in the category of cytology, and patient advocacy organizations, especially those focused on women's health; indications of support have been expressed by the medical community at large, which has just begun to become educated in the availability and reliability of the new technologies for cytological examination. The Department will continue to work with interested and affected parties in carrying out this amendment's provisions, and will notify laboratories in an unequivocal and timely manner of any changes affecting the cytotechnologists' workload standard or exceptions to that standard following adoption of this proposal.

The Department is not aware of any opposition to increasing workload limits for cytotechnologists using new technologies, and no potential of organized opposition is apparent. Consequently, regulated parties, including those operated as a small business or by local government, should be able to comply with these regulations as of their effective date, upon filing with the Secretary of State.

#### **Rural Area Flexibility Analysis**

##### **Effect of Rule:**

Rural areas are defined as counties with a population under 200,000 and, for counties with a population larger than 200,000, rural areas are defined as towns with population densities of 150 or fewer persons per square mile. Forty-four counties in New York State with a population under 200,000 are classified as rural, and nine other counties include certain townships with population densities characteristic of rural areas. Of the 253 clinical laboratories holding a permit in the category of cytology, 88, many of which are hospital-based, are located in rural areas.

##### **Compliance Requirements:**

The Department expects that affected clinical laboratories located in and serving rural areas will experience minimal impact by anticipated adoption of this proposal. With the possible exception of one or two large rural hospital pathology departments, most laboratories operated in rural areas and engaged in examination of cytologic material, including Pap smears, do not process the high volume of cytologic specimens. However, any laboratory that has purchased such automated devices will be able to take advantage of the flexibility this amendment would afford. Therefore, the Department anticipates that regulated parties in rural areas will be able to comply with this amendment as of its effective date, upon filing with the Secretary of State.

##### **Professional Services:**

No need for additional professional services is anticipated.

##### **Compliance Costs:**

Clinical laboratories operating in rural areas are not required to incur additional costs as a result of this proposed amendment, since this rulemaking does not require purchase or use of automated devices for preparation and/or examination of cytology slides. However, several clinical laboratories operating in New York State and using or considering use of devices for the examination of slides have conveyed to the Department their desire to have cytotechnologist work standards specific to such devices in place as soon as practicable so that they may increase specimen throughput, in turn allowing increased reimbursement for cytopathology services and potentially increased profits. This benefit may also apply to laboratories located in rural areas, especially larger hospital-based pathology laboratories opting to use automated devices for cytologic material examination.

##### **Economic and Technological Feasibility:**

The proposed regulation would present no economic or technological difficulties to facilities located in rural areas. This proposal does not impose a requirement for purchase or use of new technologies, *i.e.*, devices for cytologic material examination.

##### **Minimizing Adverse Impact:**

These amendments will not have an adverse impact on the ability of regulated parties in rural areas to comply with Department requirements for cytotechnologist work standards.

##### **Participation by Parties in Rural Areas:**

This amendment is being proposed as an emergency rule. Notifying affected parties in rural areas about its provisions and requirements in accordance with the State Administrative Procedures Act (SAPA) process would cause unnecessary and potentially detrimental delay in establishing new and expanded work standards for cytotechnologists using automated devices for slide preparation and/or examination. All laboratories holding a permit in the category of cytology, including those located in rural areas, are being notified of this amendment's provisions, and, following its adoption, will be invited to provide comments and otherwise participate in development of standards for workload limits.

##### **Compliance Schedule:**

The Department has been engaged in ongoing communication with several device manufacturers, and has responded to many letters from women's health organizations and laboratories stating its intent to ensure that safe, effective, and efficient tests for cervical cancer are available to New York's women. These interested parties include: National Association of Nurse Practitioners in Women's Health; National Black Women's Health Imperative; Center for Women Policy Studies; National Partnership for Women and Families; National Family Planning & Reproductive Health Association; Memorial Hospital for Cancer & Allied Diseases; Department of Pathology; Memorial Sloan-Kettering Cancer Center; Al-

bany Cytopath Labs, Inc.; Centrex Clinical Laboratories, Inc.; ACM Medical Laboratory, Inc.; ClearPath Diagnostics; University of Rochester Strong Memorial Hospital Clinical Laboratories; and Sunrise Medical Laboratories, Inc.

The Department is not aware of any opposition to increasing workload limits for cytotechnologists using new technology, and no potential for organized opposition is apparent. Regulated parties, including those operating in rural areas, should be able to comply with these regulations as of their effective date, upon filing with the Secretary of State.

#### **Job Impact Statement**

##### **Nature of Impact:**

This proposed rulemaking will have an impact on the productivity of cytotechnologists who use the new cytology slide preparation and examination technology. The proposed rule would authorize cytotechnologists using such technologies to increase the number of slides that they can effectively review in a given time period.

In addition, the proposed rulemaking would make it more financially attractive for clinical laboratories to acquire new cytology slide preparation and examination technology. Therefore, more cytotechnologists will use such technology. Experienced cytotechnologists will have to receive on the job training to use some of the new technologies, while persons studying to become cytotechnologists will learn to use the new technology as part of their course work. However, given workforce shortage of cytotechnologists nationally and in New York, the Department does not expect that the use of the new technologies will have an adverse impact on employment opportunities for cytotechnologists.

##### **Category and Numbers Affected:**

Cytotechnologists working in New York licensed clinical laboratories may be affected by this rule. There are approximately 1,100 registered cytotechnologists working (on a part time or full time basis) in New York licensed clinical laboratories. However, many of these cytotechnologists work in clinical laboratories that are not located in New York State. It is unclear how many cytotechnologists will use new technologies pursuant to this proposed rulemaking to review more slides than is currently permissible.

##### **Regions of Impact:**

Cytotechnologists work in laboratories throughout New York State. However, as described below, the Department of Health Does not believe that this proposed rulemaking will have a significant adverse impact on employment opportunities for cytotechnologists.

##### **Likelihood of Adverse Impact:**

The Department expects that the proposed rulemaking, if implemented will increase cytotechnologists' productivity, it will not adversely affect job opportunities for cytotechnologists. There is currently a significant workforce shortage of cytotechnologists in the United States, including New York. This workforce is shortage is expected to worsen in coming years as large numbers of cytotechnologists retire and relatively few are being trained to replace them. The federal Clinical Laboratory Advisory Committee, the US Department of Labor and several health care professional organizations have acknowledged this workforce shortage problem. Some clinical laboratories have urged the Department to promulgate this regulation to alleviate cytotechnologist staffing shortages.

## **EMERGENCY RULE MAKING**

### **Provision of Information by the EPIC Program**

**I.D. No.** HLT-03-05-00003-E

**Filing No.** 1499

**Filing date:** Dec. 29, 2004

**Effective date:** Dec. 29, 2004

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

**Action taken:** Amendment of section 9600.4(c) of Title 9 NYCRR.

**Statutory authority:** Elder Law, sections 244, 245 and 246

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

**Specific reasons underlying the finding of necessity:** The specific reason underlying the finding of necessity to adopt as an emergency rule: The proposed regulation will require EPIC to share data with OTDA so that OTDA can match the data against its files of individuals who are in receipt of Food Stamp benefits. The match will enable an automated increase in Food Stamp benefits for those EPIC participants enrolled in the Medicare prescription drug discount program who are also Food Stamp benefi-

ciaries. In order to obtain a deduction for medical expenses that will result in this increased benefit for calendar year 2004, the exchange of data must take place before the end of the calendar year. There is not enough time to canvas all EPIC participants for their consent to release of data. An emergency regulation mandating the sharing of data is the only way to ensure that those EPIC participants enrolled in the Medicare prescription drug program who are Food Stamp eligible will have the opportunity to get their medical deduction before the end of this calendar year and that the sharing of the data does not violate the confidentiality requirements of HIPAA. For these reasons, the Department finds that the immediate adoption of the regulation is necessary for the preservation of the public health, safety and general welfare and that compliance with the procedural requirements of the State Administrative Procedure Act (SAPA) 202(1) would be contrary to the public interest.

**Subject:** Provision of information by the EPIC Program.

**Purpose:** To enable the provision of information to OTDA by EPIC regarding participants who are enrolled in the Medicare Prescription Drug Card program, to assist participants to receive an enhanced medical deduction in the calculation of Food Stamp benefits.

**Text of emergency rule:** Pursuant to the authority vested in the Elderly Pharmaceutical Insurance Coverage Panel by Sections 244, 245, and 246 of the Elder Law, a new subdivision (c) is added to Section 9600.4 of Title 9 (Executive) of the Official Compilation of Codes, Rules and Regulations of the State of New York, to be effective upon filing with the Secretary of State, as follows:

A new subdivision (c) is added to Section 9600.4 of Title 9 NYCRR to read as follows:

*(c) For the purpose of assisting participants to receive an appropriate amount of federal Food Stamp benefits, the Program for Elderly Pharmaceutical Insurance Coverage (EPIC) shall provide to the Office of Temporary and Disability Assistance (OTDA) information identifying EPIC participants who are also enrolled in the Medicare prescription drug discount card program authorized by Title XVIII of the Social Security Act. Information provided shall be limited to eligibility and enrollment data available to EPIC and sufficient to enable OTDA to identify those participants who are also Food Stamp recipients. OTDA's use of this information shall be limited to the purpose of identifying EPIC participants who are also Food Stamp recipients and are eligible for additional Food Stamp benefits by virtue of their enrollment in the Medicare prescription drug discount card program.*

**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 March 28, 2005.

**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:

The authority for the amendment of this regulation is contained sections 244, 245 and 246 of the Elder Law.

##### Legislative Objectives:

Section 244 of the Elder Law requires the Elderly Pharmaceutical Insurance Coverage (EPIC) panel, consisting of the Commissioners of the Departments of Education and Health, the Superintendent of Insurance, and the Directors of the State Office for the Aging and the Division of the Budget to promulgate regulations pursuant to Section 246 of the Elder Law. Section 245 of the Elder Law requires the Executive Director of EPIC to appoint staff and request the assistance of any department or other agency of the State in performing such functions as may be necessary to carry out the provisions of the EPIC law and to perform such other functions as may be specifically required by the law, assigned by the EPIC panel, or necessary to ensure the efficient operation of the program. Section 246 of the Elder Law defines the scope of EPIC regulations as including procedures to ensure that all information obtained on persons applying for EPIC benefits remains confidential and is not disclosed to persons or agencies other than those entitled to such information because such disclosure is necessary for the proper administration of the EPIC program.

##### Needs and Benefits:

The EPIC program provides coverage of certain drugs for residents of the State of New York who are at least 65 years of age, who have incomes within the limitations prescribed by law, who are not in receipt of Medical

Assistance and who do not have equivalent or better drug coverage from any other public or private third party payment source or insurance plan. The program provides an essential benefit for elderly New York residents who need financial assistance in order to obtain medications but who do not have other insurance benefits and are not in receipt of Medical Assistance coverage of their drug expenses. Chapter 49 of the Laws of 2004 authorizes the EPIC program to apply for transitional assistance under the Medicare prescription drug discount card program with a specific drug discount card under Title XVIII of the federal Social Security Act. EPIC automatically enrolled eligible participants in the Medicare prescription drug discount card program.

Section 1860D-31(g)(6) of the Social Security Act, as amended by the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA), 42 USC 1395w-141(g)(6), states that the availability of negotiated prices or transitional assistance received through the Medicare prescription drug card "shall not be treated as benefits or otherwise taken into account in determining an individual's eligibility for, or the amount of benefits under, any other Federal program." The Secretary of the United States Department of Agriculture, through its Northeast Regional office, has interpreted this statute as requiring that the discounts and subsidy a household receives through the Medicare prescription drug discount card be treated as standard medical expenses to be used in determining the household's medical expenses deduction for Food Stamp eligibility purposes.

EPIC seeks to assist its participants who are enrolled in the Medicare prescription drug discount program who are applying for or in receipt of Food Stamp benefits to receive the appropriate amount of Food Stamp benefits. Providing information to the Office of Temporary and Disability Assistance (OTDA) about its participants who are also enrolled in the Medicare Prescription Drug card program will assist these participants to receive an enhanced medical deduction in the calculation of Food Stamp benefits. Improved health outcomes for these participants as a result of increased Food Stamp benefits and the resultant potential for decreased prescription drug needs for these participants has a direct impact on the EPIC program and justifies the sharing of this information with OTDA.

##### COSTS:

Costs for the Implementation of, and Continuing Compliance with the Regulation to the Regulated Entity:

There are no costs to regulated entities as a result of this proposed regulation which requires EPIC to share data with OTDA.

Costs to State and Local Governments:

There are no costs to State and local governments as a result of this proposed regulation.

Costs to the Department of Health:

The Department of Health will incur minimal costs in producing and transmitting the data required by this proposed regulation.

Local Government Mandates:

The proposed regulatory amendment does not impose any new mandates on local governments.

Paperwork:

No reporting requirements, forms, or other paperwork are necessitated by this proposed regulatory amendment.

Duplication:

The proposed regulatory amendment does not duplicate any existing State or federal requirements.

Federal Standards:

The proposed regulatory amendment complies with Federal statutes.

Alternatives:

The alternative considered to the proposed regulatory amendment was to obtain individual consents for release of information from all EPIC participants who were enrolled in the Medicare prescription drug card program. The length of time required to obtain this consent would have meant that many elderly participants would lose the medical deduction to which they are entitled for the current year. Release of the information pursuant to regulation is a permissible release of protected health information under regulations implementing the Health Insurance Portability and Accountability Act (HIPAA) pursuant to 45 CFR 164.512(k)(6)(i).

