

# RULE MAKING ACTIVITIES

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

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

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

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## Office of Alcoholism and Substance Abuse Services

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

#### Detoxification of Substances and Stabilization Services

**I.D. No.** ASA-49-08-00009-RP

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

**Proposed Action:** Amendment of Part 816 of Title 21 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 19.09, 19.15, 19.40 and 22.09

**Subject:** Detoxification of substances and stabilization services.

**Purpose:** To amend the proposed 816 services after initial publication and comments and bring the regulation into alignment with NYS Statutory language in the 2008-2009 Article 7 bill.

**Substance of revised rule:** The proposed regulations would revise Section 816 of the Mental Hygiene regulations (Requirements for Chemical Dependence Crisis Services) regarding patients who have substance abuse addictions to allow for statutory implementation of language in Part C of Chapter 58 of the Laws of 2008 as and further amended by Part C of Chapter 58 of the Laws of 2009 which amended section 2807-c(4)(I) of the Public Health law changing rates from a Diagnosis Related Group system to a per diem system.

The proposed regulation would add the following definitions in Part 816.4 Detoxification, Discrete Unit, Medically Managed Withdrawal Services, Medically Supervised Withdrawal Services-Inpatient, Medically Supervised Withdrawal Services-Outpatient, Medically Monitored, Observation Bed, Prescribing Professional, Recovery Care Plan, and

update Qualified Health Professionals to include Licensed Mental Health Counselors, in order to effectively integrate operation of the proposed regulation.

The proposed regulation updates section 816.6, Standards applicable to medically managed withdrawal and stabilization services, in order to define inpatient services that can be offered in this service. The proposed regulation would establish that medically managed services could also provide medically supervised services within the same setting with no change to their Office of Alcoholism and Substance Abuse Services certification. The proposed regulation also defines the differences in the two services.

The proposed regulation was developed by OASAS staff and providers of withdrawal and stabilization services to allow for greater clinical flexibility; reduced paperwork requirements; increased patient-centered focus and a more targeted focus on withdrawal and stabilization services followed by linkage to support ongoing recovery for patients. Recommendations from the Detoxification Task Force convened by the Commissioner in the summer of 2007 included revising the Part 816 regulations, and changes designed to “identify and modify, where appropriate the regulatory requirements that currently impede development of community-based medically supervised withdrawal programs”. The proposed regulations have been revised to protect patient safety and quality of care while providing greater flexibility for medical and clinical staff to exercise clinical judgment.

These changes should allow communities to develop increased community-based withdrawal and stabilization programs to meet the overall goal of the Detoxification Task Force to reduce unnecessary hospital detoxifications and increase access to community based care where safe and appropriate.

The proposed regulation also updates 816.7 Standards applicable to medically supervised withdrawal and stabilization services. The regulation changes the type of paperwork required and staffing configuration for inpatient settings.

The proposed regulation provides a separate section for 816.8 Standards applicable to medically supervised outpatient withdrawal and stabilization services. Changes to the outpatient regulation allow for a face to face visit with a medical professional including a registered nurse and for the physician to schedule visits less than daily if deemed safe and appropriate. This change addresses the biggest previous barrier to the provision of outpatient services; the need for daily physician contact.

The proposed regulation changes section 816.9, Standards applicable to medically monitored withdrawal and stabilization services, and recognizes the need for flexibility in order to maintain the highest quality in patient care. Each medically monitored withdrawal and stabilization center will be required to submit a staffing protocol that is compliant with clients’ needs, federal, state and local laws and suitable for their situation. These protocols will be reviewed by the Medical Director for approval and must be submitted at all future re-certifications.

The proposed regulation would reduce the amount of paperwork in both the inpatient and outpatient medically managed and medically supervised setting. The proposed regulation no longer requires vocational and education assessments, changes the language from a biopsychosocial assessment to an assessment targeting only the information necessary to safely stabilize patients, engage them in a change process and link them to appropriate treatment services. The proposed regulation requires targeted assessments aimed at withdrawal and stabilization and linkages, thereby allowing more time for counseling services and providing more time to engage the client in the recovery process.

The proposed regulation expands clinical flexibility by providing individualized treatment when a patient is interested in withdrawal and stabilization services. By triaging the patient, a more efficient and cost effective level of care determination can be made allowing for more individualized withdrawal assessment and stabilization.

The proposed Part 816 regulation supports implementation of the enacted 2008-2009 Health and Mental Hygiene Budget and Part C of

Chapter 58 of the Laws of 2008 as and further amended by Part C of Chapter 58 of the Laws of 2009 which amended section 2807-c(4)(I) of the Public Health Law to reconfigure reimbursement for hospital based medically managed withdrawal / detoxification; and, authorize the reimbursement methodology for a 48 hour detoxification observation period.

**Revised rule compared with proposed rule:** Substantial revisions were made in sections 816.4, 816.6, 816.7, 816.9, 816.12 and 816.51.

**Text of revised proposed rule and any required statements and analyses may be obtained from** Deborah Egel, OASAS, 1450 Western Ave., Albany, NY 12203, (518) 485-2312, email: DeborahEgel@oasas.state.ny.us

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

**Public comment will be received until:** 30 days after publication of this notice.

#### Revised Regulatory Impact Statement

The proposed Chemical Dependence Withdrawal and Stabilization Services regulation is being re-submitted for public review and comment. Proposed 816 was produced as a result of a task force convened by the Commissioner to make recommendations to detoxification services in the State of New York. As a result not a lot of comments were received by the agency. However, all comments that were received were reviewed and considered. In addition, the proposed Part 816 Chemical Dependence Withdrawal and Stabilization Services must be amended in order for OASAS to be in alignment with New York State statutory language of the enacted 2008-2009 Health and Mental Hygiene Budgets, and Part C of Chapter 58 of the Laws of 2008 as and further amended by Part C of Chapter 58 of the Laws of 2009. This chapter amended Section 2807-c of the Public Health Law to: reconfigure reimbursement for hospital based medically managed withdrawal / detoxification; and, authorizes the reimbursement methodology for a 48 hour detoxification observation period and had an effective date of December 1, 2008.

Chemical dependence is a chronic illness which can be treated effectively when medications are administered under conditions consistent with their pharmacological efficacy, and when withdrawal and stabilization services include necessary supportive services such as psychosocial counseling, treatment for co-occurring disorders, and medical services as needed. Chemical dependence withdrawal and stabilization is the first step in facilitating recovery from addiction for many patients. The proposed regulation sets forth standards to guide withdrawal and stabilization services.

##### 1. Statutory Authority:

Section 19.07(e) of the Mental Hygiene Law authorizes the Commissioner ("the Commissioner") of the Office of Alcohol and Substance Abuse Services (OASAS) to adopt standards including necessary rules and regulations pertaining to chemical dependence services.

Section 19.09(b) of the Mental Hygiene Law authorizes the Commissioner to adopt regulations necessary and proper to implement any matter under his or her jurisdiction.

Section 19.21(b) of the Mental Hygiene Law requires the Commissioner to establish and enforce certification, inspection, licensing and treatment standards for alcoholism, substance abuse, and chemical dependence facilities.

Section 19.21(d) of the Mental Hygiene Law requires the Commissioner to promulgate regulations which establish criteria to evaluate chemical dependence treatment effectiveness and to establish a procedure for reviewing and evaluating the performance of providers of services in a consistent and objective manner.

Section 32.01 of the Mental Hygiene Law authorizes the Commissioner to adopt any regulation reasonably necessary to implement and effectively exercise the powers and perform the duties conferred by Article 32.

Section 32.05 of the Mental Hygiene Law requires providers to obtain an operating certificate issued by the Commissioner in order to operate chemical dependence services.

Section 32.07(a) of the Mental Hygiene Law gives the Commissioner the power to adopt regulations to effectuate the provisions and purposes of Article 32.

The relevant sections of the Mental Hygiene Law cited above allow the Commissioner to regulate how chemical dependency services are administered. This regulation will alter the way those services are administered, providing greater flexibility within state regulations and aligning the regulation with NYS statutory language. (Part C of Chapter 58 of the Laws of 2008 and as further amended by Part C of Chapter 58 of the Laws of 2009 which amended Public Health law § 2087-c (4)(I)). The objective is in line with the legislative intent behind the enactment of Sections 19, 22 and 32 of the Mental Hygiene Law, allowing the Commissioner to certify, inspect, license and establish treatment standards for all facilities that treat chemical dependency. Revising this regulation will establish a new standard for all facilities, which will assist withdrawal

programs to provide better health care services and withdrawal from chemical dependence.

##### 2. Legislative Objectives:

Chapter 558 of the Laws of 1999 requires the promulgation of rules and regulations to regulate and assure the consistent high quality of services provided within the State to persons suffering from chemical abuse or dependence, their families and significant others, as well as those who are at risk of becoming chemical abusers. The Legislature enacted Section 19 of the Mental Hygiene Law, enabling the Commissioner to establish best practices for treating chemical dependency.

##### 3. Needs and Benefits:

Detoxification is a medical intervention that manages an individual safely through the process of withdrawal (McCorry et. al. 2000). Three components of successful detoxification have been identified in the Treatment Improvement Protocol (TIP) #45: evaluation, stabilization and linkage to treatment (CSAT, 2006). The American Society of Addiction Medicine (ASAM) recognizes five levels of care for detoxification services and recognizes that patients should be placed in the least restrictive setting.

In 2007 alone 72,099 patients, who represent 24% of all patients being admitted in addiction treatment, entered hospital and community based withdrawal and stabilization services in New York State. Among the 2007 admissions to Medically Managed Detox the number of patients, 10,029 representing 19%, arrived at another level of care within 14 days of discharge. Among the 2007 admissions to Medically Supervised Withdrawal the number of patients, 8,265 representing 40%, arrived at another level of care within 14 days of discharge. Finally the median numbers are:

Within Medically Managed Detox, 32,983 clients (i.e., UNIQUE PEOPLE) were admitted in 2007, for a total of 51,747 admissions.

73% of clients were admitted once.

15% were admitted twice.

10% were admitted 3 to 6 times.

The remaining 1.5% (n=504) of the clients were admitted 7 or more times, (n=5,185) account for 10% of the 51,747 admissions.

Within Medically Supervised Withdrawal 15,034 clients (i.e., UNIQUE PEOPLE) were admitted in 2007 for a total of 20,352 admissions.

79% of clients were admitted once.

13% were admitted twice.

7% were admitted 3 to 6 times.

The remaining 0.5% (n=72) of the clients admitted 7 or more times, (n=604) account for 3% of the 20,352 admissions.

The purpose of this regulatory change is to capitalize on better linkage and engagement to prevent multiple admissions without sustained recovery. Patients are more likely to enter and remain in subsequent substance abuse treatment if they believe that the services will help them with life problems (Fiorentine et. al. 1999). Better linkages to inpatient or outpatient rehabilitation have been found when case managers are able to directly link patients through a warm-hand-off or provide incentives. (Chutuaape, et.al. 2001; CSAT 2006).

Furthermore, information disseminated in the process of rewriting, reorganizing, and promulgating the Part 816 regulation will provide both patients and withdrawal and stabilization services clear understanding of the intent of the regulation. This will result in better implementation and homogeneous services, improving patient care and more efficient use of staff resources.

Here are the significant comments that were received and addressed in the following manner for the Proposed Part 816.

ISSUE	OASAS RESPONSE
The current proposed renumbering of sections of the Part 816 regulation would result in significant database and certification issues.	Section entitled Incorporation by Reference moved to the end of the regulation to prevent a major overhaul of the specific modalities being renumbered.
Use of inconsistent language (examples such as crisis services and recovery plan)	All references to crisis services or detoxification services were removed and changed to withdrawal and stabilization services. Substance abuse changed to chemical dependence Consistent language use of recovery care plan which is now better defined.
Add savings clause language	OASAS added language to help with the administrative tasks involved in issuing new operating certificates due to change in renumbering of services.

Each level of care or service category needs to be defined by its purpose, its target population. The specific provisions necessary to provide the level of medical needs also should be included in each section to ensure that they are followed.

This is the way the regulations were previously written. More latitude is now being given to providers in the way of clinical judgment and there is an accompanying document that defines clinical criteria for admission at each level.

In addition, OASAS has posted this on their website and held trainings throughout NYS for providers.

This comment did not come from a provider currently rendering services therefore they may not have known/and or participated in the above.

“Background and Intent” section should help users to understand the place of the regulated services in the system and explain the interrelationships of the regulated categories as necessary.

In this case it should explain the need and intent behind the changes in the names of categories particularly the deletion of the category of “crisis services” and the addition of “stabilization” to the names of the new categories.

You use and define the term “pharmacological services” in a very impractical and unusual way.

Definition changed

The proposed definition of “recovery care plan” is inadequate to properly reflect its significance and importance to the State goals of maximizing the “successful linkage” and minimizing repeated hospital detoxifications.

Definition changed

Staffing patterns rewritten and being interpreted to reduce staffing.

Staffing pattern changed to previous regulation language.

Sentence structure

Some sentences changed to better clarify the intent.

Add definition for discrete unit.

Language was proposed in the 30 day amendment for discrete units. This language was added to the regulation pending budget approval in 2009.

Medically monitored withdrawal and stabilization services will recognize the need for flexibility.

Each medically monitored withdrawal and stabilization center will be required to submit a staffing protocol that is compliant with clients’ needs, federal, state and local laws and suitable for their situation. These protocols will be reviewed by the Medical Director for approval and must be submitted at all future re-certifications.

4. Costs:

Additional costs are expected to be minimal. Any costs incurred by providers or the State will be offset by better treatment outcomes and healthier patients, which will result in lower costs for medical and other services.

a. Costs to regulated parties:

There should be no additional costs to regulated parties as a result of this regulation. The regulation changes the focus of withdrawal and stabilization services from treatment to stabilization and discharge planning.

b. Costs to the agency, state and local governments:

OASAS is not expected to see increased cost related to administering the rule. OASAS will need to modify the program review instrument currently used to certify chemical dependence withdrawal services along with providing technical assistance; however this is not expected to result in any undue hardship for OASAS.

Additionally, there is an anticipated cost saving with the regulation changing from a Diagnosis Related Group to a per diem rate. Also, patients will be moved from a more intensive service to a lower level of care more effectively thereby reducing costs to the federal, state and local government.

There will be no additional costs to counties, cities, towns or local districts.

5. Local Government Mandates:

There are no new mandates or administrative requirements placed on local governments.

6. Paperwork:

Updated Part 816 regulations decrease the amount of individual patient assessments and treatment plans saving providers considerable time and effort. Assessments are now targeted for this distinct population. Time previously spent on vocation and educational assessments is now eliminated. Services are now focused on withdrawal and stabilization and discharge planning. On average, 60% of counselors’ time is spent filling

in required paperwork which could now be dedicated to serving the patient population.

The proposed regulation provides more clinical expertise in the management of patients. The previous regulations provided for inpatient treatment in an abbreviated amount of time that was not conducive to recovery. The proposed regulations will encourage the appropriate use of a broader array of withdrawal and stabilization services. Hospitals will be required to more thoroughly assess patients for appropriate level of care and community providers have been provided more flexibility in providing community-based care. This approach to detoxification has been supported by consensus opinion (CSAT, 2006).

The proposed regulation also includes changes to allow more flexibility by reducing paperwork, targeting interventions to withdrawal and stabilization and linkages which in fact allow clinicians more time for individual contact.

7. Duplications:

There is no duplication of other state or federal requirements.

8. Alternatives:

The only other alternative is to keep the existing regulation in place. This would place OASAS in violation of New York State law. In an effort to elicit comments on the proposed regulations and possible alternatives, these amendments were shared with New York’s treatment provider community, representing a cross-section of upstate and downstate, as well as urban and rural programs. OASAS used a statewide coalition of representatives of both hospital and community based organizations that provide withdrawal and stabilization services. The regulation was published in the NYS Register and more comments were received, reviewed and more changes were made. Additionally, these regulations were also shared with the New York State’s Conference of Local Mental Hygiene Directors, New York State’s Advisory Council, Alcoholism and Substance Abuse Providers of NYS., Inc., and New York State chemical dependency providers.

9. Federal Standards:

Federal standards governing Medicaid requirements for these services are currently incorporated into Part 816.

10. Compliance Schedule:

Part 816 was promulgated by emergency on December 1, 2008 in order to be compliant with statutory language. Part 816 also appeared in the NYS Register in December for comment and review. Providers were informed that they will be reviewed on the new regulation as of one year after promulgation.

References

Center for Substance Abuse Treatment. Detoxification and Substance Abuse Treatment. Treatment Improvement Protocol (TIP) Series 45. DHHS Publication no. (SMA) 06-4131. Rockville, MD: Substance Abuse and Mental Health Services Administration, 2006.

Chutuape, M.A., Jasinski, D.R., Fingerhood, M.I., and Stitzer, M.I. One- Three- and Six- Month Outcomes After Brief Inpatient Opiate Detoxification. American Journal of Drug and Alcohol Abuse 27(1): 19-44, 2001.

Fiorentine, R., Nakashima, J., and Anglin, M.D. Client Engagement in Drug Treatment. Journal of Substance Abuse Treatment 17(3): 199-206, 1999.

McCorry, F., Garnick, D.W., Bartlett, J., Cotter, F., and Chalk, M> Developing Performance Measures for Alcohol and Other Drug Services in Managed Care Plans. Washington Circle Group. Joint Commission Journal on Quality Improvement 26(11): 633-643, 2000.

**Revised Regulatory Flexibility Analysis**

Effect of Rule: The proposed Part 816 will impact certified and/or funded providers. It is expected that the development of Withdrawal and Stabilization services will require providers to amend some of their policies and procedures. The new service will result in greater clinical flexibility; reduced paperwork requirements; increased patient-centered focus and a more targeted focus on withdrawal and stabilization and linkage to support ongoing patient recovery. These new services will result in better patient treatment outcomes. Local health care providers may see an increase in patients seeking crisis withdrawal and stabilization services due to less restrictive procedures. As a result of patients receiving these services, local governments may see a decrease in services associated with active illicit drug use such as arrests and emergency room visits. Also, local governments and districts will not be affected because any nominal increase in cost will be offset by better patient outcomes.

Compliance Requirements: It is expected that there will be some changes in compliance requirements and the development of protocols. Providers will be expected to assess patients within the hospital and determine the appropriate level of care with a focus on linking patients as they progress and move through the continuum of care. The proposed changes affect internal policies however, it is not expected that the Proposed regulation, will have additional costs.

Professional Services: Additional professional services are not expected.

**Compliance Costs:** Some programs may need additional formally trained staff to meet the proposed requirements.

**Economic and Technological Feasibility:** Compliance with the record-keeping and reporting requirements of the proposed Part 816 is expected to have a nominal economic impact on small businesses and government.

**Minimizing Adverse Impact:** Part 816 has been carefully reviewed to ensure minimum adverse impact to providers by NYS Alcoholism and Substance Abuse Providers of NYS, Inc., New York State’s Council of Local Mental Hygiene Directors and New York State’s Advisory Council, Greater New York Hospital Association, Healthcare of New York, and a statewide representative coalition from hospital and community based organizations that provide withdrawal and stabilization services. All comments received were reviewed and numerous changes were made. Any impact this rule may have on small businesses and the administration of State or local governments and agencies will either be a positive impact or have nominal costs. Compliance requirements are small and will be absorbed into the already existing economic structure. The positive impact for patients and the NYS health care system, outweigh any potential minimal costs.

**Small Business and Local Government Participation:** The proposed regulations were shared with New York’s treatment provider community including, NYS Alcoholism and Substance Abuse Providers of NYS, Inc., Greater New York Hospital Association, Healthcare of New York, the Council of Local Mental Hygiene Directors and the Advisory Council on Alcoholism and Substance Abuse Services and a statewide representative coalition from hospital and community based organizations that provide withdrawal and stabilization services.

**Revised Rural Area Flexibility Analysis**

1. Types and estimated number of rural areas: There are six (6) certified providers of medically managed detoxification services that are located in rural areas of the State five of which are public.

2. Reporting, recordkeeping and other compliance requirements; and professional services: There will be new documenting requirements to maintain clients in the higher level of care that will have some impact on providers.

3. Costs: There will be minimum impact for rural providers to implement Part 816.

4. Minimizing adverse impact: Regulatory reform of detoxification rates was driven by language in the Article 7 bill from the Executive. In order to achieve optimal results, OASAS solicited input from over 40 providers of service representing each modality statewide. This group met for a period of six months and the hospitals agreed that it was important to align detoxification care with detoxification rates. Hospitals also realized this could increase opportunities for Outpatient detoxification units with increased income.

5. Rural Area Participation: These amendments were shared with New York’s treatment provider community and included a cross-section of upstate and downstate, as well as urban and rural programs.

**Revised Job Impact Statement**

The implementation of Part 816 may have minor impact on staffing at hospital based detoxification units. Hospital based units under the current Part 816 solely operate as medically managed units which requires more staffing than any other withdrawal service. Under the Proposed 816 hospital based units can now operate two levels of care simultaneously; medically managed and medically supervised. Staffing for medically supervised services may require less staffing.

In addition, the regulation allows for flexibility within the medically monitored withdrawal and stabilization programs. This could potentially change the staffing within the medical compliment and may adversely impact some LPN’s.

**Assessment of Public Comment**

Comments received on the Proposed Part 816

The Proposed 816 was created as a result of a task force convened by the Commissioner to make recommendations to Detoxification services in the State of New York. As a result not a lot of comments were received by the agency. However, all comments that were received were reviewed and listed below are the issues that were raised and addressed in the following manner:

ISSUE	OASAS RESPONSE
The current proposed renumbering of sections of the Part 816 regulation would result in significant database and certification issues.	Section entitled Incorporation by reference moved to the end of the regulation to prevent a major overhaul of the specific modalities being renumbered.

Use of inconsistent language (i.e, crisis svcs and recovery plan)

All references to crisis services or detoxification services were removed and changed to withdrawal and stabilization services.

Substance abuse changed to chemical dependence.

Consistent language use of recovery care plan which is now better defined.

OASAS added language to help with the administrative tasks involved in issuing new operating certificates due to change in renumbering of services.

Add savings clause language

Each level of care or service category needs to be defined by its purpose, its target population. The specific provisions necessary to provide the level of medical-ness also need to be included in each section to ensure that they are followed.

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Each medically monitored withdrawal and stabilization center will be required to submit a staffing protocol that is compliant with clients needs, federal, state and local laws and suitable for their situation. These protocols will be reviewed by the Medical Director for approval and must be submitted at all future re-certifications.

## Education Department

### EMERGENCY RULE MAKING

#### State Aid for High Needs Nursing Programs

**I.D. No.** EDU-23-09-00005-E

**Filing No.** 980

**Filing Date:** 2009-08-20

**Effective Date:** 2009-08-20

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

**Action taken:** Amendment of section 150.4 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207 and 6401-a; and L. 2008, ch. 57

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

**Specific reasons underlying the finding of necessity:** The proposed amendment is necessary to revise the Regulations of the Commissioner of Education to extend the deadline for the submission of annual reports for the high needs nursing program. Currently, section 150.4 of the Regulations of the Commissioner of Education requires each institution to submit an annual report to the Department by June 1, detailing each expenditure of State aid. Institutions, however, are required to submit a report to the Department by November 15, certifying the number of students enrolled in a high needs nursing program at such institution for the fall semester and they do not receive any State aid until March or later. Therefore, the current June 1 date for submission of annual reports detailing expenditure of such aid does not provide a sufficient amount of time for institutions to comply. The purpose of the proposed amendment is to extend the deadline for submission of annual reports from June 1 to November 15 of each year to provide institutions with an adequate amount of time to submit their annual reports.

The proposed amendment was adopted as an emergency rule at the May 2009 Regents meeting of the Board of Regents, effective May 22, 2009. A Notice of Proposed Rule Making was published in the State Register on June 10, 2009. It is anticipated that the proposed amendment will be adopted as a permanent rule at the September 2009 Regents meeting. Pursuant to the State Administrative Procedure Act, the earliest the adopted rule can become effective is after its publication in the State Register on October 8, 2009. However, the emergency rule which took effect on May 22, 2009 will expire on August 20, 2009.

Therefore, a second emergency action is necessary for the preservation of the general welfare in order to ensure that the emergency rule adopted at the May 2009 Regents meeting, which extends the date for submission of annual reports for high needs nursing programs from June 1 to November 15 to provide institutions with an adequate amount of time to submit their annual reports, remains continuously in effect until the effective date of its adoption as a permanent rule, and thereby avoid disruption to the preparation and administration of contracts for the reimbursement of school districts which provide instruction to nonresident pupils for the 2009-2010 school year.

**Subject:** State aid for high needs nursing programs.

**Purpose:** Extend the deadline for submission of annual reports to provide eligible institutions with additional time to submit reports.

**Text of emergency rule:** Subdivision (f) of section 150.4 of the Regulations of the Commissioner of Education is amended, effective August 20, 2009, as follows:

(f) Annual reports. Each eligible institution that receives State aid pursuant to section 6401-a of the Education Law shall submit an annual report to the commissioner by [June 1] *November 15* of each year, detailing each expenditure of State aid received and any other information the commissioner may require, in a form prescribed by the commissioner.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. EDU-23-09-00005-P, Issue of June 10, 2009. The emergency rule will expire October 18, 2009.

**Text of rule and any required statements and analyses may be obtained from:** Chrisine Moore, Office of Counsel, NYS Education Department, 89 Washington Avenue, Room 148, Albany, NY 12234, (518) 473-8296, email: cmoore@mail.nysed.gov

#### Regulatory Impact Statement

##### 1. STATUTORY AUTHORITY:

Section 207 of the Education Law grants general rule-making authority to the Board of Regents to carry into effect the law and policies of the State relating to education.

Section 215 of the Education Law authorizes the Commissioner of Education, or their representative, to visit, examine into and inspect, any institution in the university and any school or institution under the educational supervision of the state, and may require, as often as desired, reports in such form as the Regents or the Commissioner of Education may require.

Section 6401-a of the Education Law, as added by Chapter 57 of the Laws of 2007, authorizes the Commissioner of Education to award state aid for high needs nursing programs at certain independent colleges and universities and to promulgate any regulations necessary to implement the requirements of this section.