Compliance Schedule:

The EPIC program will transfer data as required by this regulation as of the effective date of the regulation's filing.

#### **Regulatory Flexibility Analysis**

A Regulatory Flexibility Analysis is not required. The proposed amendment would not impose any adverse impact on businesses, either large or small, nor will the proposal impose any new reporting, recordkeeping or other compliance requirements on a business.

**Rural Area Flexibility Analysis**

A Rural Area Flexibility Analysis for this proposed action is not required. As mentioned in the regulatory impact statement, the proposed amendment would require the EPIC program to share data concerning EPIC participants enrolled in the Medicare prescription drug program with OTDA in order for those participants to receive appropriate Food Stamp benefits. This provision would not affect rural areas any more than non-rural areas. The proposed amendment does not impose any new reporting, recordkeeping or any other new compliance requirements on rural or non-rural areas.

**Job Impact Statement**

A Job Impact Statement is not required. The proposal will not have an adverse impact on jobs and employment opportunities. The proposed rule is required to assist EPIC participants enrolled in the Medicare prescription drug program to receive in a timely manner medical deductions, to which they are entitled, for Food Stamp eligibility purposes.

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

**Spousal Impoverishment Budgeting**

**I.D. No.** HLT-03-05-00032-P

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

**Proposed action:** Amendment of section 360-4.10(a)(9) of Title 18 NYCRR.

**Statutory authority:** Social Services Law, section 366-c

**Subject:** Spousal impoverishment budgeting.

**Purpose:** To clarify that a community spouse’s pension fund or individual retirement account (IRA) is a countable resource for purposes of determining the institutionalized spouse’s Medicaid eligibility.

**Text of proposed rule:** Paragraph (9) of subdivision (a) of Section 360-4.10 is amended to read as follows:

(9) Resources do not include those disregarded or exempt under sections 360-4.4(d), 360-4.6(b) and 360-4.7(a) of this Subpart, *except that pension funds belonging to a community spouse which are held in individual retirement accounts or in work-related pension plans, including plans for self-employed individuals such as Keogh plans, are countable resources of the community spouse for purposes of determining the institutionalized spouse’s eligibility and calculating the amount of any community spouse resource allowance.*

**Text of proposed 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

**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**

**Statutory Authority:**  
Section 206(1)(f) of the Public Health Law requires the Department of Health (Department) to enforce the provisions of the medical assistance program, pursuant to titles eleven, eleven-A, and eleven-B of the Social Services Law (SSL). Section 363-a(2) of the SSL requires the Department to establish such regulations as may be necessary to implement the program of medical assistance for needy persons (Medicaid). Section 366-c(2)(d) of the SSL provides that the amount of the community spouse resource allowance budgeted for the spouse of an institutionalized Medicaid applicant will depend on the amount of resources otherwise available to such spouse. For purposes of this provision, section 366-c(2)(e) of the SSL authorizes the Commissioner of the Department to define the term “resources”, consistent with federal law.

**Legislative Objectives:**  
Section 363-a of the SSL designates the Department as the single State agency responsible for implementing the Medicaid program in this State, and requires the Department to promulgate any necessary regulations which are consistent with federal and State law. The proposed regulatory amendment is necessary to clarify that a community spouse’s pension fund or individual retirement account (IRA) is a countable resource for purposes of determining the institutionalized spouse’s Medicaid eligibility, and for purposes of calculating the amount of the community spouse resource allowance.

**Needs and Benefits:**

The purpose of the proposed regulatory amendment is to revise section 360-4.10(a)(9) of the Medicaid regulations to clarify that in determining Medicaid eligibility for an institutionalized spouse, a community spouse’s pension fund or IRA is a countable resource. Federal Medicaid law at 42 U.S.C. § 1396r-5(c)(5), added by the Medicare Catastrophic Coverage Act (MCCA) of 1988, defines the term “resources” to exclude only certain resources specified in federal law. Pension funds and IRAs are not among those resources specifically excluded by the MCCA, and thus are countable for purposes of determining the Medicaid eligibility of an institutionalized spouse. Therefore, when a social services district determines the income and resources of an institutionalized spouse and his or her community spouse, the assessment of the couple’s resources will include pension funds and IRAs owned by the community spouse. From the total combined countable resources of the couple, the community spouse is allowed to keep resources in an amount equal to the spousal share (but not less than \$74,820 and no more than the maximum community spouse resource allowance of \$90,660, effective January 1, 2003). Resources that exceed the community spouse resource allowance are considered available to the institutionalized spouse. Currently, pension funds and IRAs owned by a community spouse which exceed the community spouse resource allowance are not deemed available to the institutionalized spouse.

Some representatives of Medicaid applicants and recipients have argued that the existing regulations require the community spouse’s pension fund or IRA to be disregarded in the determination of the total countable resources of the couple, thereby allowing the community spouse to retain the pension fund or IRA in addition to the maximum community spouse resource allowance of \$90,660. Since disregarding pension funds and IRAs in this manner is not provided for in federal or State statute, the proposed regulation would eliminate any possible confusion over the correct interpretation of such statutes with respect to pension funds and IRAs.

**Costs:**

Because it is not possible to obtain highly specific data for this issue, a maximum fiscal amount was used to estimate the maximum possible savings that would result from the proposed amendment. The proposed regulation could save the State up to approximately \$718,000 per year of which the state share would constitute \$288,000 (40%). These figures were arrived at by assuming that all couples identified with resources over \$87,000 would be affected by the proposed regulation in addition to the savings the State would experience if all spousal impoverishment hearings were relevant to this issue.

**Local Government Mandates:**

The proposed regulatory amendment would not impose any new mandates. The amendment would clarify that in determining Medicaid eligibility for an institutionalized spouse, a community spouse’s pension fund or IRA is a countable resource. The change adds clarity and specificity for local departments of social services administering the Medicaid program at the county level.

**Paperwork:**

No reporting requirements, forms, or other paperwork are necessitated by this proposed regulatory amendment. Currently, in determining Medicaid eligibility for an institutionalized spouse, social services districts must evaluate a pension fund or IRA owned by a community spouse.

**Duplication:**

The proposed regulatory amendment does not duplicate any existing State or federal requirements.

**Alternatives:**

As indicated above, advocates for Medicaid applicants and recipients have argued that the current regulations technically require the Medicaid program to allow community spouses to retain pension funds and IRAs in addition to the maximum community spouse resource amount. If the Medicaid program were required to adopt this interpretation, and exclude pension funds from the resource assessment, more of the couple’s resources would be protected for the community spouse, and Medicaid expenditures would increase because institutionalized spouses would attain Medicaid eligibility sooner.

Since it is the wording of the existing regulations which is causing some client advocates to question the legal basis for the Department’s policy on pension funds and IRAs, it is necessary to amend the regulations to clarify the correct policy. The alternative of leaving the regulations as currently worded was rejected, since it would leave unresolved the issue of the correct meaning of the regulations, and could result in a legal challenge to the Department’s policy.

**Federal Standards:**

The proposed regulatory amendment complies with federal statute.

**Compliance Schedule:**

Social services districts will be advised of the change when the amendment becomes effective.

#### **Regulatory Flexibility Analysis**

A regulatory flexibility analysis is not required. The proposed amendment would not impose any adverse impact on businesses, either large or small, nor will the proposal impose any new reporting, recordkeeping or other compliance requirements on a business.

#### **Rural Area Flexibility Analysis**

A rural flexibility analysis statement for this proposed action is not required. As mentioned in the regulatory impact statement, the proposed amendment would clarify that a community spouse's pension fund or individual retirement account is a countable resource for purposes of determining the institutionalized spouse's Medicaid eligibility. This requirement would not affect rural areas any more than non-rural areas. The proposed amendment does not impose any new reporting, recordkeeping or any other new compliance requirements on rural or non-rural areas.

#### **Job Impact Statement**

A job impact statement is not required. The proposal will not have an adverse impact on jobs and employment opportunities. The proposed rule is required to clarify the treatment of a community spouse's individual retirement account (IRA) or pension fund in the determination of an institutionalized spouse's Medicaid eligibility.

universal life insurance policies, variable life insurance policies, and credit life insurance policies in accordance with statutory reserve formulas.

**Substance of emergency rule:** The First Amendment to Regulation No. 147 provides new mortality and reserve standards for credit life insurance policies. It also provides new reserve standards for certain other specified life insurance policies. The following is a summary of the amendments to Regulation No. 147:

Section 98.1(a) was amended to include credit life insurance policies and to mention clarification of principles.

Section 98.2(b) was amended to ensure consistency in applicability wording within the regulation.

Section 98.2(i) was amended to state that unless notification was previously provided to the superintendent to adopt lower reserves based on the requirements of this Part, insurers may not adopt such lower reserves without the prior approval of the superintendent.

A new subdivision (j) was added to section 98.2 regarding the use of the minimum mortality standards defined in Part 100 of this Title.

A new subdivision (k) was added to section 98.2 regarding the applicability of this regulation to certain specified life insurance policies.

A new subdivision (l) was added to section 98.2 regarding the applicability of this regulation to credit life insurance.

Subdivision (d)(2) of section 98.4 was amended to change an incorrect reference.

The last sentence of section 98.4(s) was amended to change a reference from 1% to one percent, in order to be consistent with similar references in other sections of the regulation.

Section 98.4(u) was amended to reference the examples and reserve methodologies described in section 98.9 of this Part.

The third sentence of paragraph (2) of section 98.6(a) was amended to change an incorrect reference to the Contract Segmentation Method to the mortality and interest rates used in calculating basic unitary reserves.

Section 98.7(b)(1)(i) was amended to reference section 98.9 of this Part.

Section 98.7(b)(1)(ii) was amended to have the definition of secondary guarantee period extended to this whole Part rather than just paragraph (1) of section 98.7.

Section 98.7(b)(1)(iii) was amended to reference section 98.9 of this Part and provides clarification of an example supplied in this section.

Section 98.7(c) was amended to change the reference from age 100 to the age at the end of the applicable valuation mortality table, since the 2001 CSO Mortality Tables go out to ages greater than 100.

Section 98.8(b) was amended to reference section 98.9 of this Part.

A new section 98.9 was added for certain specified life insurance policies. This section provides examples of policy designs which constitute guarantees and describes the reserve methodologies to be used in valuing such policies.

A new section 98.10 was added for credit life insurance. This section provides minimum mortality standards and minimum reserve standards for such policies.

Section 98.9 was renumbered to section 98.11. This is the severability provision.

**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 March 28, 2005.

**Text of emergency rule and any required statements and analyses may be obtained from:** Michael Barry, Insurance Department, 25 Beaver St., New York, NY 10004, (212) 480-5265, e-mail: mbarry@ins.state.ny.us

#### **Regulatory Impact Statement**

##### 1. Statutory authority:

The superintendent's authority for the First Amendment of Regulation No. 147 (11 NYCRR 98) is derived from sections 201, 301, 1304, 1308, 4217, 4218, 4240 and 4517 of the Insurance Law.

These sections establish the superintendent's authority to promulgate regulations governing reserve requirements for life insurers. 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 1304 of the Insurance Law enables the superintendent to require any additional reserves as necessary on account of life insurers' policies, certificates and contracts.

Section 1308 of the Insurance Law describes when reinsurance is permitted and the effect that reinsurance will have on reserves.

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## Insurance Department

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### EMERGENCY RULE MAKING

#### **Valuation of Life Insurance Reserves**

**I.D. No.** INS-03-05-00001-E

**Filing No.** 1497

**Filing date:** Dec. 29, 2004

**Effective date:** Dec. 29, 2004

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

**Action taken:** Amendment of Part 98 (Regulation 147) of Title 11 NYCRR.

**Statutory authority:** Insurance Law, sections 201, 301, 1304, 1308, 4217, 4218, 4240 and 4517

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

**Specific reasons underlying the finding of necessity:** Earlier this year, the Department became aware that some insurers have designed certain life insurance products with the clear intent of circumventing the existing reserve standards. The Department is concerned with the solvency of those insurers who fail to set aside sufficient funds to pay claims as they pose a serious threat to consumers who rely on insurers to honor their commitment both now and in the future. In addition, insurers who have elected to circumvent the law place themselves at a competitive advantage over those insurers who follow the rules and establish the appropriate level of reserves. On a daily basis, those insurers who abide by the law suffer substantial losses in terms of market share, as they cannot effectively compete against insurers that do not set aside adequate reserves. Action must be taken now to end to this practice of under reserving by insurers that have decided market share is more important than the safety and soundness of policyholder funds.

New York authorized insurers must file quarterly financial statements based upon minimum reserve standards in effect on the date of filing. The filing date for the December 31, 2004 annual statement is March 1, 2005. The insurers must be given advance notice of the applicable standards in order to file their reports in an accurate and timely manner.

For all of the reasons stated above, an emergency adoption of this first amendment to Regulation No. 147 is necessary for the general welfare.

**Subject:** Valuation of life insurance reserves.

**Purpose:** To prescribe rules and guidelines for valuing individual life insurance policies and certain group life insurance certificates, with primary emphasis on valuation of non-level premium and/or non-level benefit life insurance policies, indeterminate premium life insurance policies,

Section 4217(c)(6)(C) provides that reserves according to the commissioners reserve valuation method for life insurance policies providing for a varying amount of insurance or requiring the payment of varying premiums shall be calculated by a method consistent with the principles of this paragraph.

Section 4217(c)(6)(D) permits the superintendent to issue, by regulation, guidelines for the application of the reserve valuation provisions for section 4217 to such policies and contracts, as the superintendent deems appropriate.