Chapter 57 of the Laws of 2008 authorizes the Commissioner of Education to award state aid to certain eligible independent colleges and universities for high needs nursing programs, including those institutions that offer online nursing programs via the internet.

##### 2. LEGISLATIVE OBJECTIVES:

The proposed amendment carries out the legislative objectives set forth in the aforementioned statutes in that it requires each institution that receives state aid under Section 6401-a of the Education Law to submit an annual report by November 15 detailing each expenditure of state aid.

##### 3. NEEDS AND BENEFITS:

Section 6401-a of the Education Law, as amended by Chapter 57 of the Laws of 2008, authorizes the Commissioner of Education to award state aid for high needs nursing programs at certain independent institutions of higher education within the State, including those offering online nursing programs via the internet. Currently, the Regulations of the Commissioner of Education requires each institution to submit an annual report to the Department by June 1, detailing each expenditure of state aid. Institutions, however, are required to submit a report to the Department by November 15, certifying the number of students enrolled in a high needs nursing program at such institution for the fall semester and they do not receive any state aid until March or later. Therefore, the current June 1 date for submission of annual reports detailing expenditure of such aid does not provide a sufficient amount of time for institutions to comply. The purpose of the proposed amendment is to extend the deadline for submission of annual reports from June 1 to November 15 of each year to provide institutions with an adequate amount of time to submit their annual reports.

##### 4. COSTS:

a. Costs to the State government. The proposed amendment will not impose additional costs on State government.

b. Costs to local government. None.

c. Costs to private regulatory parties. The proposed amendment will not impose any additional costs on State government beyond those currently imposed by regulation.

d. Costs to the regulatory agency. None.

##### 5. LOCAL GOVERNMENT MANDATES:

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

##### 6. PAPERWORK:

Other than the annual report mentioned above, the amendment does not add or alter any other reporting or recordkeeping requirements for independent colleges and universities. The amendment will not require regulated parties to acquire professional services.

##### 7. DUPLICATION:

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

##### 8. ALTERNATIVES:

There are no viable alternatives to the proposed amendment at this time.

##### 9. FEDERAL STANDARDS:

The proposed amendment provides State aid for certain independent institutions of higher learning that offer online high needs nursing programs.

##### 10. COMPLIANCE SCHEDULE:

It is anticipated that regulated parties will be able to achieve compliance with the proposed regulation by its stated effective date.

#### Regulatory Flexibility Analysis

Section 6401-a of the Education Law, as amended by Chapter 57 of the Laws of 2008, authorizes the Commissioner of Education to award state aid to certain eligible independent colleges and universities for high needs nursing programs, including those institutions that offer online nursing programs via the internet. Currently, the Regulations of the Commissioner of Education require each institution to submit an annual report to the Department by June 1, detailing each expenditure of state aid. Institutions, however, are required to submit a report to the Department by November 15, certifying the number of students enrolled in a high needs nursing

program at such institution for the fall semester and they do not receive any state aid until March or later. Therefore, the current June 1 date for submission of annual reports detailing expenditure of such aid does not provide a sufficient amount of time for institutions to comply. The purpose of the proposed amendment is to extend the date that institutions may submit annual reports to the department from June 1 to November 15.

Because it is evident from the nature of the proposed amendment that it will not affect small businesses or local governments, no further steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis is not required and one has not been prepared.

**Rural Area Flexibility Analysis**

**1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:**

The proposed amendment applies to certain independent colleges and universities that offer nursing programs in New York State with high needs nursing programs registered by the State Education Department. Based on 2005-2006 academic year data, the Department estimates that approximately 43 colleges and universities will be eligible for state aid under the proposed regulation. Of these, approximately 12 are located in rural areas, defined as the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less.

**2. REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS, AND PROFESSIONAL SERVICES:**

Section 6401-a of the Education Law, as amended by Chapter 57 of the Laws of 2008, authorizes the Commissioner of Education to award state aid to certain eligible independent colleges and universities for high needs nursing programs, including those institutions that offer online nursing programs via the internet. Currently, section 150.4 of the Regulations of the Commissioner of Education requires each institution to submit an annual report to the Department by June 1, detailing each expenditure of state aid. Institutions, however, are required to submit a report to the Department by November 15, certifying the number of students enrolled in a high needs nursing program at such institution for the fall semester and they do not receive any state aid until March or later. Therefore, the current June 1 date for submission of annual reports detailing expenditure of such aid does not provide a sufficient amount of time for institutions to comply. The purpose of the proposed amendment is to extend the deadline for submission of annual reports from June 1 to November 15 of each year to provide institutions with an adequate amount of time to submit their annual reports.

**3. COSTS:**

The proposed amendment does not impose any additional costs, beyond those currently imposed by statute or regulation.

**4. MINIMIZING ADVERSE IMPACT:**

The statute makes no exceptions for eligible independent colleges and universities located in rural areas.

**5. RURAL AREA PARTICIPATION:**

A copy of the proposed amendment was shared with each of the independent colleges and universities in New York State with high needs nursing programs, including those located in rural areas.

In addition, comments on the proposed amendment were solicited from the Rural Education Advisory Committee, whose membership includes, among others, representatives of school districts, BOCES, business interests, and government entities located in rural areas.

**Job Impact Statement**

Section 6401-a of the Education Law, as amended by Chapter 57 of the Laws of 2008, authorizes the Commissioner of Education to award state aid to certain eligible independent colleges and universities for high needs nursing programs. Currently, the Regulations of the Commissioner of Education requires each institution to submit an annual report to the Department by June 1, detailing each expenditure of state aid. Institutions, however, are required to submit a report to the Department by November 15, certifying the number of students enrolled in a high needs nursing program at such institution for the fall semester and they do not receive any state aid until March or later. Therefore, the current June 1 date for submission of annual reports detailing expenditure of such aid does not provide a sufficient amount of time for institutions to comply. The purpose of the proposed amendment is to extend the deadline for submission of annual reports from June 1 to November 15 of each year to provide institutions with an adequate amount of time to submit their annual reports.

Because it is evident from the nature of this proposed amendment that it will have no impact on jobs or employment opportunities, no further steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one was not prepared.

**Department of Environmental Conservation**

**NOTICE OF ADOPTION**

**Lakeview and Black Pond Wildlife Management Areas**

**I.D. No.** ENV-23-09-00001-A

**Filing No.** 989

**Filing Date:** 2009-08-25

**Effective Date:** 2009-09-09

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

**Action taken:** Amendment of Part 79 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, section 11-2101

**Subject:** Lakeview and Black Pond Wildlife Management Areas.

**Purpose:** To regulate public use of the Lakeview and Black Pond Wildlife Management Areas.

**Text or summary was published** in the June 10, 2009 issue of the Register, I.D. No. ENV-23-09-00001-P.

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

**Text of rule and any required statements and analyses may be obtained from:** William Gordon, New York State Department of Environmental Conservation, 317 Washington Street, Watertown, NY 13601, (315) 785-2261, email: whgordon@gw.dec.state.ny.us

**Additional matter required by statute:** A Programmatic Environmental Impact Statement is on file with the Department of Environmental Conservation.

**Assessment of Public Comment**

The agency received no public comment.

**Department of Health**

**NOTICE OF EXPIRATION**

The following notices have expired and cannot be reconsidered unless the Department of Health publishes new notices of proposed rule making in the NYS Register.

**Amendment and Update of Life Safety and Architectural Standards for Neurobehavioral and Neurobehavioral Step Down Units**

I.D. No.	Proposed	Expiration Date
HLT-34-08-00007-P	August 20, 2008	August 20, 2009

**Neurobehavioral Step Down Unit Program**

I.D. No.	Proposed	Expiration Date
HLT-34-08-00008-P	August 20, 2008	August 20, 2009

**Insurance Department**

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

**Minimum Standards for the Form, Content and Sale of Health Insurance, Including Standards of Full and Fair Disclosure**

**I.D. No.** INS-36-09-00001-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 52.70(e)(2) of Title 11 NYCRR.

**Statutory authority:** Insurance Law, sections 201, 301, 1009 and 3234

**Subject:** Minimum Standards for the Form, Content and Sale of Health Insurance, Including Standards of Full and Fair Disclosure.

**Purpose:** Amend 11 NYCRR 52.70(e)(2) to comply with N.Y. Ins. Law 3234(b), pursuant to *Benesowitz v. Metropolitan Life Insurance Company*.

**Text of proposed rule:** Section 52.70(e)(2) is amended to read as follows:

(2) Except for dental insurance, *disability income insurance subject to section 3234 of the Insurance Law*, insurance written under section 4235(c)(1)(H) of the Insurance Law (unless such insurance is as described in paragraph (3) of this subdivision), and to the extent that insurance written under section 4235(c)(1)(B) and (D) of the Insurance Law insures employees of an employer with less than 300 employees (unless such insurance is as described in paragraph (3) of this subdivision), any group insuring 300 or more persons, excluding dependents, shall insure all persons without evidence of individual insurability, provided that coverage is elected during an initial period of eligibility of at least 30 days.

**Text of proposed rule and any required statements and analyses may be obtained from:** Andrew Mais, New York State Insurance Department, 25 Beaver Street, New York, NY 10004, (212) 480-2285, email: amais@ins.state.ny.us

**Data, views or arguments may be submitted to:** Lisette M. Johnson, Esq., New York State Insurance Department, One Commerce Plaza, Albany, NY 12257, (518) 486-7815, email: ljohnson@ins.state.ny.us

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

#### **Regulatory Impact Statement**

1. **Statutory authority:** The Superintendent's authority for the 41st amendment to 11 NYCRR 62 derives from Sections 201, 301, 1109 and 3234 of the Insurance Law.

Sections 201 and 301 of the Insurance Law authorize the Superintendent to effectuate any power accorded to him by the Insurance Law, and prescribe regulations interpreting the Insurance Law.

Section 1109 authorizes the Superintendent to promulgate regulations to effectuate the purposes and provisions of the Insurance Law and Article 44 of the Public Health Law with respect to contracts between a health maintenance organization and its insureds.

Section 3234 addresses the use of pre-existing condition provisions in group and blanket disability policies.

2. **Legislative objectives:** The statutory sections cited above establish a framework for the form, content and sale of health insurance. The proposed amendment is consistent with legislative objectives in that it will effectuate the intent of Section 3234(b) of the Insurance Law to permit medical underwriting for groups insured under disability income policies, regardless of size.

3. **Needs and benefits:** This amendment is needed to ensure that 11 NYCRR § 52.70(e)(2) conforms to Section 3234(b) of the Insurance Law. Specifically, this amendment will rectify an inconsistency between the current regulation, which prohibits medical underwriting for groups of 300 or more persons, and the statute, which permits medical underwriting in group and blanket disability policies.

The amendment is also necessary to ensure that the regulation is consistent with the decision by the New York Court of Appeals in *Benesowitz v. Metropolitan Life Insurance Company*, 8 N.Y.3d 661 (2007).

In *Benesowitz*, the Court of Appeals unanimously construed Section 3234(a)(2) of the Insurance Law to establish a waiting period, rather than a total bar, for coverage of disabilities due to a pre-existing condition that manifests itself within the first 12 months after an insured's effective date of coverage. In so holding, however, the Court noted that neither its decision nor Section 3234(b) of the Insurance Law prevents insurers from excluding or limiting disability coverage based on an individual's prior medical history other than, or in addition to, a pre-existing condition. This amendment brings the regulation into conformance with the statute and *Benesowitz* by permitting group policyholders of 300 or more persons to opt for medical underwriting of newly eligible employees in a uniform manner that precludes policyholder selection of specific employees for such treatment. After the Court of Appeals handed down its decision in *Benesowitz*, the Department, in Circular Letter No. 14 (2007), notified insurance companies that the Department intended to amend this regulation.

4. **Costs:** This amendment might only create minimal costs for insurers, health maintenance organizations, or individuals, and there should be no costs associated with this amendment to the Insurance Department, the Health Department or state or local government, either. Circular Letter No. 14 (2007), issued by the Insurance Department on December 14, 2007, instructed insurers and health maintenance organizations that if revisions to their existing policy forms were necessary in light of the decision of the Court of Appeals in *Benesowitz*, they were required to do so by late January 2008. Therefore, most of the costs for insurers or health maintenance organizations associated with this regulation already have been incurred.

Going forward, an insurer or health maintenance organization subject to this regulation would incur additional costs only to the extent that it needs to file revised forms or rate materials in order to use medical underwriting for individuals becoming insured under group disability policies covering 300 or more persons.

5. **Local government mandates:** The proposed regulation imposes no new programs, services, duties or responsibilities on local governments.

6. **Paperwork:** At this point in time, only a minimal amount of paperwork could be created by this regulation because forms that needed to be revised in order to comply with the Court of Appeals' decision in *Benesowitz* have already been filed. Otherwise, this amendment will require insurers or health maintenance organizations to file paperwork only to the extent that they choose to use medical underwriting for individuals becoming insured under group disability policies covering 300 or more persons. Such a practice may require insurers to submit amended rate filings for Insurance Department approval.

7. **Duplication:** This amendment will not result in any duplication.

8. **Alternatives:** There are no feasible alternatives to this amendment, and no feasible alternative was proposed when the Insurance Department met with industry representatives after the Court of Appeals handed down its decision in *Benesowitz*, but prior to the issuance of Circular Letter No. 14 (2007). Through the Health Bureau and its Office of General Counsel, the Department circulated a draft of the Circular Letter before it was issued and received comments from industry groups such as the Life Insurance Council of New York, the American Council of Life Insurers, and America's Health Insurance Plans, Inc. Failure to amend this regulation in accordance with the Department's Circular Letter would allow an inconsistency between the regulation and Section 3234(b) of the Insurance Law to persist, potentially causing confusion regarding the use of medical underwriting for individuals becoming insured under group disability policies covering 300 or more persons.

9. **Federal standards:** There are no minimum standards of the federal government for the same or similar subject areas.

10. **Compliance schedule:** Compliance will be required immediately upon the amendment's effective date.

#### **Regulatory Flexibility Analysis**

The Insurance Department finds that this rule would not impose reporting, recordkeeping or other requirements on small businesses. The rule is directed at insurers licensed and health maintenance organizations certified to do business in this state. Based on information provided in the annual statements filed with the Insurance Department, insurers and health maintenance organizations do not fall within the definition of small business found in Section 102(8) of the State Administrative Procedure Act because there are none that are both independently owned and that employ fewer than 100 persons. Accordingly, there is no need to prepare any special guidance materials for small businesses with regard to this rule.

The Insurance Department finds that this rule will not impose reporting, recordkeeping or other compliance requirements on local governments. The basis for this finding is that this rule is directed at insurers and health maintenance organizations, none of which are local governments.

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

1. **Types and estimated numbers of rural areas:** Insurers and health maintenance organizations, to which this regulation is applicable, do business in every county of the State, including rural areas as defined under section 102(13) of the State Administrative Procedure Act. Since the rule applies to the insurance market throughout New York, not only to rural areas, the same regulation will apply to regulated entities across the state. Therefore, there is no adverse impact on rural areas as a result of this rule.

2. **Reporting, recordkeeping and other compliance requirements; and professional services:** This amendment will require insurers or health maintenance organizations to file paperwork only to the extent that they choose to use medical underwriting for individuals becoming insured under group disability policies covering 300 or more persons. Such a practice may require insurers to submit amended rate filings for Insurance Department approval. Nothing in this amendment distinguishes between rural and non-rural areas. Professional services beyond those already available to insurers and health maintenance organizations should not be needed to comply with this requirement.

3. **Costs:** This amendment might only create minimal costs for insurers, health maintenance organizations, or individuals, and there should be no costs associated with this amendment to the Insurance Department, the Health Department or state or local government. Circular Letter No. 14 (2007), issued by the Insurance Department on December 14, 2007, instructed insurers that if revisions to their existing policy forms were necessary in order to conform to the decision of the Court of Appeals, they were required to do so by late January 2008. Therefore, most of the costs for insurers or health maintenance organizations associated with this regulation have already been incurred. Going forward, an insurer or health maintenance organization subject to this regulation would incur additional

costs only to the extent that it needs to file revised forms or rate materials in order to use medical underwriting for individuals becoming insured under group disability policies covering 300 or more persons. This amendment will not have any impact unique to rural areas.

4. Minimizing adverse impact: The same requirements apply to both rural and non-rural entities, and the amendment will have the same impact on all affected entities.

#### **Job Impact Statement**

This amendment is not likely to impact job or employment opportunities in New York. This amendment allows insurers to use medical underwriting for individuals becoming insured under group disability policies covering 300 or more persons, but neither the Court of Appeals' decision in *Benesowitz v. Metropolitan Life Insurance Company*, 8 NY3d 661 (2007) nor this regulation create any continuing paperwork obligations for insurers or health maintenance organizations. Circular Letter No. 14 (2007), issued by the Insurance Department on December 14, 2007 after the Court of Appeals' decision, required some insurers and health maintenance organizations to revise existing forms but did not require them to file new forms. Therefore, any insurers or health maintenance organizations making such filings should not have to hire any new employees or pay for outside services related to the filings.

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## Department of Labor

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### EMERGENCY RULE MAKING

#### **New York State Worker Adjustment and Retraining Notification Act (WARN)**

**I.D. No.** LAB-07-09-00013-E

**Filing No.** 981

**Filing Date:** 2009-08-21

**Effective Date:** 2009-08-23

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

**Action taken:** Addition of Part 921 to Title 12 NYCRR.

**Statutory authority:** Labor Law, section 860-f

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

**Specific reasons underlying the finding of necessity:** The effective date of the regulations coincides with the effective date of their authorizing legislation, the New York Worker Adjustment and Retraining Notification (WARN) Act, a new law that becomes effective February 1, 2009. The Act governs the provision of notice to certain employees who will lose employment through plant closings, mass layoffs, or reductions in work hours. The purpose of the authorizing statute is to ensure that the employees are aware of future actions that will affect their employment so that they can take steps to secure new employment, be retrained for more readily available work, and otherwise make arrangements to provide for their needs and those of their families when their employment ends. The law is also intended to ensure the ability of the Department of Labor and its partner, the Workforce Investment Board, to provide Rapid Response services to the affected employees prior to their employment loss. These services include providing employees with information regarding unemployment insurance, job training, and reemployment services. These regulations fill in gaps found in the law in order to more fully inform employees of their obligations and workers of their rights under the law.

The emergency promulgation of these regulations is necessitated by the dramatic job losses currently being suffered within the state, the need to ensure that the notice requirements detailed in the regulation are available to protect workers affected by such job losses, and the needs to provide reemployment services to these workers in order to return them quickly to work. The State's private-sector job count has now dropped for nine consecutive months. Since the State's private sector job count peaked in August 2008, New York has lost 212,200 private sector jobs, erasing more than half of the 400,000 jobs added during the State's last economic expansion from 2003 to 2008. After seasonal adjustment, New York State's unemployment rate increased from 7.7 percent in April, 2009 to 8.2 percent in May, 2009, its highest level since February 1993. New York City's rate increased from 6.0 percent in November 2008 to 7.0 percent in December 2008 to 9.2 percent in May 2009, the highest since October

1997. Outside of New York City, the unemployment rate was 7.7 percent in May 2009. The number of unemployed state residents increased over the month by 51,000 to 802,400 in May, its highest level since July 1976.

The impact of these job losses on workers, their families, and their communities can be staggering, more so if workers are unaware that plant closings and layoffs are coming. The state WARN Act is designed to give workers time to avoid long periods of unemployment by affording them time to search for new work, retrain for more secure long-term employment, and take advantage of reemployment services which will ensure a quick return to work after their former employment ends. The proposed rules will ensure timely notice to the Department and early intervention of Rapid Response teams in situations involving employment losses so that workers can quickly transition into new employment or retraining following the loss of their jobs. Such activities also avoid or shorten periods of unemployment, thereby reducing employer charges associated with the receipt of unemployment insurance by their former employees. On the other hand, employees need to know of the availability of unemployment insurance benefits following these employment losses since the program is designed to provide an economic safety net to the workers and their families. All efforts that will quickly transition workers into new employment when their former jobs end, or that ensure some continued income during unemployment, will allow workers to continue to make needed purchases such as housing, food, heat and other utilities and to maintain the payment of school and property taxes that support their local community.

Enacting emergency regulations, which will immediately clarify the scope, timing, and content of the notice requirements, supports the goals set forth above and protects the general welfare of the state.

**Subject:** New York State Worker Adjustment and Retraining Notification Act (WARN).

**Purpose:** To provide government enforcement and more advance notice to a larger number of workers than under the federal WARN law.

**Substance of emergency rule:** The proposed rule creates a new section of regulations designated as 12 NYCRR Part 921 entitled "New York State Worker Adjustment and Retraining Notification Act" created under Chapter 475 of the Laws of 2008. This Act requires employers of fifty (50) or more employees to provide at least ninety (90) days notice to affected employees and representatives of affected employees, the New York State Department of Labor, and local workforce partners before ordering a plant closing, mass layoff, or reduction in work hours that falls within the employment losses covered by the law. At least twenty-five (25) employees must be affected for the notice requirement to be triggered. The rule contains exceptions to the notice requirement for certain employers who are making good faith efforts to avoid employment losses and have reasonable expectation that these efforts will successfully forestall the plant closing, mass layoff, or reduction in work hours.

Many employers in the State are already subject to the federal WARN Act (29 USC §§ 2101 - 2109 and 20 CFR 639.3). The State WARN Act expands the notice requirements to a larger group of employers and, concomitantly, extends its protections to more employees. The State Act also gives the Commissioner of Labor the authority to enforce the law on behalf of affected employees who did not receive appropriate notice of a plant closing, mass layoff, or covered reduction in work hours from their employer in violation of the law. Labor Law § 860-f(1) states that the Commissioner of Labor "shall prescribe such rules as may be necessary to carry out this article."

Subpart 921-1, entitled "Purpose and Definitions" sets forth the purpose and defines the terms used in the part. Section 921-1.1(d) defines "employer" as "any business enterprise, whether for-profit or not-for-profit, that employs fifty (50) or more employees within New York State, excluding part-time employees, or fifty (50) or more employees within the state that work in aggregate at least 2,000 hours per week." Section 921-1.1(a) defines "affected employee" as "an employee who may reasonably be expected to experience an employment loss as the result of a proposed plant closing, mass layoff, relocation, or covered reduction in hours by the employer."

Subpart 921-2, entitled "Notice," requires covered employers to provide notice to affected employees at least 90 calendar days prior to an event that triggers the notice requirement. This section enumerates the factors that trigger the notice requirement. It further spells out the contents of the notice, how notice is to be served and who must receive notice.

Subpart 921-3, entitled "Extension or Postponement of Mass Layoff Period" requires an employer to give additional notice if the triggering event is extended or postponed. Section 921-3.1 states that an "employer that previously announced and carried out a short-term layoff of six (6) months or less which is being extended beyond six (6) months due to business circumstances (e.g., unforeseeable changes in price or cost) not reasonably foreseeable at the time of the initial layoff must give notice required under the Act and this Part as soon as it becomes reasonably fore-

seeable that an extension is required.” Section 921-3.2 states that “if, after notice has been given, an employer decides to postpone a plant closing, mass layoff, or covered reduction in work hours for less than ninety (90) days, additional notice shall be given as soon as possible after the decision to postpone.” This subpart also prohibits “rolling notice”.

Subpart 921-4, entitled “Transfers,” states that “notice is not required when an employer offers to transfer an employee to a different site of employment within a reasonable commuting distance with no more than a six (6)-month break in employment, regardless of whether the employee accepts such employment, or when an employer offers to transfer the employee to any other site of employment regardless of distance with no more than a six (6)-month break in employment and the employee accepts within thirty (30) days of the offer or of the closing or layoff, whichever is later.”

Subpart 921-5, entitled “Temporary Employment,” states that “notice is not required if the closing is of a temporary facility, or if the closing or layoff results from the completion of a particular project or undertaking, and the affected employees were hired with the understanding that their employment was limited to the duration of the facility, project, or undertaking.” This subpart also makes clear that the burden of proof is on the employer to show that the job was understood to be temporary.

Subpart 921-6, entitled “Exceptions,” provides exceptions to the 90-day notice period for which the employer bears the burden of proof. This subpart includes exceptions for faltering companies, unforeseeable business circumstances, natural disasters, strikes or lockouts, and economic strikers.

Subpart 921-7, entitled “Enforcement by the Commissioner of Labor,” describes the administrative procedure followed by the Department when a WARN violation is suspected or alleged. Section 921-7.2 states that an employer who fails to give notice, as required, is subject to a civil penalty of \$500 for each day of the employer’s violation. Section 921-7.3 states that an employer who fails to give notice is liable to each employee for back pay and the value of any benefits to which the employee would have been entitled. Further this subpart provides for an administrative appeal to the Commissioner and then an appeal under Article 79 of the CPLR.

Subpart 921-8, entitled “Confidentiality of Information Obtained by the Commissioner of Labor,” requires that information obtained by the Commissioner through the administration of this Act be maintained as confidential and not be published or open to public inspection.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. LAB-07-09-00013-EP, Issue of February 18, 2009. The emergency rule will expire October 19, 2009.

**Text of rule and any required statements and analyses may be obtained from:** Maria Colavito, Esq., New York State Department of Labor, State Office Campus, Building 12, Room 508, Albany, New York 12240, (518) 457-4380, email: nysdol@labor.state.ny.us

#### **Regulatory Impact Statement**

##### **1. Statutory authority:**

Labor Law § 860 as added by Chapter 475 of the Laws of 2008 sets forth the requirements of the State Worker Adjustment and Retraining Notification Act. Section 860-f states that the Commissioner of Labor shall prescribe such rules as may be necessary to carry out Article 25-A of the Labor Law.