Section 4217(c)(9) requires that reserves for any plan of life insurance which provides for future premium determination, the amounts of which are to be determined by the insurance company based on then estimates of future experience, or which is of such a nature that the minimum reserves cannot be determined by the methods prescribed in sections 4217 and 4218, must be computed by a method consistent with the principles of sections 4217 and 4218 as determined by the superintendent.

Section 4218 requires that when the actual premium charged for life insurance under any life insurance policy is less than the modified net premium calculated on the basis of the commissioners reserve valuation method the minimum reserve required for such policy shall be the greater of either the reserve calculated according to the mortality table, rate of interest, and method actually used for such policy, or the reserve calculated by the commissioners reserve valuation method replacing the modified net premium by the actual premium charged for the policy in each contract year for which such modified net premium exceeds the actual premium.

Section 4240(d)(6) states that the reserve liability for variable contracts shall be established in accordance with actuarial procedures that recognize the variable nature of the benefits provided and any mortality guarantees provided in the contract.

Section 4240(d)(7) states that the superintendent shall have the power to promulgate regulations, as may be appropriate, to carry out the provisions of this section.

For fraternal benefit societies, section 4517(b)(2) provides that reserves according to the commissioners reserve valuation method for life insurance certificates providing for a varying amount of benefits or requiring the payment of varying premiums shall be calculated by a method consistent with the principles of this subsection (b).

#### 2. Legislative objectives:

One major area of focus of the Insurance Law is solvency of insurers doing business in New York. One way the Insurance Law seeks to ensure solvency is through requiring all insurers authorized to do business in New York State to hold reserve funds necessary in relation to the obligations made to policyholders.

#### 3. Needs and benefits:

The regulation is necessary to help ensure the solvency of life insurers doing business in New York. Additionally, some companies have sold life insurance products that result in reserves being held that are lower than the reserves that would be required for products with similar death benefit and premium guarantees and are therefore holding reserves lower than those intended by section 4217 of the Insurance Law and the current version of Regulation No. 147. The new reserve methodologies in this amendment address this problem. Not adopting this amendment could result in inadequate reserves for some insurers, which would jeopardize the security of policyholder funds.

The regulation will also set standards for determining policy reserves for credit life insurance.

#### 4. Costs:

Costs to most insurers authorized to do business in New York State will be minimal. Since the majority of the reserve requirements and methodologies included in this regulation have been in effect since the original adoption of this regulation in March of 2003, most companies would only need to update their current computer programs to implement the new reserve methodologies for policies with secondary guarantees and credit life insurance policies. An insurer that needs to modify its current system could produce the modifications internally or if the system was purchased from a consultant, have their consultant produce the modifications. The cost associated with the modifications is estimated to be \$50,000 - \$100,000. The cost would include the actual modifications as well as the testing and implementation of the new software. Once the modifications to the system have been developed, no additional costs should be incurred due to those requirements.

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

#### 5. Local government mandates:

The 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 regulation imposes no new reporting requirements.

#### 7. Duplication:

The regulation does not duplicate any existing law or regulation.

#### 8. Alternatives:

One significant alternative considered was to keep the current version of Regulation No. 147, which would result in some companies holding reserves lower than those intended by section 4217 of the Insurance Law and Regulation No. 147. Another alternative was to not include the methodology stated in Section 98.9(c)(8)(ii), which states the standards for certain universal life insurance policies issued on or after January 1, 2006, and instead rely on the methodology stated in section 98.9(c)(8)(i). This could result in companies being able to design policies that would result in reserves being held that are lower than those intended by section 4217 of the Insurance Law and Regulation No. 147. Another alternative was to keep the minimum standard for credit life insurance as it currently stands, but this would result in a mortality standard that is inconsistent with that stated in a recently adopted National Association of Insurance Commissioners (NAIC) model regulation.

#### 9. Federal standards:

There are no federal standards in this subject area.

#### 10. Compliance schedule:

The regulation applies to financial statements filed on or after December 31, 2004 which allows insurers subject to the regulation time to achieve full compliance. The Department's concern about very low reserves being held for certain product designs is well known in the insurance industry. Numerous discussions with impacted insurers have taken place in the course of attempting to develop a national standard through the National Association of Insurance Commissioners. The insurers impacted by this amendment should have already formed an estimate of the impact. In some cases, use of such estimate may be necessary for the statement that is to be filed by March 1, 2005.

### **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 insurers authorized 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:

Insurance companies 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 amendment to this regulation establishes reserve requirements for certain types of life insurance, including universal life insurance with secondary guarantees, and for credit life insurance.

#### 3. Costs:

Costs to most insurers licensed to do business in New York State will be minimal. Since the majority of the reserve requirements and methodologies included in this regulation have been in effect since the original adoption of this regulation in March of 2003, most insurers would only need to update their current computer programs to implement the new reserve methodologies for policies with secondary guarantees and credit life insurance policies. An insurer that needs to modify its current system could produce the modifications internally or if the system was purchased from a consultant, have their consultant produce the modifications. The cost associated with the modifications is estimated to be \$50,000 - \$100,000. The cost would include the actual modifications as well as the testing and implementation of the new software. Once the modifications to

the system have been developed, no additional costs should be incurred due to those requirements.

4. Minimizing adverse impact:

The regulation does not impose any adverse impact on rural areas.

5. Rural area participation:

The Department's concern about very low reserves being held for certain product designs is well known in the insurance industry. Numerous discussions with impacted insurers have taken place in the course of attempting to develop a national standard through the National Association of Insurance Commissioners. Insurers that may be impacted by this standard are aware of the issues and should have already formed an estimate of the impact. In some cases, use of such estimate may be necessary for the statement that is to be filed by March 1, 2005.

**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 sets standards for setting life insurance reserves for insurers. The regulation is unlikely to impact jobs and employment opportunities.

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 authorized 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.

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## Long Island Power Authority

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### PROPOSED RULE MAKING HEARING(S) SCHEDULED

**Tariff for Electric Service**

**I.D. No.** LPA-03-05-00014-P

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

**Proposed action:** Partial waiver of the tariff for electric service to allow for negotiation of a service classification 13 contract price for electric service.

**Statutory authority:** Public Authorities Law, section 1020-f(Z) and 1020-f(U)

**Subject:** Tariff for electric service.

**Purpose:** To partially waive the tariff for electric service to allow for negotiation of a service classification 13 contract price.

**Public hearing(s) will be held at:** 10:00 a.m., March 1, 2005 at Huntington Town Hall, 100 Main St., Huntington, NY; 2:00 p.m., March 1, 2005 at Long Island Power Authority, 333 Earle Ovington Blvd., Suite 403, 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:** The Long Island Power Authority ("Authority") is considering a proposal to waive partially LIPA's Tariff for Electric Service ("Tariff") to allow for negotiation of a Service Classification 13 contract price for electric service to Photocircuits Corporation less than the minimum level set forth in the Tariff, in order to retain that customer on Long Island. The Authority may adopt, reject or modify, in whole or part, the proposal.

**Text of proposed rule and any required statements and analyses may be obtained from:** Richard M. Kessel, Chairman, 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.

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## Division of the Lottery

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### EMERGENCY RULE MAKING

**Video Lottery Gaming**

**I.D. No.** LTR-03-05-00004-E

**Filing No.** 1500

**Filing date:** Dec. 29, 2004

**Effective date:** Dec. 29, 2004

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

**Action taken:** Addition of Part 2836 to Title 21 NYCRR.

**Statutory authority:** Tax Law, section 1617-a

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

**Specific reasons underlying the finding of necessity:** (1) The nature and location of the general welfare need:

The New York Lottery operates lottery games to fund education in New York State. The current financial situation in New York State is such that funds are urgently needed to meet revenue shortfalls, particularly after the September 11th disaster and the general economic downturn that followed. It is projected that the operation of video lottery gaming in New York State may generate over \$1 billion for education annually when fully implemented. Any game delay that jeopardizes start up of video lottery gaming this fiscal year could result in a loss of approximately \$1 to 4 million weekly in aid to education.

Since passage of the legislation in October 2001 authorizing the Division to license the operation of video lottery gaming at racetracks around New York State, the Division has worked diligently with contractors and racetrack owners to develop the game and the gaming facilities. With commencement of gaming anticipated sometime around the end of this year, the Division continues to finalize the gaming product and to work with the racetracks to design their business operations. These regulations are a result of that product development, and have only now been completed. Consequently, this is the earliest the regulations could have been drafted, leaving inadequate time prior to the anticipated start date to comply with the normal rulemaking procedure set forth in the State Administrative Procedure Act Section 202(1).

(2) Description of the cause, consequences, and expected duration of the need to file emergency rules:

The cause of the need is set forth in paragraph #1 above. The consequence of filing this emergency rulemaking is that the Division will begin to generate needed aid to education through the operation of video lottery gaming. In July 2003, the first draft of these regulations was published. The Division received a number of comments during the public comment period. Revisions to the proposed regulations based on comments received from the public and arising from internal product development are included in these emergency regulations. The Division intends to file shortly a Notice of Revised Rulemaking pursuant the State Administrative Procedure Act Section 202(4-a) to continue the normal rulemaking procedures relative to these regulations.

(3) Compliance with the requirements of § 202(1) of the State Administrative Procedure Act would be contrary to the public interest because it would delay implementation of the game and deprive the state of needed

revenue to education. The approximately \$1 to 4 million in weekly aid to education lost this fiscal year by this delay would need to be taken from other revenue sources.

(4) Circumstances necessitate that the public and interested parties be given less than the minimum period of 30 days for notice and comment because any game delay would result in a loss of approximately \$1 to 4 million weekly this fiscal year in aid to education. As mentioned above, the Division continues to finalize the gaming product and to work with the racetracks to design their business operations. These regulations are a result of that product development, and have only now been completed. Consequently, this is the earliest the regulations could have been finalized, leaving inadequate time prior to the anticipated start date to comply with the normal rulemaking procedure set forth in the State Administrative Procedure Act Section 202(1). Delaying the commencement of gaming for the time needed to utilize the normal rulemaking process would mean a loss in aid to education of approximately \$1 to 4 million per week which would have to be made up from other state revenues.

**Subject:** Video lottery gaming.

**Purpose:** To allow for the licensed operation of video lottery gaming.

**Substance of emergency rule:** Chapter 383 of the Laws of 2001 as amended by Chapter 85 of the Laws of 2002, as amended by Chapter 62 of the Laws of 2003, codified as § 1617-a of the New York State Tax Law, authorized the Division of the Lottery to license the operation of video lottery gaming at eligible racetracks around New York State. That legislation directed the Division to promulgate rules and regulations for the licensing and operation of those games.

The regulations begin by setting forth the general provisions, construction, and application of the rules. This section contains the definitions for key terms that are used throughout the body of the document.

Many of the regulations set forth the licensing procedures for the various participants needed to bring video lottery gaming into operation. Licensees include the racetracks that are eligible under the enabling legislation to operate video lottery gaming, and their employees, as well as gaming and non-gaming vendors that will supply goods and services to both the Division and the racetracks. Licensing procedures include financial disclosure and, in some instances, background investigations for principles and key employees. Non-gaming vendors supplying goods and services below a certain threshold will not be required to undergo the licensing process, but will have to register as suppliers.

The racetracks, referred to in the regulations as video lottery gaming agents, will be required to submit business plans for approval by the Division prior to licensing, and to establish a set of internal control procedures pursuant to guidelines provided by the Division. The agents will be required to submit periodic financial reports and undertake other financial controls. The regulations set forth the continuing obligations of video lottery gaming agents following licensure, and identify penalties that may be imposed on licensees for violation of the regulations.

The regulations establish rules for the conduct and operation of video lottery gaming. Movement of the terminals is closely regulated, and surveillance and security systems are established at each facility.

**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 March 28, 2005.

**Text of emergency rule and any required statements and analyses may be obtained from:** Robert J. McLaughlin, General Counsel, Division of the Lottery, One Broadway Center, P.O. Box 7500, Schenectady, NY 12301, (518) 388-3408, e-mail: rmclaughlin@lottery.state.ny.us

#### **Regulatory Impact Statement**

1. **Statutory Authority:** On October 31, 2001, Governor Pataki signed into law Part C of Chapter 383 of the Laws of 2001, as amended by Chapter 85 of the laws of 2002, as amended by Chapters 62 and 63 of the Laws of 2003, codified as 1617-a and 1612 of the New York State Tax Law, which authorizes the New York State Division of the Lottery ("Division") to license the operation of video lottery gaming at racetrack locations around the state. That legislation directs the Division to promulgate regulations allowing for the licensed operation of video lottery gaming. These regulations fulfill that mandate, enabling the licensing and operation of video lottery gaming at authorized racetracks.

2. **Legislative Objectives:** These proposed regulations advance the legislative objective of raising additional revenue for education by establishing video lottery gaming.

3. **Needs and Benefits:** The regulations satisfy a legislative mandate directing the Division to promulgate regulations for the design, licensing and implementation of video lottery gaming. Pursuant to a Memorandum

of Understanding between the Division and the Racing and Wagering Board, potential duplicative licensing requirements for the racetrack employees have been eliminated.

The regulations set forth the manner in which the regulated community will be licensed to conduct video lottery gaming. Additionally, they describe the game operation, financial operations, terminal design, the manner in which the security systems must operate, and certain requirements for the physical layout of the gaming facilities. These regulations provide the regulated community with the details and guidance to effectively implement video lottery gaming in New York State.