##### **2. Legislative objectives:**

Article 25-A establishes the New York State Worker Adjustment and Retraining Notification (WARN) Act which is intended to provide more advance notice to a larger number of workers who are laid off from their jobs than under the federal WARN law. Under the State WARN, companies with at least 50 employees must provide at least 90 days’ notice to affected employees and their representatives, the New York Department of Labor, and the local Workforce Investment Board(s) where at least 25 of the employees will suffer an employment loss as a result of a plant closing, mass layoff, or a covered reduction in work hours by their employer. These provisions will allow the Department of Labor’s Rapid Response Unit to provide workers with reemployment and retraining services well in advance of their loss of employment. This early intervention is designed to reduce or avoid periods of unemployment, ensure that workers are aware of job placement and retraining services, and, if attempts to transition workers into new employment are unsuccessful, make them aware of the availability of unemployment insurance benefits as an economic safety net for them and their families. Under the Act, the Commissioner of Labor is required to enforce the law by recovering back wages on behalf of workers whose employers failed to give timely notice and by imposing penalties against such employers.

##### **3. Needs and benefits:**

Workers whose employment is affected as a result of plant closings, mass layoffs, or significant reduction of hours require early and adequate

notice to find new employment and prepare for their future. As the downturn in the economy increasingly impacts companies large and small, larger numbers of workers are impacted by such events. Over the past quarter, more than 100,000 private sector jobs have been lost in New York State. At the time of this writing, the State’s seasonally-adjusted unemployment rate jumped from 6 percent in November to 7 percent in December, hitting a 14-year high and nearly equaling the nationwide 7.2 percent rate. The November-to-December unemployment rate spike was the biggest since the Department of Labor began tracking the state’s rate in 1976. Unemployment insurance covers less than half of the unemployed and does not capture any of the long term unemployed, persons in non-covered employment who lost jobs, and others such as new entrants and those reentering the job market. Moreover, certain job sectors in the state, such as manufacturing, continue to decline, signaling a need to prepare workers exiting jobs in this sector with retraining to take other jobs in the economy. All in all, the current economic climate makes it essential to provide the Department with early access to workers who will be losing employment so that they can receive information and assistance that will return them to work as soon as possible following their job loss.

A federal WARN law has existed for a number of years; the law, however, does not apply to small and medium sized businesses; it only applies to firms with at least 100 employees where at least 50 workers have been affected by employment loss. As a result, large numbers of workers are not receiving the benefit of early warning of adverse employment events. If the State WARN law had been in effect in the 2007-2008 fiscal year, between 24,000 to 48,000 additional workers in at least 973 additional firms in New York would have been entitled to receive advance notice of layoffs. Fiscal Policy Institute, “The Role of Worker Notification in a New Economic Strategy for New York,” May 19, 2008. At the same time, the federal law does not provide an enforcement mechanism for workers aggrieved by an employer’s failure to comply. By contrast, the state statute allows the Commissioner of Labor to enforce the law against violating employers and to collect back wages and benefits and impose penalties as a deterrent to future violations.

Early intervention to assist workers with obtaining new jobs is key to avoiding the economic impact of large-scale employment losses on workers, their families, and their communities. Large-scale job losses addressed by the state law impact employee spending and lead to the general decline of the local economy. This affects businesses that serve the workforce, adversely impacts local sales and property taxes, housing values, and the like. The Department of Labor’s Dislocated Worker Unit provides rapid response activities to workers to transition them into new employment as quickly as possible after a job loss. They do this by providing access to and information about dislocated worker re-employment assistance, unemployment insurance benefit information, job training, and other services. The state WARN Act increases the benefit to be derived from these services by giving workers more time to plan their reemployment strategy and more time to obtain retraining (if needed). Moreover, the notice provided to the Department under the state law and rule will include detail that will assist the Department in providing such services including the names of affected workers. Early intervention leading to reemployment also reduces dependence upon unemployment insurance benefits for laid off workers. Although such benefits are a critical economic safety net for workers and their families, reemployment is always preferable and provides greater income to workers. Reemployment reduces UI charges to individual employers and also UI benefit costs. Reduction of UI benefit costs is particularly beneficial to the state at this point in time since the State expects it will have to borrow from the federal government over the course of the upcoming year in order to support benefit payments.

The state Act and regulations also meet a significant need by providing workers with an effective mechanism to seek redress for employer violations of the notice requirements. Currently, the federal WARN law requires aggrieved employees to bring private lawsuits to sue for redress; neither the federal nor state departments of labor have the authority to enforce the federal WARN law. Private actions are a remedy that has been very seldom used over the years given that workers who fail to receive the required federal WARN notice typically lack the resources to sue their employers. Instead, they must focus their efforts and savings on finding new employment to support their families. The State WARN Act and these emergency regulations, however, give the Commissioner of Labor the authority to recover back wages and benefits on behalf of such workers and to impose civil penalties against employers who fail to provide the required WARN notice.

##### **4. Costs:**

It is impossible to predict the potential cost of the rule on regulated parties with any certainty. As noted elsewhere in this document, employers with 100 or more employees are already required to provide WARN notice for covered employment losses. The rule extends notification requirements to covered employment losses involving employers with 50 or more employees. There are 9,388 employers in the state who have between 50

and 100 employees. However, these employers will not necessarily be impacted by the rule unless they engage in a plant closing, mass layoff, or reduction in work hours that meets the numerical notice triggers set forth in the Act and the rule. Moreover, the number of employers set forth above is inflated because it includes employers with part-time employees who are not included in the numerical trigger computations referenced in the rule.

For those employers who are subject to the rule, costs of providing notice include preparation of the notice and mailing or delivery of the notice to affected workers, their representatives, the Department, and the local Workforce Investment Boards. The Department has attempted to keep such costs to a minimum by allowing employers to include notices with paychecks or direct deposit statements already provided to employees. Moreover, for those employers in New York already required to provide notice under the federal WARN Act, additional costs will be associated with providing notice to more employees, i.e. nominal postage costs or somewhat higher costs associated with other delivery methods which the employer may elect to use. However, since the notice will be a one page sheet of information, such postage charges should be minimal. The rule would not preclude an employer from utilizing the same notice to meet both state and federal notice requirements so long as the notice includes all information required under the proposed rule.

Apart from employee notice, which must be provided individually to all affected employees, only three other notices (Department of Labor, employee representatives, and local Workforce Investment Boards) are typically required. The only exceptions to this would involve circumstances in which employees may be represented by different unions or where covered employment sites are served by multiple Workforce Investment Boards. Under these circumstances, more than one notice may be required. In the event an employer has already given notice of a mass layoff and extends the duration of that layoff, or in the event an employer has given notice of a plant closing, mass layoff, relocation, or covered reduction in work hours and postpones that action for which notice was given, that employer must also give notice of the extension or postponement as soon as possible. Finally, the rule also requires that an employer, who elects to pay affected employees sixty days of pay and benefits to avoid liability and penalties for failure to provide the required notice, must still provide notice to affected employees notifying them of the potential availability of unemployment insurance and reemployment services. This notice must be provided with the final paycheck or through a separate notice provided at the time of termination. As elsewhere, the rule specifically provides the content of the notice for the convenience of regulated parties.

Employers who wish to assert an exception to the notice requirement will have to provide the Commissioner with documentary and other evidence that they fit one or more of the various exception categories. While such evidence should already exist in many circumstances, e.g. copies of loan or grant applications soliciting capital to continue business operations, other evidence may have to be compiled by the employer in response to an investigation of the employer's failure to provide timely notice, e.g. documentation of the effects of an unexpected, serious downturn in the economy on the employer's business operation.

Employers who fail to comply with the regulation would be subject to penalties, back pay, and other damages, as well as costs associated with their defense. The rule allows the Commissioner to forego damages and penalties where the employer timely makes payment equivalent to sixty days of pay and benefits to employees within three weeks of termination.

Minimal costs may be incurred by labor unions representing employees affected by plant closings, layoffs, and covered reductions in work hours but these costs would typically involve normal representational and information activities. Similarly, costs associated with WIB and Departmental responses to employment losses would be part of regularly funded workforce services and unemployment insurance activities.

#### 5. Paperwork:

In addition to documentation discussed above, the proposal may result in increased paperwork for the Department. The Department's enforcement will require paperwork associated with investigations and, where necessary, hearings to determine violations and to impose appropriate penalties.

Employers charged with violating the law will have to document activities that would support their claim to exemptions from the notice provisions. In the event of appeals, there will be additional paperwork for the Department and employers to reproduce the hearing record and prepare necessary court filings.

#### 6. Local government mandates:

The state WARN law does not apply to any units of local government so the regulations do not affect such entities. A local government may bring a civil action on behalf of any affected employee(s) and may recover attorney's fees from the court.

#### 7. Duplication:

There is no duplication of existing state rules or regulations. There is

some overlap of the proposed rules with federal rules governing the federal WARN; the Department has drafted state regulations to be consistent with federal rules to the extent possible, while still meeting the spirit and intent of the more stringent state law.

Rather than create new administrative rules to govern the WARN enforcement process, the Department's current procedural rules for Departmental hearings under 12 NYCRR Part 701 will be used for any administrative hearings conducted under the WARN Act, thereby avoiding duplication in this regard.

#### 8. Alternatives:

The Department believes the promulgation of regulations will ensure that employers and employees impacted by the WARN Act are fully aware of their rights and responsibilities under law. Since the passage of the Act, regulated parties have been contacting the Department in large numbers requesting clarification of many provisions contained in statute, and requesting regulations to address these issues.

The Department has considered a number of other alternatives and, where possible, has selected those that will minimize the adverse impact of the rule. Wherever state and federal WARN laws contain identical requirements, these regulations track federal regulations for the federal WARN which have been in place for more than a decade. Where federal WARN regulations did not address issues pertinent to the state Act, or were inconsistent with the legislative intent behind the state law, the Department adopted different requirements. Rather than requiring a separate state and federal notice for those employers who are subject to both state and federal notice requirements, the Department chose to allow a single form of notice to be used so long as the notice contains all the information elements required under the state regulation. While the Department included a requirement that the WARN notice apprise affected employees of the availability of unemployment insurance and reemployment services, it chose to include in the rule the actual language that may be used by employers for this purpose. The Department also chose to allow delivery of the notice along with other routine contacts with employees such as with their paychecks or direct deposit slips should the employer choose to do so in order to avoid costs associated with separate delivery.

In considering whether an employer's out of state workers would count toward determining the size of the workforce needed to cover an employer under the state WARN Act, the Department noted that federal regulations count workers at foreign sites of employment to determine whether an employer's workforce would subject the employer to the federal Act, even though the foreign sites would not be covered. Since one of the main goals of the WARN Act is to require small and medium-sized businesses in the state to provide advance layoff notices and to extend the Department's rapid response to these additional firms, the Department determined that the regulations should be limited to companies' New York workforce.

The Department also considered alternatives regarding the scope of employee notice under the proposed rule. While the Department could have limited the information contained in the notice to that which is required by federal law, the Department believes it is critical that the notice contain information which employees can use to hasten their return to work following termination of employment. While the Federal WARN rules encourage, but do not require the inclusion of useful information on dislocated worker assistance programs, the Department chose to require the notices to contain information on the potential availability of unemployment insurance and reemployment services. By providing the actual language which employers can use to satisfy this requirement, the Department minimized the impact of the requirement on the regulated community.

The Department also considered the alternative of creating a separate enforcement procedure for the state WARN Act, but instead decided to utilize the administrative procedure currently in place for other administrative hearings conducted by the Department.

#### 9. Federal standards:

Federal standards implementing the federal WARN law exist and are found at 29 USC §§ 2101 - 2109 and 20 CFR 639.3. However, consistent with a less stringent federal law, such regulations provide a shorter period of notice, cover fewer employers, and do not permit administrative enforcement of the law. Since the Commissioner of Labor is required to enforce the Act, additional provisions not contained in the federal WARN regulations were included to ensure that information regarding notice requirements, investigations, and determinations in the state regulations sufficiently inform all affected parties of their rights and obligations and ensure a fair and thorough determination of violations based on the requirements of the Act.

#### 10. Compliance schedule:

The Act takes effect February 1, 2009. Employers planning layoffs or other employment losses subject to the Act on or after February 1st must provide at least 90 days' notice prior to the planned termination date.

#### Regulatory Flexibility Analysis

##### 1. Effect of rule:

The New York State Worker Adjustment and Retraining Notification

(WARN) Act (Chapter of the Laws of 2008, effective February 1, 2009) requires businesses in New York with 50 or more employees to provide notice at least 90 days prior to a plant closing, mass layoff, or covered reduction in work hours where at least 25 of the employees will experience an employment loss from such event. Prior to the Act, only larger firms with at least 100 workers covered by the federal WARN law were required to provide 60 days notice of such events. The state WARN notice must be given to the affected employees and their representatives, the New York Department of Labor, and the local Workforce Investment Board(s) where the employment losses occur. If the State WARN had been in effect during the 2007-2008 fiscal year, between 24,000 to 48,000 additional workers at 973 small and medium-sized firms in New York would have been entitled to receive such advance notice. Such notice would have allowed the Department to deploy Rapid Response staff to assist workers with reemployment and return them quickly to work after their employment loss. It is estimated that at least the same number of smaller and medium-sized businesses will be required to serve WARN notices in 2009, though the number may actually be larger given the current economic climate.

State, local, and tribal governments are not subject to the requirements of the rule.

The WARN notice will enable the Department of Labor to provide workers with access to and information concerning dislocated worker assistance, unemployment benefits, job training, and job opportunities. Most of the workers for these smaller-sized businesses are expected to remain with their employers until their last day of employment in order to continue to receive income.