While the Division considers video lottery gaming to be very similar to other lottery games that the Division has successfully conducted for over twenty-five years, some components set it apart from those more traditional games. For example, most of the Division's current licensed agents are food and beverage retailers. Video lottery gaming will require the Division to license racetrack venues as video lottery gaming agents, in addition to licensing video lottery gaming and non-gaming suppliers, as well as principals, key employees, and employees.

In furtherance of its statutory mandate to design a game that is comparable to others in the industry, the Division has spent a considerable amount of time since the legislation was signed studying video lottery gaming venues in other states, namely, Delaware, Rhode Island, and West Virginia. In some respects, the video lottery gaming design in these regulations is modeled after those states; however, there are significant differences. For example, the video lottery games and the video lottery terminals are designed to meet specific legal requirements unique in this state.

A Notice of Proposed Rule Making was published in July 2003. Since that time, the game design has continued to develop during the start up phase of the project. Because of this, and based on comments received during the public comment period, it was necessary to revise the proposed regulations. These emergency regulations include the revisions. By way of example, sections were added authorizing the issuance of badges for temporary employees, expressly setting forth a procedure to request exemption from the regulations, and authorizing the video lottery gaming agents to use Division logos and other copyrighted material to advertise and promote video lottery gaming at the licensed facilities.

In response to comments received from prospective licensees, the video lottery gaming agents were given increased latitude in managing their business operations. For example, rather than adhering to internal controls procedures prescribed by the Division, each agent will design their own in compliance with guidelines established by the Division. License applications with minor deficiencies can be resubmitted without the need to wait a lengthy resubmission time. If temporary employees are needed intermittently, they may utilize a badging system instead of undergoing a lengthy licensing process. Gaming agents will be able to utilize a Division logo in their advertising program, and will be able to sell all lottery products. Grammatical and formatting changes were made for clarity and ease of use.

These regulations will assist the regulated parties to fully understand and comply with all the requirements of the operation of video lottery gaming, while generating sales and revenue to aid education in the State of New York.

4. **Costs:** This is a voluntary program. Members of the regulated community need only apply for licenses if they choose to enter into video lottery gaming. It is expected that the decision to apply for a license will result from the exercise of sound business judgment.

The regulations, as well as the legislation, require facilities be in conformance with state and local building codes. These requirements, in addition to the necessary changes to facilities to accommodate video lottery terminals and related peripheral equipment, will result in each video lottery gaming agent incurring construction costs.

According to data provided by the racetracks, total costs for new construction, rehabilitation of facilities and readying facilities for the installation of the video lottery terminals will approximate \$450 million if all eligible venues participate. Each racetrack's proposed project differs. The cost for each facility ranges from \$4 million to \$250 million dollars. The regulations require video lottery gaming agents housing over 2500 terminals to equip the facility with an alternate emergency power source. It is estimated that this could cost those agents an additional \$250-\$300 per video lottery terminal. The individual facilities will also be incurring closing costs and interest expenses on any funds borrowed to pay project costs. Each track's expenditures in readying the facility for compliance with the regulations include adequate heating, venting, air conditioning, cashier's cages, electrical and communication upgrades.

The racetracks will incur certain labor costs associated with operating video lottery gaming. The gaming facilities throughout the state are expected to employ upwards of a total estimated 4,000 people. Individual gaming agents will be employing approximately 200 to 1,200 people. The average number of employees at each facility is estimated to be over 500. Hourly wages are expected to range from minimum wage to \$65 per hour, with annual salaries ranging from \$22,000 to \$250,000. Total annual payroll for each racetrack could range from \$3.0 million to over \$15 million.

There are other incidental costs that will be incurred by the video lottery gaming agents. These include costs relative to providing sufficient internal controls to satisfy Division guidelines as well as auditing, both expected to exceed what is currently in place at the racing facilities. It is anticipated that most of these controls will be established through sufficient experienced racetrack personnel. Additional external auditing costs are expected to average approximately \$65,000 annually.

Members of the regulated community will be required to expend money for licensing costs. Gaming vendors will be required to pay a \$10,000 licensing fee to cover costs related to conducting background investigations of their principals and key employees. Principals and employees will be required to pay approximately \$100 to cover the cost of fingerprints.

Total costs for the State, the tracks and vendors for start up and a full year of operations are estimated to be approximately \$500 million, with total revenue for the project for that time period estimated to be over \$1.2 billion.

5. Local Government Mandates: No local mandates are imposed by rule upon any county, city, village, etc. The legislation permits local communities which have racetracks not expressly identified in the legislation to pass local laws authorizing video lottery gaming at racetracks in their communities, if they so choose.

6. Paperwork: The regulations require that the regulated entities complete a licensing application, including fingerprints, and to update and renew the application periodically. The application will follow a standard multi-state format used by other states that license similar gaming activities. Completion of these applications will be a new responsibility for the video lottery gaming agents, their principals, and key employees. Agents, their principals and key employees will be required to provide more detailed disclosure than they have previously been required to provide for licensure. This level of disclosure is common in other gaming states. Provisional licenses will be granted under certain circumstances, so that the licensing review process is not expected to pose a barrier to immediate entry into the business.

The regulated vendors should be familiar with these licensing forms and reporting requirements as they are similar to those required in other states where these vendors currently do business. In fact, gaming vendors routinely have regulatory compliance departments to assist in fulfillment of these requirements.

Vendors supplying goods or services not directly related to gaming must register to do business with the video lottery gaming agents. However, if their contracts exceed certain thresholds outlined in the regulations, they will be required to undergo a full licensing procedure. In particular, non-gaming vendors will be required to submit license applications if any of the following conditions exist:

- (a) the non-gaming vendor has a contract with a video lottery gaming agent that exceeds \$100,000.00 in any twelve (12) month period;
- (b) the non-gaming vendor has contracts with more than one video lottery gaming agent that combined exceed \$150,000.00 in any twelve (12) month period;
- (c) the non-gaming vendor has contract(s) for a portion of a video lottery gaming facility construction project that exceeds \$500,000.00 in any twelve (12) month period;
- (d) the non-gaming vendor has combined contracts for a portion of more than one video lottery gaming facility construction project exceeding \$1,000,000.00 within any twelve (12) month period.

Agents will be required to submit business plans that will include floor plans of the gaming areas, staffing plans, internal control procedures, marketing plans, and security plans. These will need to be updated periodically.

In order to ensure the financial integrity and security of video lottery gaming, the video lottery gaming agents will be required to develop internal control procedures, to undergo an auditing process and to submit financial reports. These financial reports are produced during the regular course of business, and their submission should not prove burdensome. These will need to be updated periodically.

7. Duplication: This rule will not duplicate, overlap or conflict with any State or Federal statute or rules. Currently, the New York State Racing and Wagering Board must license the operation of pari-mutuel wagering at the racetracks as well as licensing racetrack employees. Because the operation of video lottery gaming is separate and distinct from pari-mutuel wagering, and further because only the Division may license the operation of video lottery gaming, dual licensing of the racetracks is not duplicative. Pursuant to a Memorandum of Understanding between the Division and that agency, potential duplicative licensing requirements for the racetrack employees have been eliminated.

8. Alternatives: In furtherance of its statutory mandate to design a game that is comparable to others in the industry, the Division has spent a considerable amount of time since the legislation was signed studying video lottery gaming venues in other states, namely, Delaware, Rhode Island, and West Virginia. In some respects, the video lottery gaming design in these regulations is modeled on those states; however, there are significant differences. For example, the video lottery games and the video lottery terminals are designed to meet specific legal requirements unique in this state.

Prior to publication of the first proposed regulations, members of the regulated community were contacted and comments to the proposed draft regulations solicited. In response, the Division received hundreds of comments that were carefully and thoroughly examined. These comments fell broadly into the following general categories:

- (a) That the requirements to become licensed and operate video lottery gaming appeared oftentimes unclear or vague;
- (b) That many of the requirements established in the proposed draft regulations were overly burdensome;
- (c) That the licensing authority of the Division was questionable;
- (d) That the regulations imposed excessive costs to satisfy unnecessary regulatory requirements; and
- (e) That the regulations contained definitions that were inconsistent, inaccurate or ambiguous.

As a result of this outreach effort, a number of revisions were made and included in the first proposed regulations published in July 2003. The public comment period which followed elicited a number of comments primarily from prospective licensees. Many of those comments proved valuable in drafting these emergency regulations which both meet the needs of the regulated community while maintaining the high standards established by the Division to operate and regulate its games. All comments received are available for public review by contacting Robert J. McLaughlin, Esq., General Counsel, New York State Division of the Lottery at One Broadway Center, P.O. Box 7500, Schenectady, New York 12301 or by calling 518-388-3408 or e-mailing to [rmclaughlin@lottery.state.ny.us](mailto:rmclaughlin@lottery.state.ny.us).

While the majority of requests for revision were accommodated whenever feasible, the Division did not accept any requests for change that in its estimation would undermine the security and integrity of the game. For example, when asked to make changes which would reduce the costs of developing or operating their businesses, the Division generally accommodated those requests when possible. Conversely, though comments were received that the stringent licensing application process was overly burdensome, the Division did not lessen these requirements.

As another alternative, the Division entered into a Memorandum of Understanding with the Racing and Wagering Board to avoid potential duplicative licensing requirements for the racetrack employees.

9. Federal Standards: This rule will not duplicate, overlap or conflict with any State or Federal statute or rules.

10. Compliance Schedule: The licenses must be issued prior to commencement of video lottery gaming. In many instances, the license applicants will be issued provisional licenses immediately upon filing their application. All requirements concerning the conduct and operation of video lottery gaming must be complied with prior to actual commencement of the games and maintained on-going throughout the operation of the games.

#### **Regulatory Flexibility Analysis**

1. Effect of Rule: The Division of the Lottery finds that the rule will not adversely affect local government. The rule will impact a number of different types of businesses:

- (a) Licensed racetracks: It is expected that the racetracks will employ greater than 100 employees at their facilities and, therefore, are not "small businesses" as that term is defined in New York State Administrative Procedure Act § 102;
- (b) Gaming vendors: Vendors wishing to supply gaming products and services must be licensed. These include the supplier of the central com-

puter system that will support the video lottery games, the companies supplying the games and terminals, management companies and certain leaders. It is anticipated that once video lottery gaming has commenced, these companies will recoup any costs associated with licensing and start-up;

(c) Non-gaming vendors: Most vendors supplying goods and services not directly related to gaming will be required to complete a registration process. However, if their contract exceeds a certain value, they will be required to comply with licensing provisions. While it is difficult to estimate all costs associated with doing business with a video lottery gaming agent, the costs of registration will be minimal. The costs of licensing, should that be necessary, will conform to the costs of licensing discussed in paragraph (c) below. However, non-gaming vendors who must undergo a licensing process will not be required to pay a licensing fee other than the costs of fingerprinting.

Participation in video lottery gaming by any of these entities is voluntary and it is expected they will use good business judgment when deciding whether or not to participate in these games. It is expected there will be no adverse economic impact on any of these regulated businesses.

2. Compliance Requirements: These rules will not require small businesses to complete burdensome forms or reports. To the extent that any small business becomes a non-gaming vendor to a video lottery agent, a contract value threshold of \$100,000 applies before licensing is necessary. Completion of the licensing application will be required. Certain small vendors may not even be required to register.

3. Professional Services: It is not anticipated that any professional services by a small business or local government will be needed to comply with these proposed rules.

4. Compliance Costs: This is a voluntary program. Members of the regulated community need only apply for licenses if they choose to enter into video lottery gaming. It is expected that the decision to apply for a license will result from the exercise of sound business judgment.

The regulations, as well as the legislation, require facilities be in conformance with state and local building codes. These requirements, in addition to the necessary changes to facilities to accommodate video lottery terminals and related peripheral equipment, will result in each video lottery gaming agent incurring construction costs.

Based on forecasted estimates provided by the racetracks themselves, total costs for new construction, rehabilitation of facilities and readying facilities for the installation of the video lottery terminals will exceed \$240 million if all eligible venues participate. Each facility's proposed project differs. The cost for each facility ranges is from \$4 million to over \$100 million dollars. The regulations require video lottery gaming agents housing over 2,500 terminals to equip the facility with an alternate emergency power source. It is estimated that this will cost those agents an additional \$250-\$300 per installed video lottery terminal. The individual facilities will also be incurring closing costs and interest expenses on any funds borrowed to pay project costs. Each track's expenditures in readying the facility for compliance with the regulations include adequate heating, venting, air conditioning, cashier's cages, electric and communication upgrades.

The gaming facilities throughout the state are expected to employ upwards of a total estimated 1,900 people. Individual gaming agents will be employing between approximately 70 to 700 people. The average number of employees at each facility is estimated to be over 240. Hourly wages are expected to range from minimum wage to \$65 per hour, with annual hourly salaries between \$22,000 to \$250,000. Total annual payroll for each racetrack will range from \$1.8 million to over \$10.8 million, with an average payroll of over \$6.6 million.

There are other incidental costs which will be incurred by the video lottery gaming agents. These include costs relative to providing sufficient internal controls to satisfy Lottery guidelines as well as auditing, both expected to exceed what is currently in place at the racing facilities. The majority of these controls are put in place through adequate experienced personnel and the personnel costs are set forth above. Additional external auditing costs are expected to average approximately \$65,000 annually.

Members of the regulated community will be required to expend money for licensing costs. Gaming vendors will be required to pay a \$10,000 licensing fee to cover costs related to conducting background investigations of their principals and key employees. Principals and employees will be required to pay approximately \$100 to cover the cost of fingerprints.

5. Economic and Technological Feasibility: The economic and technological impact of these rules on local government is minimal.

There are no expected adverse economic or technological impact on small businesses in complying with these regulations.

6. Minimizing Adverse Impact: In the case of smaller, non-gaming vendor contracts, these vendors will not be required to comply with licensing and background checks. Small businesses supplying non-gaming goods and services pursuant to contracts valued at less than \$25,000 annually will be exempt from any registration or licensing requirements, and businesses supplying non-gaming goods and services pursuant to contracts valued at less than \$100,000 will only need to complete a registration process.

7. Small Business and Local Government Participation: During the pre-proposal stage of the regulatory process, members of the regulated community were contacted and given the opportunity to participate in the formation of these regulations. The New York Lottery received numerous comments from members of the community, many of which were incorporated during the final drafting of the proposed regulations. After publication of the Notice of Proposed Rule Making on July 16, 2003, the Lottery received numerous comments mostly from prospective licensees, during the public comment period. These emergency regulations include revisions made to the regulations as a result of that comment period.

**Rural Area Flexibility Analysis**

Many of the racetracks eligible for video lottery gaming licenses are located within "rural areas" as that term is defined in New York State Executive Law Section 481(7): Batavia Downs in Genesee County, Finger Lakes Racetrack in Ontario County, Saratoga Harness Track in Saratoga County, and Monticello Racetrack in Sullivan County.

However, the Division has determined that these regulations will impose no adverse impact on these rural areas. The rule places no additional requirements on racetracks, other businesses or communities located within the rural areas than it does on racetracks, businesses or communities located outside rural areas.

The Division believes that there will be positive impact on these rural areas, as this new industry brings increased levels of business and employment to the communities.

**Job Impact Statement**

The Division has determined that the rule will not have a substantial adverse impact on jobs and employment opportunities. To the contrary, the agency has determined the rule will have a positive impact on jobs and employment opportunities.

According to estimates provided by the racetracks, it is anticipated that racetracks, or gaming agents, throughout the state are expected to employ upwards of 1,900 people. Individual gaming agents will be employing between approximately 70 to 700 people. The average number of employees at each gaming facility (incremental over current operations) is estimated to be over 240. Hourly wages are expected to range from minimum wage to \$65 per hour, with annual salaries between \$22,000 to \$250,000. Total annual payroll for each racetrack will range from \$1.8 million to over \$10.8 million, with an average payroll of over \$6.6 million.

In addition to added employment from gaming operations, needed construction to the racetrack facilities will generate many new jobs. Undoubtedly, employment in the surrounding communities will increase to service the increased labor population and influx of patrons to the racetracks.

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## Office of Mental Health

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**EMERGENCY  
RULE MAKING**

**Operation of Residential Treatment Facilities for Children and Youth**

**I.D. No.** OMH-03-05-00006-E

**Filing No.** 1501

**Filing date:** Dec. 30, 2004

**Effective date:** Dec. 30, 2004

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

**Action taken:** Amendment of section 584.5(e) of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 7.09(b), 31.04(a)(2) and 31.26(b)

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

**Specific reasons underlying the finding of necessity:** To address the immediate needs of children being served in residential treatment facilities for children and youth (RTF) it is necessary to continue to temporarily expand the capacity of certain RTF's.

**Subject:** Operation of residential treatment facilities for children and youth.

**Purpose:** To continue the temporary increase in the capacity of certain RTF's to serve the needs of emotionally disturbed children and youth.

**Text of emergency rule:** Pursuant to the authority granted the Commissioner in Sections 7.09, 31.04, and 31.26 of the Mental Hygiene Law, Title 14 of the Official Compilation of Codes, Rules and Regulations of the State of New York is amended as follows:

Subdivision 584.5(e) of Part 584 of 14 NYCRR is amended to read as follows:

(e) An operating certificate shall be issued for a residential treatment facility for a resident capacity of no less than 14 and no more than 56; provided, however, that for the period commencing April 1, 2000 through [September 30, 2004.] *September 30, 2007*, bed capacity for facilities primarily serving New York City residents may be temporarily increased up to an additional ten beds over the maximum certified capacity with the prior approval of the Commissioner. In order to receive such approval, the residential treatment facility must demonstrate that the additional capacity will be used to serve those children and youth deemed most in need of RTF services by the New York City Preadmission Certification Committee as set forth in Section 583.8.

**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 March 29, 2005.

**Text of emergency rule and any required statements and analyses may be obtained from:** Dan Odell, Bureau of Policy, Legislation and Regulation, Office of Mental Health, 44 Holland Ave., Albany, NY 12229, (518) 473-6945, e-mail: dodell@omh.state.ny.us

#### **Regulatory Impact Statement**

1. Statutory Authority: §§ 7.09(b), 31.04(a)(2) and 31.26(b) of the Mental Hygiene Law grant the Commissioner the power and responsibility to adopt regulations that are necessary and proper to implement matters under his jurisdiction, to set standards of quality and adequacy of facilities, and to adopt regulations governing Residential Treatment Facilities for Children and Youth, respectively.

2. Legislative Objectives: NYCRR Part 584 sets forth standards for the operation of Residential Treatment Facilities for Children and Youth. This amendment to Part 584 allows for the temporary increase of capacity of certain facilities to allow additional children and youth to be served in the program.

3. Needs and Benefits: The Office of Mental Health has determined that it is necessary to continue the existing capacity of these Residential Treatment Facilities for Children and Youth (RTFs) which serve seriously emotionally disturbed children and youth who are residents of New York City. Under the existing regulation, (14 NYCRR Section 584.5(e)), RTF bed capacity serving primarily New York City residents may be temporarily increased until September 30, 2004 by up to 10 additional beds over the permitted maximum of 56 per facility. This amendment would extend the referenced expiration date, to September 30, 2007.

There are a number of initiatives underway that focus on improving the use of the current RTF resources by decreasing the length of stay. These initiatives include focused development of supervised community residences, family based treatment programs, case management and family support to assist the youth discharged from an RTF to successfully reintegrate into the community.

To expand capacity in 2000, a total of 21 temporary beds were added to 5 existing RTF facilities serving New York City residents. These beds were added on a voluntary basis with the cooperation of the facilities and the support of the New York City Department of Mental Health. Three of the facilities that were not at the 56 bed maximum had their capacity increased administratively by a total of 13, without going over the maximum. One of the facilities, St. Christopher Otilie, was at 56 beds and another, Linden Hill, was at 55 beds. St. Christopher Otilie added 5 beds. Linden Hill added 3 beds. Therefore, 7 beds are permitted to be added under 14 NYCRR Section 584.5(e). That permission expired on September 30, 2004. Although significant improvements in development of residen-

tial alternatives, such as the supervised community residences and the family based treatment beds, have been made in the last four years. However, these additional beds are still needed.

#### 4. Costs:

(a) Costs to private regulated parties: There will be no mandated costs to the regulated parties associated with allowing an increase in capacity to the RTF program.

(b) Cost to state and local government: The annual state cost for the 7 beds is estimated to be \$465,000. These additional funds will be covered by the State share of Medicaid appropriation. There is no local share for the RTF program. Funding for these beds is included in the enacted budget for State Fiscal Year 2004-2005.

(c) The cost projection was calculated by applying the per bed projected Medicaid rate to the 7 additional beds.

5. Local Government Mandates: There will be no additional mandates to local government.

6. Paperwork: There are no new paperwork requirements associated with this amendment.

7. Duplication: There are no duplicate, overlapping or conflicting mandates which may effect this rule.

8. Alternatives: The only alternative would be to allow the temporary additional capacity authority to expire, which is not acceptable given the critical need for these services.

9. Federal Standards: The rule does not exceed any Federal standards.

10. Compliance Schedule: Providers will be able to comply with this rule immediately.

#### **Regulatory Flexibility Analysis**

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not being submitted with this notice because the amended rules will not impose any adverse economic impact on small businesses, or local governments.

#### **Rural Area Flexibility Analysis**

A Rural Area Flexibility Analysis is not being submitted with this notice because the amended rules impact only Residential Treatment Facilities for Children and Youth serving children who are New York City residents.

#### **Job Impact Statement**

Because this amendment will impact only 2 providers of Residential Treatment Facilities for Children and Youth, and only permits these 2 providers to continue the temporary operation of a total of 7 beds until September 30, 2007, it will not have any impact on jobs and employment activities.

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## Office of Mental Retardation and Developmental Disabilities

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### EMERGENCY/PROPOSED RULE MAKING HEARING(S) SCHEDULED

#### **Rate/Fee Setting**

**I.D. No.** MRD-03-05-00008-EP

**Filing No.** 1503

**Filing date:** Dec. 31, 2004

**Effective date:** Jan. 1, 2005

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

**Action taken:** Amendment of sections 635-10.5, 671.7, 680.12, 681.14 and 690.7 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 13.07, 13.09 and 43.02

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

**Specific reasons underlying the finding of necessity:** Fiscal uncertainties precluded OMRDD from securing necessary control agency approvals to allow for timely proposal and promulgation of these amendments within the regular SAPA procedural time frames. The emergency amendments revise the rates/fees of reimbursement of the referenced facilities and services. If OMRDD did not file this emergency adoption and establish the

regulatory authority to pay the revised rates and fees effective Jan. 1, 2005, the loss of revenues could have a deleterious effect on the fiscal viability of some providers, especially those which have smaller operations. This potential negative effect could translate into compromised services for citizens with developmental disabilities who need such services.

**Subject:** Rate/fee setting in voluntary agency operated individualized residential alternative (IRA) facilities and home and community-based (HCBS) waiver services; HCBS waiver community residential habilitation services; specialty hospitals; intermediate care facilities for persons with developmental disabilities; and day treatment facilities serving persons with developmental disabilities.

**Purpose:** To revise the methodologies used to calculate rates/fees of the referenced facilities or programs and establish trend factors to be applied within the context of the referenced reimbursement methodologies, effective Jan. 1, 2005.

**Public hearing(s) will be held at:** 10:30 a.m. on March 7, 2005 via video conference at the following three locations (to participate call OMRDD at (518) 474-1830 no later than Feb. 28, 2005): Capital District DDSO, Balltown and Consaul Rd., Bldg. 3, Conference Rm. 1, Schenectady, NY; Metro New York DDSO, 75 Morton St., New York, NY; Finger Lakes DDSO, Conference Rm. 3/4, 620 Westfall Rd., Rochester, NY; and 10:30 a.m., March 8, 2005 at 4th Fl., Conference Rm. B, 44 Holland Ave., Albany, 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.

**Text of emergency/proposed rule:** Paragraph 635-10.5(i)(1) - Add new subparagraph (xxi):

(xxi) 3.33 percent to trend 2004-2005 costs to 2005-2006. The application of these trend factors shall include services provided in accordance with paragraph (c)(2) of this section. For agency sponsored family care, the agency must pay the trend related to the difficulty of care payment to the individual family care provider.

Note: Rest of paragraph is renumbered accordingly.

Paragraph 635-10.5(i)(2) - Add new subparagraph (xxi):

(xxi) 3.33 percent to trend calendar 2004 costs to calendar year 2005. The application of these trend factors shall include services provided in accordance with paragraph (c)(2) of this section. For agency sponsored family care, the agency must pay the trend related to the difficulty of care payment to the individual family care provider.

Note: Rest of paragraph is renumbered accordingly.

Clause 671.7(a)(1)(vi)(a) - Add new subclause (13):

(13) For calendar year 2005:  
 NYC and Nassau, Rockland, Suffolk, and Westchester Counties \$29.47 per day  
 Rest of State \$28.47 per day

Note: Rest of clause remains unchanged.

Clause 671.7(a)(1)(xvi)(a) - Add new subclause (11):

(11) 0.00 percent from January 1, 2005 through December 31, 2005.

Clause 671.7(a)(1)(xvi)(b) - Add new subclause (11):

(11) 0.00 percent from July 1, 2005 through June 30, 2006.

Paragraph 680.12(d)(3) - Add new subparagraph (xviii):

(xviii) 3.28 percent for 2005.

Add new subclause 681.14(c)(3)(ii)(b)(5):

(5) If a facility is subject to an expanded desk audit per subclause (b)(2) of this subparagraph, but the desk audit has not been completed by January 1, 2005 or July 1, 2005, OMRDD shall continue the rate established according to the first sentence of subclause (b)(3) and, if applicable, further trended to 2005 or 2005-2006 dollars until OMRDD completes the expanded desk audit. Upon OMRDD's completion of the expanded desk audit, for the base period and subsequent periods beginning January 1, 2003 or July 1, 2003, the methodology described in this section will apply.

Subparagraphs 681.14(g)(1)(xii)-(xix) are amended as follows:

(xii) Effective February 1, 2004, facilities will receive an amount that they would have received if the trend factor in subparagraph (xi) of this paragraph for the rate period of July 1, 2003 to June 30, 2004 were increased in the amount of 3.12 percent. The trend factor in effect for the rate period ending June 30, 2004 shall be deemed to be increased in the amount of 3.12 percent; [and]

(xiii) 3.20 percent for 2003-2004 to 2004-2005[.] ; and

(xix) 3.33 percent for 2004-2005 to 2005-2006.

Subparagraphs 681.14(g)(2)(xii)-(xix) are amended as follows:

(xii) Effective February 1, 2004, facilities will receive an amount that they would have received if the trend factor in subparagraph (xi) of this paragraph for calendar year 2003 were increased in the amount of 3.12 percent. The trend factor for the rate year ending December 31, 2003 shall be deemed to be increased in the amount of 3.12 percent; [and]

(xiii) 3.20 percent for 2003 to 2004 [.] ; and

(xix) 3.33 percent for 2004 to 2005.