#### 2. Compliance requirements:

Employers of 50 or more employees, other than part-time employees, will be required to provide a WARN notice to the required parties under the WARN Act containing information set forth in the rule. Such employers must also maintain records to support any exception they may claim from the notice requirement so that they may share this information with the Department should it commence an investigation into the employer's failure to provide timely notice. Employers in New York are already required to maintain accurate and complete payroll records in order to comply with state laws relating to wages and unemployment taxes. These records allow employers to know the size of their workforce and the hours worked by employees in order to determine whether a WARN notice is required. Information regarding employees who will be affected by a plant closing, mass layoff or covered reduction in work hours would have been developed and documented during the planning phase for such actions; therefore necessary information would be readily available to employers to assure compliance with the WARN notice requirements. To the extent that bumping rights might exist in the place of employment, these rights would be established in the employer's collective bargaining agreement with the union representing its workers. The rule acknowledges that information specifically identifying individuals affected by bumping rights may not be available at the time notice is required and simply requires that the notice contain a statement whether bumping rights exist. Finally, the records required to support a WARN exception claim are records that should already be in the employer's possession as, for example, under the faltering company exception where the employer applied for loans or was seeking clients or capital to keep its business open.

#### 3. Professional services:

Employers covered by this rule are not expected to require professional services to comply with the rule. As noted above, information that must be included in the notice to the Department, the Workforce Investment Board, employees, and their representatives is simple, straightforward, and already available to the employer. It includes information regarding the planned action, the individuals who will be impacted, and employer contact information. The Department has included a requirement that the notice contain a statement for employees and their representatives regarding potential eligibility for unemployment insurance benefits and various reemployment services available from the Department. The Department has included the content of this notice in the rule to minimize the impact of the requirement on the employers.

Employers who are cited for a violation of the notice requirement may elect to hire legal counsel to defend such action.

#### 4. Compliance costs:

The adoption of the regulations is expected to result in minimal costs to employers. They will be required to file a WARN notice with the required parties; costs associated with providing the notice will depend upon the number of employees affected and the means of delivery selected by the employer. The rule permits delivery of the notice to be included with employee pay or direct deposit statements. Notice may also be personally delivered to individual employees at the workplace. Should employers choose to send the notice via first class mail, postage costs would still be minimal as the notice should be no more than a one or two page document. Apart from employee notice, which must be provided individually to all

affected employees, notices to the Department of Labor, employee representatives, and local Workforce Investment Boards are required. Again, postage costs associated with such delivery should be nominal. In some circumstances, employees suffering an employment loss may be represented by different unions. In those cases, notices would be required to be sent to each of the different unions. In rare circumstances where places of employment are served by multiple Workforce Investment Boards, more than one notice may be required.

In the event an employer has already given notice of a mass layoff and extends the duration of that layoff, or in the event an employer has given notice of a plant closing, mass layoff, relocation, or covered reduction in work hours and postpones that action for which notice was given, that employer must give notice of the extension or postponement as soon as possible.

Employers who wish to assert an exception to the notice requirement will have to provide the Commissioner with documentary and other evidence that they fit one or more of the various exception categories. While such evidence should already exist in many circumstances, e.g. copies of loan or grant applications soliciting capital to continue business operations, other evidence may have to be compiled by the employer in response to an investigation of the employer's failure to provide timely notice, e.g. documentation of the effects of a unexpected, serious downturn in the economy on the employer's business operation.

Employers who fail to comply with the regulation would be subject to penalties, back pay and other damages, as well as costs associated with their defense. The rule allows the Commissioner to forego damages and penalties where the employer timely makes payment equivalent to sixty days of pay and benefits to employees within three weeks of termination.

Minimal costs may be incurred by labor unions representing employees affected by plant closings, layoffs, and covered reductions in work hours but these costs would typically involve normal representational and information activities. Similarly, costs associated with WIB and Departmental responses to employment losses would be part of regularly funded workforce services and unemployment insurance activities.

#### 5. Economic and technological feasibility:

The adoption of these emergency regulations is not expected to create an undue burden on employers. Larger employers that are required to file a WARN notice with the Department in compliance with the federal WARN law may file a single notice so long as it meets the notice requirements set forth in the regulations. Consistent with current federal WARN regulations, notice must be provided using a method that ensures the timely receipt of notice by the required parties, such as first class mail or personal delivery. While the rules do also permit notice to be provided along with paychecks or direct deposit receipts, they do not permit electronic service of notice as this means is not considered reliable and not all employees may have email accounts.

#### 6. Minimizing adverse impact:

The proposed rule is being promulgated in response to dozens of requests received from employers, their attorneys, workers, and worker representatives seeking clarification and guidance on the scope and requirements of the state WARN statute. The Department has sought to minimize adverse impact upon the regulated community by including provisions in the rule that address the issues and concerns raised in these inquiries. These provisions allow employers to better understand their obligations under the law, and inform employees of their rights under the law. This proposal is intended to assist employers to avoid violations while ensuring that workers receive the notice that will provide them with an opportunity to plan for their futures and support their families following employment termination.

The Department has taken a number of steps to minimize the adverse impact of the rule. Wherever state and federal WARN laws contain identical requirements, these regulations track federal regulations for the federal WARN which have been in place for more than a decade. For those employers who are subject to state and federal notice requirements, the Department will allow a single form of notice to be used so long as the notice contains all the information elements required under the state regulation. Where the Department included a requirement that the WARN notice apprise affected employees of the availability of unemployment insurance and reemployment services, the rule contains the actual language to be used by employers for this purpose. The rule allows delivery of the notice along with paychecks or direct deposit slips should the employer choose to do so, in order to avoid costs associated with separate delivery.

Another example of the Department's effort to minimize adverse impact involves the issue of whether an employer's out of state workers would count toward determining the size of the workforce needed to cover an employer under the state WARN Act. The federal regulations count workers at foreign sites of employment to determine whether an employer's workforce would subject the employer to the federal Act, even though the foreign sites would not be covered. Since one of the main goals of the WARN Act is to require small and medium-sized businesses in the state to

provide advance layoff notices and to extend the Department's rapid response to these additional firms, the Department determined that the regulations should be limited to such companies' New York workforce.

The statute and regulation also minimize adverse impact by including exceptions to the notice requirement where the employer can demonstrate that providing the notice would adversely impact the business' efforts to obtain financing, customers, or other financial support that would allow it to remain open or avoid employment losses. Employers who assert this defense to a failure to provide timely notice must be able to demonstrate such efforts to the satisfaction of the Department.

As a whole, the proposed rules ensure the early intervention of the Department in situations involving employment losses so that workers can quickly transition into new employment or retraining following the loss of their jobs. Where such activities lead to reemployment, employers will not face benefit charges associated with the receipt of unemployment insurance by their former employees. If such activities do not serve to avoid unemployment, unemployment insurance benefits will provide an economic safety net to the workers and their families. All efforts which will either keep the workers employed, move them quickly into new employment, or ensure some continued income will assist their communities. Income allows workers to continue to make needed purchases including housing, food, utilities, etc. and to maintain the payment of school and property taxes that support their local community. This income is particularly important in rural communities which often have fewer commercial and industrial businesses to support their tax base and depend upon employed residents to financially support local business and governmental services.

#### 7. Small business and local government participation:

The state WARN Act and the proposed rule does not apply to state, local, or tribal governments.

The Department discussed the WARN Act at the Summer Meeting of the Labor and Employment section of the New York State Bar Association and at the Fall Meeting of the New York Chapter of the Association of Corporate Counsel. Many individuals attending these meetings likely represent small businesses impacted by the rule. In addition, the Department published information on its website, issued press releases, and held press conferences regarding the passage of the state WARN Act. All of these activities prompted numerous contacts from businesses, corporate counsel, and worker representatives identifying areas of the statute which they felt required clarification in the regulations. The Department has attempted to address all these requests for clarification in the rule.

The Department also intends to publish a copy of the rule on its website and to mail copies to organizations representing business and labor for distribution to their constituency. These information activities will be in addition to the formal publication of the proposed rule in the *State Register*.

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

##### 1. Types and estimated numbers of rural areas:

Employers of fifty (50) or more employees in the state who engage in plant closings, mass layoffs, or reductions in work hours covered under the Act and the rule must provide notice of such employment losses under both the statute and the emergency rule. Such employers are located throughout the state and, therefore, all the state's rural areas are affected by the rule.

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

Rural area employers of 50 or more employees, other than part-time employees, who have a plant closing, mass layoff, or reduction in work hours covered by the Act will be required to provide a WARN notice to the required parties under the WARN Act containing information set forth in the rule. Such employers must also maintain records to support any exception they may claim from the notice requirement so that they may share this information with the Department should it commence an investigation into the employer's failure to provide timely notice. Employers in New York are already required to maintain accurate and complete payroll records in order to comply with state laws relating to wages and unemployment taxes. These records allow employers to know the size of their workforce and the hours worked by employees in order to determine whether a WARN notice is required. Information regarding employees who will be affected by a plant closing, mass layoff or covered reduction in work hours would have been developed and documented during the planning phase for such actions; therefore necessary information would be readily available to employers to assure compliance with the WARN notice requirements. To the extent that bumping rights might exist in the place of employment, these rights would be established in the employer's collective bargaining agreement with the union representing its workers. The rule acknowledges that information specifically identifying individuals affected by bumping rights may not be available at the time notice is required and simply requires that the notice contain a statement whether bumping rights exist. Finally, the records required to support a WARN exception claim are records that should already be in the employer's pos-

session as, for example, under the faltering company exception where the employer applied for loans or was seeking clients or capital to keep its business open.

Rural area employers covered by this rule are not expected to require professional services to comply with the rule. As noted above, information that must be included in the notice to the Department, the Workforce Investment Board, employees, and their representatives is simple, straightforward, and already available to the employer. It includes information regarding the planned action, the individuals who will be impacted, and employer contact information. The Department has included a requirement that the notice contain a statement for employees and their representatives regarding potential eligibility for unemployment insurance benefits and various reemployment services available from the Department. The Department has included the content of this notice in the rule to minimize the impact of the requirement on the employers.

Employers who are cited for a violation of the notice requirement may elect to hire legal counsel to defend such action.

##### 3. Costs:

It is impossible to predict the potential cost of the rule on regulated parties with any certainty. As noted elsewhere in this rulemaking, employers with 100 or more employees are already required to provide WARN notice for covered employment losses. The rule extends notification requirements to covered employment losses involving employers with 50 or more employees. There are 9,388 employers in the state who have between 50 and 100 employees. Some of these employers will undoubtedly be located in rural areas. However, these employers will not necessarily be impacted by the rule unless they engage in a plant closing, mass layoff, or reduction in work hours that meets the numerical notice triggers set forth in the Act and the rule. Moreover, the number of employers set forth above is inflated because it includes employers with part-time employees who are not included in the numerical trigger computations referenced in the rule.

For those rural employers who are subject to the rule, costs of providing notice include preparation of the notice and mailing or delivery of the notice to affected workers, their representatives, the Department, and the local Workforce Investment Boards. The Department has attempted to keep such costs to a minimum by allowing employers to include notices with paychecks or direct deposit statements already provided to employees. Moreover, for those employers in New York already required to provide notice under the federal WARN Act, additional costs will be associated with providing notice to more employees, i.e. nominal postage costs or somewhat higher costs associated with other delivery methods which the employer may elect to use. However, since the notice will be a one page sheet of information, such postage charges should be minimal. The rule would not preclude an employer from utilizing the same notice to meet both state and federal notice requirements so long as the notice includes all information required under the proposed rule.

Apart from employee notice, which must be provided individually to all affected employees, only three other notices (Department of Labor, employee representatives, and local Workforce Investment Boards) are typically required. The only exceptions to this would involve circumstances in which employees may be represented by different unions, or where covered employment sites are served by multiple Workforce Investment Boards. Under these circumstances, more than one notice may be required. In the event an employer has already given notice of a mass layoff and extends the duration of that layoff, or in the event an employer has given notice of a plant closing, mass layoff, relocation, or covered reduction in work hours and postpones that action for which notice was given, that employer must also give notice of the extension or postponement as soon as possible. Finally, the rule also requires that an employer, who elects to pay affected employees sixty days of pay and benefits to avoid liability and penalties for failure to provide the required 90-day notice, must provide notice to affected employees notifying them of the potential availability of unemployment insurance and reemployment services. This notice must be provided with the final paycheck or through a separate notice provided at the time of termination. As elsewhere, the rule specifically provides the content of the notice for the convenience of regulated parties.

Employers who wish to assert an exception to the notice requirement will have to provide the Commissioner with documentary and other evidence showing that they fit one or more of the various exception categories. While such evidence should already exist in many circumstances, e.g. copies of loan or grant applications soliciting capital to continue business operations, other evidence may have to be compiled by the employer in response to an investigation of the employer's failure to provide timely notice, e.g. documentation of the effects of an unexpected, serious downturn in the economy on the employer's business operation.

Employers who fail to comply with the regulation would be subject to penalties, back pay and other damages, as well as costs associated with their defense. The rule allows the Commissioner to forego damages and penalties where the employer timely makes payment equivalent to sixty days of pay and benefits to employees within three weeks of termination.