Subparagraphs 681.14(g)(3)(xx)-(xxii) are amended as follows:

(xx) Effective February 1, 2004, facilities will receive an amount that they would have received if the trend factor in subparagraph (xix) of this paragraph for the rate period of July 1, 2003 to June 30, 2004 were increased in the amount of 3.12 percent. The trend factor in effect for the rate period ending June 30, 2004 shall be deemed to be increased in the amount of 3.12 percent; [and]

(xxi) 3.20 percent for 2003-2004 to 2004-2005 [.] ; and

(xxii) 3.33 percent for 2004-2005 to 2005-2006.

Subparagraphs 681.14(g)(4)(xx)-(xxii) are amended as follows:

(xx) Effective February 1, 2004, facilities will receive an amount that they would have received if the trend factor in subparagraph (xix) of this paragraph for calendar year 2003 were increased in the amount of 3.12 percent. The trend factor for the rate year ending December 31, 2003 shall be deemed to be increased in the amount of 3.12 percent; [and]

(xxi) 3.20 percent for 2003 to 2004 [.] ; and

(xxii) 3.33 percent for 2004 to 2005.

Subparagraph 690.7(d)(6)(i) - Add new clause (q):

(q) 0.00 percent for 2004-2005 to 2005-2006, including those facilities in Regions II and III designated or elected to a Region I reporting year-end and fiscal cycle and excluding those facilities in Region I designated or elected to a Region II or III reporting year-end and fiscal cycle in accordance with subparagraph (b)(1)(iv) of this section.

Subparagraph 690.7(d)(6)(ii) - Add new clause (q):

(q) 0.00 percent for 2004 to 2005, including those facilities in Region I designated or elected to Region II or III and excluding those facilities in Region II or III designated or elected to Region I in accordance with subparagraph (b)(1)(iv) of this section.

**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 March 30, 2005.

**Text of rule and any required statements and analyses may be obtained from:** Barbara Brundage, Director, Regulatory Affairs Unit, Office of Mental Retardation and Developmental Disabilities, 44 Holland Ave., Albany, NY 12229, (518) 474-1830; e-mail: barbara.brundage@omr.state.ny.us

**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.

**Additional matter required by statute:** Pursuant to the requirements of the State Environmental Quality Review Act (SEQRA) and in accordance with 14 NYCRR Part 622, OMRDD has on file a negative declaration with respect to this action. Thus, consistent with the requirements of 6 NYCRR Part 617, OMRDD, as lead agency, has determined that the action described herein will not have a significant effect on the environment, and an environmental impact statement will not be prepared.

**Regulatory Impact Statement**

1. Statutory authority:

a. The New York State Office of Mental Retardation and Developmental Disabilities' (OMRDD) statutory responsibility to assure and encourage the development of programs and services in the area of care, treatment, rehabilitation, education and training of persons with mental retardation and developmental disabilities, as stated in the New York State Mental Hygiene Law Section 13.07.

b. OMRDD's authority to adopt rules and regulations necessary and proper to implement any matter under its jurisdiction as stated in the New York State Mental Hygiene Law Section 13.09.

c. OMRDD's responsibility, as stated in section 43.02 of the Mental Hygiene Law, for setting Medicaid rates for services in facilities licensed by OMRDD.

2. Legislative objectives:

These emergency/proposed amendments further the legislative objectives embodied in sections 13.07, 13.09, and 43.02 of the Mental Hygiene Law. The enactment of these emergency/proposed amendments will ensure the funding to voluntary agency providers of the following services:

a. Individualized Residential Alternative (IRA) facilities and Home and Community-based (HCBS) Waiver services (amendments to section 635-10.5).

b. Home and Community-based (HCBS) Waiver Community Residential Habilitation Services (amendments to section 671.7).

c. Specialty Hospitals (amendments to section 680.12).

d. Intermediate Care Facilities for Persons with Developmental Disabilities (ICF/DD) (amendments to section 681.14).

e. Day Treatment Facilities for Persons with Developmental Disabilities (amendments to section 690.7).

This funding is necessary in order to enable voluntary agencies that operate the above facilities to maintain services in the areas of care, treatment, rehabilitation, and training of persons with mental retardation and developmental disabilities.

### 3. Needs and benefits:

From the time of their inception and implementation in New York State, OMRDD has provided funding for the above referenced facilities and services. Such funding is necessary to assure the continued delivery of services to persons with developmental disabilities. The emergency/proposed amendments are concerned with identifying the respective trend factors applicable to these facilities and services, effective January 1, 2005.

Fiscal uncertainties precluded OMRDD from securing necessary control agency approval to allow for previous proposal and timely promulgation of these amendments within the regular SAPA procedural time frames. The loss of revenues, if OMRDD did not file this Emergency/Proposed Agency Action and establish the regulatory authority to reimburse providers of the above referenced facilities and services at revised rates/fees for the periods beginning January 1, 2005 and July 1, 2005, could have a negative effect on the fiscal viability of some providers, especially those which have smaller operations. This potentially negative effect could translate into compromised services for citizens with developmental disabilities.

### 4. Costs:

a. Costs to the Agency and to the State and its local governments. The aggregate cost of the application of the trend factors contained in the emergency/proposed amendments is approximately \$69.4 million. This represents approximately \$34.5 million in State funds, \$32.7 million in federal funds and \$2.0 million in local government share. The specific impacts by facility or program type are as follows:

- For Individualized Residential Alternative (IRA) facilities and Home and Community-based (HCBS) Waiver services (amendments to section 635-10.5). New York State currently funds IRA facilities and all authorized HCBS Waiver residential habilitation, day habilitation, supported employment, respite, and prevocational services for the approximately 60,200 persons receiving such services as of December 2004.

The emergency/proposed amendments implement a trend factor of 3.33 percent. The estimated cost for implementation of the trend factor contained in the emergency/proposed amendments on an annual aggregate basis is approximately \$43.8 million for the fee periods beginning January 1, 2005 and July 1, 2005. This represents approximately \$21.8 million in State share and \$20.0 million in federal funds. The estimated cost of the 3.33 percent trend factor to local governments is approximately \$2.0 million on an annual aggregate basis and divided among the counties.

- For Home and Community-based (HCBS) Waiver Community Residential Habilitation Services (amendments to section 671.7). Currently, OMRDD funds voluntary operated community residence facilities which are providing services to approximately 1,800 persons as of December 2004. The emergency/proposed amendments implement a trend factor of zero percent. There are therefore no costs attributable to this amendment, either to the State or to local governments.

The amendments to section 671.7 also update the SSI per diem allowances consistent with levels determined by the Federal Social Security Administration. There are no additional costs attributable to this conforming amendment, either to the State or to local governments.

- For Specialty Hospitals (amendments to section 680.12). New York State funds the one such facility currently in operation. The emergency/proposed amendments implement a trend factor of 3.28 percent. The estimated total cost for implementation of this trend factor on an aggregate annualized basis is approximately \$490,000 for the period beginning January 1, 2005. This represents approximately \$245,000 in State share and \$245,000 in federal funds. There are no costs to local governments as a result of the amendments.

- For Intermediate Care Facilities for Persons with Developmental Disabilities (ICF/DD), (amendments to section 681.14). As of December 2004, there were 618 voluntary-operated sites certified by OMRDD to

provide ICF/DD services in New York State. The emergency/proposed amendments implement a trend factor of 3.33 percent. The estimated cost for implementation of the trend factor contained in the emergency/proposed amendments on an annual aggregate basis is approximately \$25.1 million for the rate periods beginning January 1, 2005 and July 1, 2005. This represents approximately \$12.5 million in State share and \$12.5 million in federal funds.

There are no costs to local governments resulting from emergency/proposed amendments to section 681.14.

- For Day Treatment facilities serving persons with developmental disabilities (amendments to section 690.7). As of December 2004, there were 171 sites certified by OMRDD to provide day treatment services statewide. The amendments implement a trend factor of zero percent for the periods beginning January 1, 2005 and July 1, 2005. There is therefore no fiscal impact, State or federal, associated with the emergency/proposed amendments. There are also no costs to local governments resulting from these emergency/proposed amendments.

Pursuant to Social Services Law sections 365 and 368-a, local governments incur no costs for most of the above referenced facilities or services, or the State reimburses local governments for their share of the cost of Medicaid funded programs and services. As previously discussed on a facility/service specific basis, an unreimbursed local government share is involved for only a portion of the consumers receiving HCBS waiver services (section 635-10.5). These are consumers who live with their families or on their own and who do not qualify for local share relief under State law.

In all instances, these estimated cost impacts have been derived by applying the trend factor provisions of the emergency/proposed amendments within the context of the respective reimbursement methodologies to the providers of services certified or authorized as of December, 2004.

b. Costs to private regulated parties: There are no initial capital investment costs nor initial non-capital expenses. There are no additional costs associated with implementation and continued compliance with the rule. The emergency/proposed amendments are necessary to maintain funding of the above cited facilities at revised levels of reimbursement in effect as of January 1, 2005. To the extent that the amendments provide trend factor increases to the providers of the various facilities and services, the amendments will result in increased funding to provider agencies.

### 5. Local government mandates:

Other than the local share discussed above, there are no new requirements imposed by the rule on any county, city, town, village; or school, fire, or other special district.

### 6. Paperwork:

No additional paperwork will be required by most of the emergency/proposed amendments.

### 7. Duplication:

The emergency/proposed amendments do not duplicate any existing State or Federal requirements that are applicable to the above cited facilities or services for persons with developmental disabilities.

### 8. Alternatives:

The current course of action as embodied in these emergency/proposed amendments reflects what OMRDD believes to be a fiscally prudent, cost-effective reimbursement of the facilities and developmental disabilities services in question. No alternatives to these trend factors were considered. There is no alternative to emergency adoption that would allow for prompt, timely implementation of the trend factor provisions contained in the emergency/proposed amendments.

### 9. Federal standards:

The emergency/proposed amendments do not exceed any minimum standards of the federal government for the same or similar subject areas.

### 10. Compliance schedule:

The emergency rule is effective January 1, 2005. OMRDD has concurrently filed the rule as a Notice of Proposed Rule Making, and it intends to finalize the rule as soon as possible within the time frames mandated by the State Administrative Procedure Act. The emergency/proposed amendments are concerned with revising the various reimbursement methodologies to implement trend factor adjustments for facilities and providers of services to persons with developmental disabilities. These amendments do not impose any significant new requirements with which regulated parties are expected to comply.

### Regulatory Flexibility Analysis

1. Effect on small business: These emergency/proposed regulatory amendments will apply to voluntary not-for-profit corporations that operate the following facilities and/or provide the following services for persons with developmental disabilities in New York State:

- Individualized Residential Alternative (IRA) facilities, and Home and Community-based (HCBS) Waiver services (amendments to section 635-10.5). New York State currently funds IRA facilities and all authorized HCBS Waiver residential habilitation, day habilitation, supported employment, respite and prevocational services for the approximately 60,200 persons receiving such services as of December 2004.

- Home and Community-based (HCBS) Waiver Community Residential Habilitation Services (amendments to section 671.7). Currently, OMRDD funds voluntary operated community residence facilities which serve approximately 1,800 persons.

- Intermediate Care Facilities for Persons with Developmental Disabilities (ICF/DD), (amendments to section 681.14). As of December 2004, there were 618 voluntary-operated sites certified by OMRDD to provide ICF/DD services in New York State.

- Day Treatment Facilities for Persons with Developmental Disabilities (amendments to section 690.7). As of December 2004, there were 171 voluntary-operated sites certified by OMRDD to provide day treatment services statewide.

The OMRDD has determined, through a review of the certified cost reports, that the organizations which operate the above referenced facilities or provide the developmental disabilities services employ fewer than 100 employees at the discrete certified or authorized sites and would, therefore, be classified as small businesses.

There is only one Specialty Hospital (amendments to section 680.12) certified to operate in New York State. It employs more than 100 persons and would therefore not be considered a small business as contemplated under the State Administrative Procedure Act (SAPA).

The emergency/proposed amendments have been reviewed by OMRDD in light of their impact on these small businesses and on local governments. OMRDD has determined that these amendments will continue to provide appropriate funding for small business providers of developmental disabilities services. Further, OMRDD expects that the emergency/proposed amendments will not cause undue hardship to small business providers due to increased costs for additional services or increased compliance requirements. In fact, the provisions contained in the emergency/proposed amendments will either have no fiscal impact, or they will provide for increased reimbursements to small business providers of services, due to the application of the trend factors established by the amendments. Specific impacts of the increased funding are set forth in the accompanying Regulatory Impact Statement as costs to State and Federal government.

Pursuant to Social Services Law sections 365 and 368-a, local governments incur no costs for most of the above referenced facilities or services, or the State reimburses local governments for their share of the cost of Medicaid funded programs and services. As discussed on a facility/service specific basis in the Regulatory Impact Statement, an unreimbursed local government share is involved for only a portion of the consumers receiving HCBS waiver services (section 635-10.5). These are consumers who live with their families or on their own and who do not qualify for local share relief under State law. For these people receiving HCBS waiver services, the implementation of the 3.33 percent trend factor contained in the emergency/proposed amendments will result in a county share of approximately \$2.0 million in the aggregate. This cost impact is divided among all the counties. The overall cost of the application of the trend factors contained in the emergency/proposed amendments is approximately \$69.4 million.

2. Compliance requirements: Other than the local share discussed above, there are no additional compliance requirements for small businesses or local governments resulting from the implementation of these emergency/proposed amendments.