Minimal costs may be incurred by labor unions representing employees affected by plant closings, layoffs, and covered reductions in work hours but these costs would typically involve normal representational and information activities. Similarly, costs associated with WIB and Departmental responses to employment losses would be part of regularly funded workforce services and unemployment insurance activities.

To the extent that early intervention and reemployment services offered by the Department through its Rapid Response activities reduce the number of workers who will ultimately claim unemployment insurance benefits as a result of the adverse employment action, covered employers will see UI charges decrease as a result of the rule.

#### 4. Minimizing adverse impact:

The proposed rule is being promulgated in response to dozens of requests received from employers and attorneys representing them seeking clarification and guidance on the scope and requirements of the statute creating the state WARN program. The Department has sought to minimize adverse impact upon the regulated community by including language in the rule that addresses the issues and concerns raised in these inquiries.

Wherever feasible and desirable, these regulations track federal regulations for the federal WARN which have been in place for more than a decade. The Department will allow a single notice form to be used to satisfy both the state and federal notice requirements so long as the form contains all the information elements required under the state regulation. The Department has also drafted language to be included in the notice informing employees of the availability of Departmental programs and benefits as a service to employers. Service of notice is permitted along with paychecks or direct deposit slips should the employer choose to do so in order to avoid costs associated with separate delivery.

The statute and regulation also minimize adverse impact by including exceptions to the notice requirement where the employer can demonstrate that providing the notice would adversely impact the business' efforts to obtain financing, customers, or other financial support that would allow it to remain open or avoid employment losses. Employers who assert this defense to a failure to provide timely notice must be able to demonstrate such efforts to the satisfaction of the Department.

As a whole, the proposed rules ensure the early intervention of the Department in situations involving employment losses in rural areas so that workers can quickly transition into new employment or retraining following the loss of their jobs. Where such activities lead to reemployment, employers will not face benefit charges associated with the receipt of unemployment insurance by their former employees. If such activities do not serve to avoid unemployment, unemployment insurance benefits will provide an economic safety net to the workers and their families. All efforts which will either keep the workers employed, move them quickly into new employment, or ensure some continued income will assist their rural area communities. Income allows workers to continue to make needed purchases including housing, food, utilities, etc. and to maintain the payment of school and property taxes that support their local community. This income is particularly important in rural communities which often have fewer commercial and industrial businesses to support their tax base and depend upon employed residents to financially support local business and governmental services.

#### 5. Rural area participation:

The Department discussed the WARN Act at the Summer Meeting of the Labor and Employment section of the New York State Bar Association and at the Fall Meeting of the New York Chapter of the State Association of Corporate Counsel. Individuals attending these events likely represent some clients located in rural areas. In addition, the Department published information on its website, issued press releases, and held press conferences regarding the passage of the state WARN Act. These efforts resulted in the Department receiving dozens of phone calls and written requests for clarification of various aspects of the law from all over the state. The Department has attempted to address all these requests for clarification in the emergency rule.

The Department intends to publish a copy of the rule on its website and to mail copies to organizations representing business and labor in all areas of the state, including rural areas, for their comment and distribution to their constituency, including those located in rural areas. These information activities will be in addition to the formal publication of the rule in the *State Register*.

#### Job Impact Statement

This rule requires notice to be provided to employees and other parties 90 days prior to covered plant closings, mass layoffs, relocations, and reductions in work hours at sites of employment subject to the rule. It is apparent from the nature and purpose of the rule that it will not have a substantial adverse impact on jobs and employment.

#### Assessment of Public Comment

The agency received no public comment.

## Public Service Commission

### NOTICE OF ADOPTION

#### Major Gas Rate Filing

**I.D. No.** PSC-01-09-00018-A

**Filing Date:** 2009-08-20

**Effective Date:** 2009-08-20

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

**Action taken:** On August 20, 2009, the PSC adopted an order establishing a rate plan for Corning Natural Gas Corporation.

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

**Subject:** Major gas rate filing.

**Purpose:** To establish a rate plan to increase annual gas revenues.

**Substance of final rule:** The Commission, on August 20, 2009, adopted an order establishing a rate plan for Corning Natural Gas Corporation (the company) and directed the company to file on not less than one day's notice, to take effect on or after September 1, 2009 on a temporary basis, such further tariff changes as are necessary to effectuate the provisions adopted in this order, subject to the terms and conditions set forth in the order.

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

**Text of rule may be obtained from:** Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann\_ayer@dps.state.ny.us 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. (08-G-1137SA1)

### NOTICE OF ADOPTION

#### Mini Rate Filing

**I.D. No.** PSC-06-09-00005-A

**Filing Date:** 2009-08-21

**Effective Date:** 2009-08-21

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

**Action taken:** On 8/20/09, the PSC adopted an order approving, with modifications, Village of Holley's amendments to PSC 1—Electricity, to increase its annual electric revenues of \$237,496, or 18.3%, effective September 1, 2009.

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

**Subject:** Mini rate filing.

**Purpose:** To approve an increase in annual electric revenues of \$237,496, or 18.3%.

**Substance of final rule:** The Commission, on August 20, 2009, adopted an order approving, with modifications Village of Holley's amendments to PSC 1—Electricity, to increase its annual electric revenues of \$237,496, or 18.3%, effective September 1, 2009, subject to the terms and conditions set forth in the order.

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

**Text of rule may be obtained from:** Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann\_ayer@dps.state.ny.us 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.

(09-E-0053SA1)

## NOTICE OF ADOPTION

**Request for Authorization to Defer the Incremental Gas Leak Repair Expenses Related to Gas Operations****I.D. No.** PSC-10-09-00011-A**Filing Date:** 2009-08-20**Effective Date:** 2009-08-20

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

**Action taken:** On 8/20/09, the PSC adopted an order denying the Petition of Central Hudson Gas & Electric Corporation (Central Hudson) for authorization to defer Incremental Gas Leak Repairs Expense for the year ended December 31, 2008.

**Statutory authority:** Public Service Law, section 66(9)

**Subject:** Request for authorization to defer the incremental gas leak repair expenses related to gas operations.

**Purpose:** To deny Central Hudson's request to defer the incremental gas leak repair expenses related to gas operations.

**Substance of final rule:** The Commission, on August 20, 2009, adopted an order denying the Petition of Central Hudson Gas & Electric Corporation for authorization to defer Incremental Gas Leak Repairs Expense for the year ended December 31, 2008.

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

**Text of rule may be obtained from:** Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann\_ayer@dps.state.ny.us 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.

(09-G-0139SA1)

## NOTICE OF ADOPTION

**Request Authorization to Defer Incremental Bad Debt Expense Resulting from Uncollectible Accounts****I.D. No.** PSC-10-09-00014-A**Filing Date:** 2009-08-24**Effective Date:** 2009-08-24

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

**Action taken:** On 8/20/09, the PSC adopted an order approving in part, and denying in part Central Hudson Gas & Electric Corporation's petition for authority to defer Bad Debt Net Write-Off Expense for the year ended December 31, 2008.

**Statutory authority:** Public Service Law, section 66(9)

**Subject:** Request authorization to defer incremental bad debt expense resulting from uncollectible accounts.

**Purpose:** To approve in part and deny in part authorization to defer incremental bad debt expense resulting from uncollectible accounts.

**Substance of final rule:** The Commission, on August 20, 2009, adopted an order approving in part, and denying in part Central Hudson Gas & Electric Corporation's petition for authority to defer Bad Debt Net Write-Off Expense for the year ended December 31, 2008, subject to the terms and conditions set forth in the order.

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

**Text of rule may be obtained from:** Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann\_ayer@dps.state.ny.us 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.

(09-M-0140SA1)

## NOTICE OF ADOPTION

**Mini Rate Filing****I.D. No.** PSC-11-09-00010-A**Filing Date:** 2009-08-21**Effective Date:** 2009-08-21

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

**Action taken:** On 8/20/09, the PSC adopted an order approving, with modifications, Bath Electric, Gas & Water System's amendments to PSC 1—Electricity, to increase its annual electric revenues of \$180,146 or 4.4%, effective September 1, 2009.

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

**Subject:** Mini rate filing.

**Purpose:** To approve an increase in annual electric revenues of \$180,146 or 4.4%.

**Substance of final rule:** The Commission, on August 20, 2009, adopted an order approving, with modifications, Bath Electric, Gas & Water System's amendments to PSC 1—Electricity, to increase its annual electric revenues of \$180,146 or 4.4%, effective September 1, 2009, subject to the terms and conditions set forth in the order.

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

**Text of rule may be obtained from:** Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann\_ayer@dps.state.ny.us 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.

(09-E-0201SA1)

## NOTICE OF ADOPTION

**Sanctioning Certain ESCOs for Failing to Make Required Filings****I.D. No.** PSC-13-09-00009-A**Filing Date:** 2009-08-25**Effective Date:** 2009-08-25

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

**Action taken:** On 8/20/09, the PSC adopted an order imposing consequences and revoking the eligibility of certain Energy Service Companies (ESCOs) to sell natural gas and/or electric commodity to residential and non-residential customers in NYS.

**Statutory authority:** Public Service Law, section 66(1)

**Subject:** Sanctioning certain ESCOs for failing to make required filings.

**Purpose:** To approve the sanctioning of certain ESCOs for failing to make required filings.

**Substance of final rule:** The Commission, on August 20, 2009, adopted an order imposing sanctions on several Energy Service Companies for failure to comply with the Commission's October 27, 2008 order, and revoked the eligibility of the following Energy Service Companies (ESCOs) to sell natural gas and/or electric commodity to residential and non-residential customers in New York State: Atlantic Utilities LLC; Enercon, Inc.; Energy One LLC; and Highway 3 MHP LLC d/b/a eTricity, subject to the terms and conditions set forth in the order.

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

**Text of rule may be obtained from:** Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann\_ayer@dps.state.ny.us 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.

(98-M-1343SA17)

**NOTICE OF ADOPTION**

**Specific Large Industrial Gas and Electric Energy Efficiency Programs**

**I.D. No.** PSC-20-09-00008-A

**Filing Date:** 2009-08-24

**Effective Date:** 2009-08-24

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

**Action taken:** On 8/20/09, the PSC adopted an order approving, with modifications, electric & gas energy efficiency programs designed to serve the large industrial customer market sector to be administered by Niagara Mohawk Power Corporation d/b/a National Grid & NYSERDA.

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

**Subject:** Specific large industrial gas and electric energy efficiency programs.

**Purpose:** To approve with modifications, selected gas and electric energy efficiency programs.

**Substance of final rule** The Commission, on August 20, 2009, adopted an order approving, with modifications, electric and gas energy efficiency programs designed to serve the large industrial customer market sector to be administered by Niagara Mohawk Power Corporation d/b/a National Grid (Niagara Mohawk) and New York State Energy Research and Development Authority (NYSERDA). The approved programs include the Energy Initiative Program (electric) to be administered by Niagara Mohawk and the Industrial and Process Efficiency Program (gas) to be administered by NYSERDA. The programs rejected are the Waste Energy Recovery programs (electric and gas) proposed by NYSERDA, subject to the terms and conditions set forth in the order.

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

**Text of rule may be obtained from:** Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann\_ayer@dps.state.ny.us 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.

(09-G-0363SA2)

**NOTICE OF ADOPTION**

**Procedures for Estimation of Customer Bills**

**I.D. No.** PSC-21-09-00005-A

**Filing Date:** 2009-08-20

**Effective Date:** 2009-08-20

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

**Action taken:** On 8/20/09, the PSC adopted an order approving the Petition of New York State Electric & Gas Corporation to revise certain procedures for estimating customer usage of electricity and natural gas for billing purposes when metered usage data is not available.

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

**Subject:** Procedures for estimation of customer bills.

**Purpose:** To approve the revision of procedures for estimation of customer bills.

**Substance of final rule:** The Commission, on August 20, 2009, adopted an order approving the Petition of New York State Electric & Gas Corporation to revise certain procedures for estimating customer usage of electricity and natural gas for billing purposes when metered usage data is not available.

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

**Text of rule may be obtained from:** Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann\_ayer@dps.state.ny.us 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.

(09-M-0394SA1)

**NOTICE OF ADOPTION**

**Procedures for Estimation of Customer Bills**

**I.D. No.** PSC-21-09-00007-A

**Filing Date:** 2009-08-20

**Effective Date:** 2009-08-20

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

**Action taken:** On 8/20/09, the PSC adopted an order approving the Petition of Rochester Gas and Electric Corporation to revise certain procedures for estimating customer usage of electricity and natural gas for billing purposes when metered usage data is not available.

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

**Subject:** Procedures for estimation of customer bills.

**Purpose:** To approve the revision of procedures for estimation of customer bills.

**Substance of final rule:** The Commission, on August 20, 2009, adopted an order approving the Petition of Rochester Gas and Electric Corporation to revise certain procedures for estimating customer usage of electricity and natural gas for billing purposes when metered usage data is not available.

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

**Text of rule may be obtained from:** Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann\_ayer@dps.state.ny.us 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.