3. Professional services: In accordance with existing practice, providers are required to submit annual cost reports by certified accountants. The emergency/proposed amendments do not alter this requirement. Therefore, no additional professional services are required as a result of these amendments. The amendments will have no effect on the professional service needs of local governments.

4. Compliance costs: Other than the local share discussed above, there are no additional compliance costs to small business regulated parties or local governments associated with the implementation of, and continued compliance with, these emergency/proposed amendments.

5. Economic and technological feasibility: The emergency/proposed amendments are concerned with rate/fee setting in the affected facilities or services, and only revise the reimbursement methodologies which describe the ways in which OMRDD calculates the appropriate reimbursement of

such facilities and services. The amendments do not impose on regulated parties the use of any technological processes.

6. Minimizing adverse economic impact: The purpose of these emergency/proposed amendments is to allow OMRDD to reimburse providers of the referenced services at revised levels in effect as of January 1, 2005. Specifically, these amendments establish trend factor adjustments for the regulations governing the reimbursement of the referenced facilities/services for the rate/fee periods beginning January 1, 2005 and July 1, 2005. The trend factor provisions will either have no impact on funding of small business providers of services, or will have positive impacts resulting from increased reimbursements to the providers.

As previously stated, the emergency/proposed amendments will only have a relatively minimal fiscal impact on local governments due to the implementation of the 3.33 percent trend factor contained in the amendments for reimbursements to HCBS waiver services.

These amendments impose no adverse economic impact on regulated parties, and no compliance response. The local government share of Medicaid funded programs is established by State law. Therefore, the approaches for minimizing adverse economic impact suggested in section 202-b(1) of the State Administrative Procedure Act are not applicable.

7. Small business and local government participation: To the extent that information regarding provider reimbursement has been available, OMRDD has shared and discussed such information with provider representatives.

Further, OMRDD has complied with relevant Federal notice requirements concerning changes in certain Medicaid funded facilities and services. Thus, known information concerning regulatory amendments involving changes to the reimbursement methodology of Day Treatment facilities was published in a Public Notice that appeared in the State Register prior to the emergency adoption of these amendments.

In addition, OMRDD is required to hold public hearings only on those amendments to section 671.7 as they may affect reimbursement of the room and board components of the community residence fees. However, it has been OMRDD's long-standing practice to enlarge the scope of these scheduled public hearings so as to include all of the emergency/proposed amendments contained in this rule making, as well as to provide an opportunity to comment on any aspect of the various rate and fee setting methodologies. These hearings are scheduled to be held on March 7, 2005 (via video conference at Capital District DDSO, Metro New York DDSO, and Finger Lakes DDSO) and March 8, 2005 (OMRDD, 44 Holland Avenue) according to the specifications contained in the Notice for this rule making.

#### **Rural Area Flexibility Analysis**

A Rural Area Flexibility Analysis for these amendments is not submitted because the amendments will not impose any adverse impact or significant reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. The amendments are concerned with providing necessary revisions to the reimbursement methodologies which OMRDD uses in determining the reimbursement of the affected developmental disabilities services or facilities. OMRDD expects that adoption of the amendments will not have adverse effects on regulated parties. Further, the amendments will have no adverse fiscal impact on providers as a result of the location of their operations (rural/urban), because the overall reimbursement methodologies are primarily based upon reported costs of individual facilities, or of similar facilities operated by the provider or similar providers in the same area. Thus, the reimbursement methodologies have been developed to reflect variations in cost and reimbursement which could be attributable to urban/rural and other geographic and demographic factors.

#### **Job Impact Statement**

A Job Impact Statement for these amendments is not being submitted because it is apparent from the nature and purposes of the amendments that they will not have a substantial impact on jobs and/or employment opportunities. This finding is based on the fact that the amendments are concerned with providing revisions to the reimbursement methodologies which OMRDD uses in determining the appropriate reimbursement of the affected developmental disabilities services or facilities. The amendments establish trend factors to be applied within the context of reimbursement methodologies for the various facility/program types. These trend factor increases are not expected to result in changes in reimbursements significant enough to affect staffing patterns within the regulated facilities or programs. They will not have any adverse impacts on jobs or employment opportunities in New York State.

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## Public Service Commission

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### NOTICE OF ADOPTION

#### Submetering of Electricity by Elad Properties

**I.D. No.** PSC-30-04-00004-A  
**Filing date:** Dec. 30, 2004  
**Effective date:** Dec. 30, 2004

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

**Action taken:** The commission, on Dec. 15, 2004, adopted an order in Case 04-E-0756 allowing Elad Properties to submeter electricity at 21 Astor Place, New York, NY.

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

**Subject:** Request for the submetering of electricity.

**Purpose:** To submeter electricity at a newly renovated master-metered residential condominium.

**Substance of final rule:** The Commission approved a request by Elad Properties to submeter electricity at a renovated building consisting of fifty residential condominiums at 21 Astor Place, New York, New York, located in the service 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-0756SA1)

### NOTICE OF ADOPTION

#### Submetering of Electricity by Carousel Park Preservation, LP

**I.D. No.** PSC-34-04-00019-A  
**Filing date:** Dec. 29, 2004  
**Effective date:** Dec. 29, 2004

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

**Action taken:** The commission, on Dec. 15, 2004, adopted an order in Case 04-E-0953 allowing Carousel Park Preservation LP (Carousel Park) to submeter electricity at 100 Oliver St., North Tonawanda, NY.

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

**Subject:** Request for the submetering of electricity.

**Purpose:** To submeter electricity at a newly renovated residential apartment complex.

**Substance of final rule:** The Commission approved a request by Carousel Park Preservation, LP to submeter electricity to low-income senior residential tenants at a newly renovated residential apartment complex at 100 Oliver Street, North Tonawanda, New York, located in the service territory of Niagara Mohawk Power Corporation.

**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-0953SA1)

### NOTICE OF ADOPTION

#### Submetering of Electricity by Elmwood Park Preservation, LP

**I.D. No.** PSC-36-04-00004-A  
**Filing date:** Dec. 29, 2004  
**Effective date:** Dec. 29, 2004

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

**Action taken:** The commission, on Dec. 15, 2004, adopted an order in Case 04-E-1001 allowing Elmwood Park Preservation, LP (Elmwood Park) to submeter electricity at 505-515 Elmwood Avenue, Buffalo, NY.

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

**Subject:** Request for the submetering of electricity.

**Purpose:** To submeter electricity at a newly renovated residential apartment complex.

**Substance of final rule:** The Commission approved a request by Elmwood Park Preservation, LP to submeter electricity to low income senior residential tenants at a newly renovated residential apartment complex at 505-515 Elmwood Avenue, Buffalo, New York, located in the service territory of Niagara Mohawk Power Corporation.

**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-1001SA1)

### NOTICE OF ADOPTION

#### Submetering of Electricity by Urge Electrical Management Company, Inc.

**I.D. No.** PSC-36-04-00005-A  
**Filing date:** Dec. 30, 2004  
**Effective date:** Dec. 30, 2004

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

**Action taken:** The commission, on Dec. 15, 2004, adopted an order in Case 04-E-1004 allowing Urge Electrical Management Company, Inc. to submeter electricity at 3-9 Hubert St., New York, NY.

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

**Subject:** Request for the submetering of electricity.

**Purpose:** To submeter electricity at a new master-metered residential condominium.

**Substance of final rule:** The Commission approved a request by Urge Electrical Management Company, Inc. to submeter a new building consisting of thirty-four residential condominiums at 3-9 Hubert Street, New York, New York, located in the service 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-1004SA1)

## NOTICE OF ADOPTION

## Quarterly Reports by Niagara Mohawk Power Corporation

I.D. No. PSC-40-04-00006-A

Filing date: Dec. 29, 2004

Effective date: Dec. 29, 2004

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

**Action taken:** The commission, on Dec. 15, 2004, adopted an order in Case 01-M-0075 approving Niagara Mohawk Power Corporation's (Niagara Mohawk) request to revise the filing date for its quarterly report.

**Statutory authority:** Public Service Law, section 66(4)

**Subject:** Modification of a deadline date established.

**Purpose:** To file its quarterly report for the first quarter of each calendar year on June 30th, instead of May 15th.

**Substance of final rule:** The Commission granted Niagara Mohawk Power Corporation (Niagara Mohawk) a waiver of the requirements of 16 NYCRR Section 731.2 to allow Niagara Mohawk to file its quarterly report for the first quarter on June 30th as opposed to May 15th for the year 2005 and every year thereafter, 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.

(01-M-0075SA22)

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

**Interconnection Agreement between Verizon New York Inc. and AT&T Communications of New York, Inc., et al.**

I.D. No. PSC-03-05-00015-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 or reject, in whole or in part, a modification filed by Verizon New York Inc. and AT&T Communications of New York, Inc., ACC National Telecom Corporation and Teleport Communications Group Inc. to revise the interconnection agreement effective on Aug. 2, 2002.

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

**Subject:** Intercarrier agreements to interconnect telephone networks for the provisioning of local exchange service.

**Purpose:** To amend the agreement.

**Substance of proposed rule:** The Commission approved an Interconnection Agreement between Verizon New York Inc. and AT&T Communications of New York, Inc., ACC National Telecom Corporation and Teleport Communications Group Inc. in November 2002. The companies subsequently have jointly filed amendments to clarify the provisions regarding reciprocal compensation rates. 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, 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.

(01-C-0095SA4)

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

**Interconnection Agreement between Verizon New York Inc. and XO New York, Inc.**

I.D. No. PSC-03-05-00016-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 whether to approve or reject, in whole or in part, a modification filed by Verizon New York Inc. and XO New York, Inc. to revise the interconnection agreement effective on Oct. 24, 2003.

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

**Subject:** Intercarrier 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 Verizon New York Inc. and XO New York, Inc. in October 2003. The companies subsequently have jointly filed amendments to clarify the provisions regarding reciprocal compensation rates. 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, 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-C-1234SA2)

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

**Interconnection Agreement between Verizon New York Inc. and BridgeCom International, Inc.**

I.D. No. PSC-03-05-00017-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 or reject, in whole or in part, a proposal filed by Verizon New York Inc. and BridgeCom International, Inc. for approval of an interconnection agreement executed in Feb. 3, 2003.

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

**Subject:** Interconnection of networks for local exchange service and exchange access.

**Purpose:** To review the terms and conditions of the negotiated agreement.

**Substance of proposed rule:** Verizon New York Inc. and BridgeCom International, Inc. have reached a negotiated agreement whereby Verizon New York Inc. and BridgeCom International, Inc. will interconnect their networks at mutually agreed upon points of interconnection to provide Telephone Exchange Services and Exchange Access to their respective customers. The Agreement establishes obligations, terms and conditions under which the parties will interconnect their networks lasting until June 23, 2005, or as extended.

**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, 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-0739SA1)

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

**Interconnection Agreement between Frontier Communications of Sylvan Lake, Inc. and Frontier Communications of America, Inc.**

**I.D. No.** PSC-03-05-00018-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 Frontier Communications of Sylvan Lake, Inc. and Frontier Communications of America, Inc. for approval of an interconnection agreement executed on Nov. 22, 2004.

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

**Subject:** Interconnection of networks for local exchange service and exchange access.

**Purpose:** To review the terms and conditions of the negotiated agreement.

**Substance of proposed rule:** Frontier Communications of Sylvan Lake, Inc. and Frontier Communications of America, Inc. have reached a negotiated agreement whereby Frontier Communications of Sylvan Lake, Inc. and Frontier Communications of America, Inc. will interconnect their networks at mutually agreed upon points of interconnection to provide Telephone Exchange Services and Exchange Access to their respective customers. The Agreement establishes obligations, terms and conditions under which the parties will interconnect their networks lasting until November 22, 2005, or as extended.

**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, 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-1694SA1)

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

**Interconnection Agreement between Citizens Telecommunications Company of New York, Inc. and Frontier Communications of America, Inc.**

**I.D. No.** PSC-03-05-00019-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 Citizens Telecommunications Company of New York, Inc. and Frontier Communications of America, Inc. for approval of an interconnection agreement executed on Nov. 22, 2004.

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

**Subject:** Interconnection of networks for local exchange service and exchange access.

**Purpose:** To review the terms and conditions of the negotiated agreement.

**Substance of proposed rule:** Citizens Telecommunications Company of New York, Inc. and Frontier Communications of America, Inc. have reached a negotiated agreement whereby Citizens Telecommunications

Company of New York, Inc. and Frontier Communications of America, Inc. will interconnect their networks at mutually agreed upon points of interconnection to provide Telephone Exchange Services and Exchange Access to their respective customers. The Agreement establishes obligations, terms and conditions under which the parties will interconnect their networks lasting until November 22, 2005, or as extended.

**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, 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-1695SA1)

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

**Reversal of Herbert E. Hirschfeld Petition by Janis J. Graham**

**I.D. No.** PSC-03-05-00020-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 a request filed by Ms. Janis J. Graham to reverse its approval in its order issued on Dec. 10, 2001 on the petition filed by Herbert E. Hirschfeld on behalf of the owner, Ebbets Field Apartments Corporation, to submeter electricity at Ebbets Field Apartments, 1720 Bedford Ave., Brooklyn, NY.

**Statutory authority:** Public Service Law, sections 25 and 65(1)

**Subject:** Rehearing of the commission's order issued on Dec. 10, 2001.

**Purpose:** To reconsider the commission's decision regarding the submetering proposal.

**Substance of proposed rule:** The Public Service Commission is considering a request filed by Ms. Janis J. Graham to reverse its approval in its order issued on December 10, 2001 on the petition filed by Herbert E. Hirschfeld on behalf of the Owner, Ebbets Field Apartments Corporation, to submeter electricity at Ebbets Field Apartments, 1720 Bedford 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. Brillling, 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.  
(01-E-1290SA2)

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

**New Types of Electricity Meters, Transformers and Auxiliary Devices by Landis & Gyr Incorporated**

**I.D. No.** PSC-03-05-00021-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 request filed by Landis & Gyr Incorporated on behalf of Keyspan Energy Services for approval of the FOCUS solid-state metering line.

**Statutory authority:** Public Service Law, section 67(1)

**Subject:** Approval of new types of electricity meters, transformers and auxiliary devices.

**Purpose:** To permit electric utilities and other entities in New York State to use the FOCUS electronic meter.

**Substance of proposed rule:** The Commission will consider a request from Landis & Gyr Incorporated for approval of the FOCUS electronic residential meter for use in New York State. The meter has the capability of selectable metrics and display options and has the capability of collecting, storing, and transmitting electric KWh consumption.

**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, 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-0732SA1)

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

**Submetering of Electricity by Hunt Power/E-MON**

**I.D. No.** PSC-03-05-00022-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, the petition filed by Hunt Power/E-MON, on behalf of Rao's City Views, LLC, to submeter electricity at 453-55 E. 114th St. and 263 Pleasant Ave., New York, NY.

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

**Subject:** Submetering of electricity.

**Purpose:** To submeter electricity at 453-55 E. 114th St. and 263 Pleasant Ave., New York, NY.

**Substance of proposed rule:** The Public Service Commission is considering whether to grant, deny, or modify, in whole or in part, the petition filed by Hunt Power/E-MON, on behalf of Rao's City Views, LLC, to submeter electricity at 453-55 East 114th Street and 263 Pleasant Avenue, New York, 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. Brillling, 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-1604SA1)

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

**Submetering of Electricity by Bay City Metering Company, Inc.**

**I.D. No.** PSC-03-05-00023-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, the petition filed by Bay City Metering Company, Inc., on behalf of David Frankel Properties, Inc., to submeter electricity at 400 E. 58th St., Manhattan, NY.

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

**Subject:** Submetering of electricity.

**Purpose:** To submeter electricity at 400 E. 58th St., Manhattan, NY.

**Substance of proposed rule:** The Public Service Commission is considering whether to grant, deny, or modify, in whole or in part, the petition filed by Bay City Metering Company, Inc., on behalf of David Frankel Properties, Inc., to submeter electricity at 400 East 58th Street, Manhattan, 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. Brillling, 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-1627SA1)

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

**Lightened Regulation by TBG Cogen Partners**

**I.D. No.** PSC-03-05-00024-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 the request of TBG Cogen Partners ("TBG") for an order providing for lightened regulation.

**Statutory authority:** Public Service Law, sections 4(1), 66(1), 69, 70 and 110

**Subject:** Order providing for lightened regulation.

**Purpose:** To consider the request.

**Substance of proposed rule:** By petition filed December 31, 2004, TBG Cogen Partners seeks an order providing for lightened regulation of it as an electric corporation operating in the wholesale electricity market. Its facility was formerly a cogeneration facility, but not generates only electricity.

**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, 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-1710SA1)

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

**Consolidation of Gas Maintenance Warehouses by Local 101, Utility Division Transport Workers Union of America**

**I.D. No.** PSC-03-05-00025-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 petition filed by Local 101, Utility Division Transport Workers Union of America requesting an investigation and review of The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery New York's consolidation of its Greenpoint, Brooklyn

and Hicksville, Long Island storage facilities under its Gas Maintenance Warehouse Plan.

**Statutory authority:** Public Service Law, sections 4(1), 65(1), 66(1), (2) and (8)

**Subject:** Consolidation of gas maintenance warehouses.

**Purpose:** To consider The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery New York's Gas Maintenance Warehouse Plan.

**Substance of proposed rule:** The Public Service Commission is considering whether to approve, modify or reject, in whole or in part, a petition filed by Local 101, Utility Division Transport Workers Union of America (Local 101). This petition requests an investigation and review of The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery New York's (KeySpan) consolidation of its Greenpoint, Brooklyn and Hicksville, Long Island gas maintenance storage facilities. KeySpan is currently in the process of moving inventory from Brooklyn to Hicksville in an effort to reduce costs and help improve the efficiency and effectiveness of its warehouse operation. Local 101 believes that this consolidation will diminish the quality of service that its members provide in maintaining KeySpan's natural gas distribution facilities located in the boroughs of Brooklyn and Queens. By this petition, Local 101 requests that the Commission institute a proceeding and examine KeySpan's warehouse consolidation plan.

**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:** Jaelyn A. Brillling, 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-1624SA1)

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

#### Gas Service Thresholds by Corning Natural Gas Corporation

**I.D. No.** PSC-03-05-00026-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 Corning Natural Gas Corporation to make various changes in the rates, charges, rules and regulations contained in its schedule for gas service—P.S.C. No. 4.

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

**Subject:** Service Classification No. 2—Industrial and Service Classification No. 7—Firm Transportation application to retail customers served by Service Classification No. 2.

**Purpose:** To establish a qualifying threshold for Service Classification No. 2 customers at 100,000 Mcf annually and to revise the current threshold for Service Classification No. 7 from 25,000 Mcf annually to 100,000 Mcf annually.

**Substance of proposed rule:** Corning Natural Gas Corporation proposes to establish a qualify threshold for S.C. No. 2—Industrial customers of 100,000 Mcf annually and to revise the qualifying threshold for S.C. No. 7—Firm Transportation applicable to retail customers served by S.C. No. 2 from 25,000 Mcf annually to 100,000 Mcf annually.

**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:** Jaelyn A. Brillling, 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-1701SA1)

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

#### Request for Waivers by Long Island Power Authority

**I.D. No.** PSC-03-05-00027-P

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

**Proposed action:** Consideration of the Long Island Power Authority's request for waivers of 16 NYCRR sections 86.3(a)(1)(iii), (b)(2) and 86.10(a) in its application for a certificate of environmental compatibility and public need for the construction and operation of the Newbridge Road connector project.

**Statutory authority:** Public Service Law, sections 4(1) and 122(1)

**Subject:** Filing requirements in art. VII proceedings concerning archaeological, geologic, historic and scenic areas; maps and aerial photographs; and cost estimates.

**Purpose:** To determine whether the appropriate filing requirements are met without imposing any undue burdens.

**Substance of proposed rule:** The Commission is considering a request from the Long Island Power Authority (LIPA) for waivers of certain filing requirements of the Commission's rules. Specifically, LIPA seeks waivers of 16 NYCRR §§ 86.3(a)(1)(iii); 86.3(b)(2); and 86.10(a). LIPA seeks a Certificate of Environmental Compatibility and Public Need to construct (1) a 4 mile long 345 kV underground electric transmission line from the East Garden City substation to the Newbridge Road substation in Levittown, and (2) a 9.1 mile long 345 kV underground electric transmission line from the Newbridge Road substation to the Ruland Road substation in Melville, 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:** Jaelyn A. Brillling, 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-T-1687SA1)

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

#### Waiver of Franchising Process by the Village of Hastings-on-Hudson

**I.D. No.** PSC-03-05-00028-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 petition by the Village of Hastings-on-Hudson (Westchester County) for a waiver of 9 NYCRR sections 594.1 through 594.4 and 594.4(b)(ii) pertaining to the franchising process.

**Statutory authority:** Public Service Law, section 216(1)

**Subject:** Waiver of franchising process.

**Purpose:** To allow the Village of Hastings-on-Hudson to waive certain preliminary franchising procedures to expedite the franchising process.

**Substance of proposed rule:** The Public Service Commission is considering whether to approve or reject, in whole or in part, a petition by the Village of Hastings-on-Hudson (Westchester County) for a waiver of 9 NYCRR Part 594.1 through 594.4 and 594.4(b)(ii) pertaining to the franchising process.

**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, 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-V-1651SA1)

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

**Waiver of Franchising Process by the Village of Scarsdale**

**I.D. No.** PSC-03-05-00029-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 petition by the Village of Scarsdale (Westchester County) for a waiver of 9 NYCRR sections 594.1 through 594.4 and 594.4(b)(ii) pertaining to the franchising process.

**Statutory authority:** Public Service Law, section 216(1)

**Subject:** Waiver of franchising process.

**Purpose:** To allow the Village of Scarsdale to waive certain preliminary franchising procedures to expedite the franchising process.

**Substance of proposed rule:** The Public Service Commission is considering whether to approve or reject, in whole or in part, a petition by the Village of Scarsdale (Westchester County) for a waiver of 9 NYCRR Part 594.1 through 594.4 and 594.4(b)(ii) pertaining to the franchising process.

**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, 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-V-1686SA1)

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

**Surcharge by Aquarion Water Company of New York**

**I.D. No.** PSC-03-05-00030-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 petition filed by Aquarion Water Company of New York for permission to implement a surcharge that would recover the increased costs of purchased water from Aquarion Water Company of Connecticut and Westchester Joint Water Works.

**Statutory authority:** Public Service Law, section 89-c(10)

**Subject:** Implementation of a surcharge.

**Purpose:** To approve a surcharge that would recover amounts associated with the increased costs of purchased water from Aquarion Water Company of Connecticut and Westchester Joint Water Works.

**Substance of proposed rule:** On December 17, 2004, Aquarion Water Company of New York (AWC-NY) filed a petition for permission to implement total surcharges of 7.95% and 1.63%, respectively on customers' bills and public fire customers to recover increased costs of purchased water from Aquarion Water Company of Connecticut and Westchester Joint Water Works. The surcharges will increase the average annual residential bill of \$545 by an additional \$43. The Commission may approve or reject, in whole or in part, or modify the company's petition.

**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, 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-W-1628SA1)

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

**Purchased Water Surcharge Statement by United Water New Rochelle Inc.**

**I.D. No.** PSC-03-05-00031-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 filing by United Water New Rochelle Inc. to revise its purchased water surcharge statement based on the current cost of water from the New York City Water Board.

**Statutory authority:** Public Service Law, section 89-c(10)

**Subject:** Implementation of a surcharge.

**Purpose:** To revise the purchased water surcharge statement based on the current cost of water from the New York City Water Board.

**Substance of proposed rule:** On December 17, 2004, United Water New Rochelle Inc. (UWNR or the company) filed Purchased Water Adjustment Statement No. 11, to become effective on January 18, 2005. The company proposes to revise the purchased water adjustment to 11.940 cents per hundred cubic feet of water for all metered service classifications to recover the current cost of purchased water. The company states that the rate charged by the New York City Water Board has increased from \$448.27 per million gallons to the current rate of \$591.21 per million gallons and projects an under-recovery of \$964,616 based on purchases of 6,753.12 million gallons. The Commission may approve or reject, in whole or in part, or modify the company's filing.

**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, 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-W-1702SA1)

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## Department of Taxation and Finance

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### NOTICE OF ADOPTION

#### Fuel Use Tax on Motor Fuel and Diesel Motor Fuel

**I.D. No.** TAF-45-04-00003-A

**Filing No.** 1

**Filing date:** Jan. 4, 2005

**Effective date:** Jan. 4, 2005

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

**Action taken:** Addition of section 492.1(b)(1)(xxxvii) to Title 20 NYCRR.

**Statutory authority:** Tax Law, sections 171, subd. First; 301-h(c); 509(7); 523(b) and 528(a)

**Subject:** Fuel use tax on motor fuel and diesel motor fuel and the art. 13-A carrier tax jointly administered therewith.

**Purpose:** To set the sale tax component and the composite rate per gallon of the fuel use tax on motor fuel and diesel motor fuel for the calendar quarter beginning Jan. 1, 2005, and ending March 31, 2005, and reflect the aggregate rate per gallon on such fuels for such calendar quarter for purposes of the joint administration of the fuel use tax and the art. 13-A carrier tax.

**Text or summary was published** in the notice of proposed rule making, I.D. No. TAF-45-04-00003-P, Issue of November 10, 2004.

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

**Text of rule and any required statements and analyses may be obtained from:** Diane M. Ohanian, Tax Regulations Specialist 4, Department of Taxation and Finance, Bldg. 9, State Campus, Albany, NY 12227, (518) 457-2254

**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.

### NOTICE OF ADOPTION

#### Abatement of Penalties

**I.D. No.** TAF-45-04-00004-A

**Filing No.** 2

**Filing date:** Jan. 4, 2005

**Effective date:** Jan. 19, 2005

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

**Action taken:** Amendments of Parts 2392, 2396 and 2397 of Title 20 NYCRR.

**Statutory authority:** Tax Law, sections 171, subd. First and 697(a)

**Subject:** Abatement of penalties (other than additions to tax) upon a showing of reasonable cause and an absence of willful neglect.

**Purpose:** To add a citation for the penalty imposed on partnerships and S-corporations who fail to pay estimated taxes for their partners/shareholders into the list of penalties that can be abated by a showing of reasonable cause; and clarify that the general provisions for reasonable cause will apply to penalties imposed upon participants in the electronic funds transfer programs for sales tax and withholding tax.

**Text or summary was published** in the notice of proposed rule making, I.D. No. TAF-45-04-00004-P, Issue of November 10, 2004.

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

**Text of rule and any required statements and analyses may be obtained from:** Diane M. Ohanian, Tax Regulations Specialist 4, Department of Taxation and Finance, Bldg. 9, State Campus, Albany, NY 12227, (518) 457-2254

**Assessment of Public Comment**

The agency received no public comment.