(09-M-0395SA1)

**NOTICE OF ADOPTION**

**Water Rates and Charges**

**I.D. No.** PSC-21-09-00008-A

**Filing Date:** 2009-08-24

**Effective Date:** 2009-08-24

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

**Action taken:** On 8/20/09, the PSC approved a request filed by West Valley Crystal Water Company to make changes in the rates and charges contained in its tariff schedule P.S.C. No. 3—Water, to become effective to September 1, 2009.

**Statutory authority:** Public Service Law, sections 4(1), 5(1)(f), 89-c(1) and (10)

**Subject:** Water rates and charges.

**Purpose:** To approve an increase in annual operating revenues by \$11,183 or 35.6%.

**Substance of final rule:** The Commission on August 20, 2009, adopted an order approving the request of West Valley Crystal Water Company, to increase its annual operating revenues by \$11,183 or 35.6%, effective September 1, 2009, subject to the terms and conditions set forth in the order.

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

**Text of rule may be obtained from:** Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann\_ayer@dps.state.ny.us 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.  
(09-W-0389SA1)

**NOTICE OF ADOPTION**

**Authorization of Approximately \$95 Million RPS Main Tier Procurement**

**I.D. No.** PSC-22-09-00008-A

**Filing Date:** 2009-08-21

**Effective Date:** 2009-08-21

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

**Action taken:** On 8/20/09, the PSC adopted an order authorizing additional main tier solicitation and setting solicitation guidelines for the Renewable Portfolio Standard (RPS) program.

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

**Subject:** Authorization of approximately \$95 million RPS Main Tier procurement.

**Purpose:** To approve a solicitation for Renewable Portfolio Standard (RPS) Main Tier resources.

**Substance of final rule:** The Commission, on August 20, 2009, adopted an order authorizing the New York State Energy Research and Development Authority (NYSERDA) to conduct a solicitation for Renewable Portfolio Standard (RPS) Main Tier resources, drawing on approximately \$95 million in RPS funds available for this purpose, subject to the terms and conditions set forth in the order.

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

**Text of rule may be obtained from:** Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann\_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

**Assessment of Public Comment**

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

(03-E-0188SA21)

**NOTICE OF ADOPTION**

**Amendment to Net Energy Metering to Customer-Generators**

**I.D. No.** PSC-22-09-00009-A

**Filing Date:** 2009-08-21

**Effective Date:** 2009-08-21

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

**Action taken:** On 8/20/09, the PSC adopted an order granting rehearing, & directing Niagara Mohawk Power Corporation d/b/a National Grid to tariff 12 kW as the limit on the size of a solar facility that a non-residential, non-demand customer may net meter.

**Statutory authority:** Public Service Law, section 66-j

**Subject:** Amendment to Net Energy Metering to customer-generators.

**Purpose:** To approve tariffs for the net metering program to comply with changes in PSL Section 66-j.

**Substance of final rule:** The Commission, on August 20, 2009, adopted an order granting the petition of Buddy's Place LLC for rehearing, and directed Niagara Mohawk Power Corporation d/b/a National Grid to tariff 12 kW as the limit on the size of a solar facility that a non-residential, non-demand customer may net meter, but should find that it is statutorily prohibited from raising the limit further, subject to the terms and conditions set forth in the order.

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

**Text of rule may be obtained from:** Leann Ayer, Public Service Commis-

sion, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann\_ayer@dps.state.ny.us 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.

(08-E-1305SA2)

**PROPOSED RULE MAKING  
HEARING(S) SCHEDULED**

**Disposition of a Federal Income Tax Refund**

**I.D. No.** PSC-36-09-00010-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 Niagara Mohawk Power Corporation d/b/a National Grid to retain \$4.66 million of a \$25.6 million federal income tax refund.

**Statutory authority:** Public Service Law, section 113(2)

**Subject:** Disposition of a federal income tax refund.

**Purpose:** To determine how much of a federal income tax refund should be retained by National Grid.

**Public hearing(s) will be held at:** 10:30 a.m., Dec. 10, 2009 at Three Empire State Plaza, 3rd Fl. Hearing Rm., Albany, NY.\*

\*There could be requests to reschedule the hearings. Notification of any subsequent scheduling changes will be available at the DPS Website ([www.dps.state.ny.us](http://www.dps.state.ny.us)) under Case No. 09-M-0554SP1.

**Interpreter Service:** Interpreter services will be made available to hearing impaired 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.

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

**Substance of proposed rule:** Niagara Mohawk Power Corporation d/b/a National Grid filed a petition proposing the disposition of a portion of a federal income tax refund allocable to its regulated New York electric and gas operations. The total tax refund of approximately \$25.6 million, inclusive of interest, was the result of IRS adjustments and IRS Appeals Office settlement adjustments related to the period of 1991 to 1995. National Grid has requested permission to retain a portion of the tax refund (net of deferred taxes) of approximately \$4.66 million. The Public Service Commission may approve or reject, in whole or in part, National Grid's request.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: leann\_ayer@dps.state.ny.us

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: jaclyn\_brillling@dps.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**

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.

(09-M-0554SP1)

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

**Specific Commercial and Industrial Electric and Gas Energy Efficiency Programs**

**I.D. No.** PSC-36-09-00003-P

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

**Proposed Action:** The Commission is considering commercial and industrial electric and gas energy efficiency program proposals as a component of the Energy Efficiency Portfolio Standard.

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

**Subject:** Specific commercial and industrial electric and gas energy efficiency programs.

**Purpose:** To encourage electric and gas energy conservation in the State.

**Substance of proposed rule:** The Commission is considering whether to adopt, modify, or reject, in whole or in part, (a) commercial and industrial electric energy efficiency program proposals made in response to an order in Case 07-M-0548 entitled "Order Establishing Energy Efficiency Portfolio Standard and Approving Programs" issued by the Public Service Commission on June 23, 2008 [see Ordering Clauses 8, 10 & 17]; and (b) commercial and industrial gas energy efficiency program proposals made in response to a notice in Case 07-M-0548 entitled "Notice Requesting Proposals" issued by the Secretary to the Public Service Commission on April 20, 2009. For potential independent program administrators that submitted updated proposals for programs in accordance with Ordering Clause 8 of the aforementioned June 23, 2008 Order, such submissions shall be considered as pre-filed comments responsive to this notice to the degree that they relate to the provision of energy efficiency programs for commercial and industrial customers. The program proposals under consideration for this rule include the following:

1. Cases 08-E-1127 and 09-G-0363 - Consolidated Edison Company of New York, Inc., "Residential and Commercial Energy Efficiency Programs" dated September 22, 2008, "Multifamily, Multifamily Low Income and Large Industrial Gas Efficiency Programs" dated May 20, 2009, and "Commercial Gas Efficiency Programs" dated June 5, 2009: (a) C&I Custom Efficiency Program (electric), (b) Steam Cooling Program (electric), (c) Commercial and Industrial Custom Gas Efficient Equipment Program (gas), and (d) Industrial Energy Efficiency Equipment Rebate Program (gas).

2. Cases 08-E-1129/08-E-1130 and 09-G-0363 - New York State Electric & Gas Corporation/Rochester Gas and Electric Corporation, "Electric Program Plan of New York State Electric & Gas Corporation and Rochester Gas and Electric Corporation" dated September 22, 2008, Updates dated April 22, 2009 and April 24, 2009, Updates dated May 15, 2009 (corrected June 11, 2009), and Updates dated August 4, 2009 (corrected August 6, 2009): (a) Non-residential Small Business Direct Installation Program (electric), (b) Non-residential Commercial & Industrial (C&I) Custom Rebate Program (electric), and (c) Non-residential Commercial & Industrial (C&I) Custom Rebate Program (gas).

3. Cases 08-E-1132 and 09-G-0363 - New York State Research and Development Authority, "Energy Efficiency Portfolio Program Administrator Proposal" dated September 22, 2008, Updates dated November 21, 2008, and Updates dated June 5, 2009: (a) Statewide Combined Heat and Power Performance Program (electric).

4. Cases 08-E-1133 and 09-G-0363 - Niagara Mohawk Power Corporation d/b/a National Grid, "Electric and Gas Energy Efficiency Program Proposals" dated September 22, 2008: (a) Commercial High-Efficiency Heating and Water Heating Program (gas).

5. Case 09-G-0363 - The Brooklyn Union Gas Company/KeySpan Gas East Corporation, "Gas Energy Efficiency Program Proposals" dated September 22, 2008, and Updates dated June 5, 2009: (a) Commercial High-Efficiency Heating and Water Heating Program (gas).

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: [leann\\_ayer@dps.state.ny.us](mailto:leann_ayer@dps.state.ny.us)

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: [jaclyn\\_brillling@dps.state.ny.us](mailto:jaclyn_brillling@dps.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**

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.

(08-E-1127SP7)

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

**Contributions in Aid of Construction**

**I.D. No.** PSC-36-09-00004-P

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

**Proposed Action:** The Commission is considering a proposed filing by Consolidated Edison Company of New York, Inc. to make various changes in the rates, charges, rules and regulations contained in its Schedule for Electric Service, PSC No. 9 - Electricity.

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

**Subject:** Contributions in Aid of Construction.

**Purpose:** To revise General Rules III-2 and III-3 regarding contributions in aid of construction.

**Substance of proposed rule:** The Commission is considering whether to approve, modify or reject, in whole or in part, a proposed filing by Consolidated Edison Company of New York, Inc. (the Company) filed pursuant to Commission Order issued April 24, 2009 in Case 08-E-0539. The proposed filing revises Rule III-2 to permit the Company to designate 265/460 volt service or high tension service when it would result in the least cost to the Company. It also proposes changes to Rule III-3: (a) to require customer contributions in aid of construction based on a cost test; (b) to define "premises"; and (c) to permit the Company to charge for excess distribution facilities in place of those normally provided or otherwise designated by the Company. The proposed filing has an effective date of November 19, 2009.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: [leann\\_ayer@dps.state.ny.us](mailto:leann_ayer@dps.state.ny.us)

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: [jaclyn\\_brillling@dps.state.ny.us](mailto:jaclyn_brillling@dps.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**

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.

(08-E-0539SP4)

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

**Waiver and Suspension of Section 609.4(b)(7) of the Commission's Rules and Regulations**

**I.D. No.** PSC-36-09-00005-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 from Verizon New York Inc. seeking a waiver of certain language requirements in suspension and termination notices sent to residential customers.

**Statutory authority:** Public Service Law, section 94

**Subject:** Waiver and suspension of Section 609.4(b)(7) of the Commission's Rules and Regulations.

**Purpose:** Consideration of a petition to relieve Verizon New York Inc. of certain suspension and termination notice language requirements.

**Substance of proposed rule:** The Commission is considering whether to grant or deny, in whole or in part, approval of Verizon New York Inc.'s petition for partial waiver of the portion of 609.4(b)(7) of the Commission's Rules and Regulations that requires that notices of suspension and termination to residential customers with basic local exchange service include language specified therein.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: leann\_ayer@dps.state.ny.us

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: jaclyn\_brillling@dps.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**

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.

(09-C-0551SP1)

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

**St. Lawrence Gas Company's Petition for Additional "Fast Track" Utility-administered Gas Energy Efficiency Program Funding**

**I.D. No.** PSC-36-09-00006-P

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

**Proposed Action:** The Commission is considering a petition submitted by St. Lawrence Gas Company, Inc. (the company) for approval of additional funding for the company's previously approved "fast track" utility-administered gas energy efficiency program.

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

**Subject:** St. Lawrence Gas Company's petition for additional "fast track" utility-administered gas energy efficiency program funding.

**Purpose:** To consider the company's petition for additional "fast track" utility-administered gas energy efficiency funding.

**Substance of proposed rule:** The Commission is considering whether to adopt, modify, or reject, in whole or in part, the proposal set forth by St. Lawrence Gas Company, Inc. (the company) in a petition filed dated August 6, 2009 and entitled "Petition of St. Lawrence Gas Company, Inc. for Approval of Additional Funding in the Energy Efficiency Portfolio Standard "Fast Track" Utility-Administered Gas Energy Efficiency Program." The petition requests additional funding for the company's Residential Gas HVAC "Fast Track" program.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: leann\_ayer@dps.state.ny.us

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: jaclyn\_brillling@dps.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**

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.

(08-G-1021SP2)

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

**Costs of Interconnecting a Net Metered Farm Waste Generator**

**I.D. No.** PSC-36-09-00007-P

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

**Proposed Action:** The Commission is considering a complaint from the Boxler Dairy Farm asking for a determination of the costs Niagara Mohawk Power Corporation d/b/a National Grid may collect for interconnecting a net metered farm waste generator.

**Statutory authority:** Public Service Law, section 66-j

**Subject:** Costs of interconnecting a net metered farm waste generator.

**Purpose:** To determine the costs of interconnecting a net metered farm waste generator.

**Substance of proposed rule:** The Public Service Commission is considering a complaint from the Boxler Dairy Farm (the Farm) asking for a determination that the costs Niagara Mohawk Power Corporation d/b/a National Grid (National Grid) may collect for interconnecting a 500 kW net metered farm waste generator to be installed at the Farm's location will be limited to no more than \$5,000, instead of the approximately \$141,000 National Grid proposes to collect. The Commission may adopt, reject or modify, in whole or in part, the relief proposed.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: leann\_ayer@dps.state.ny.us

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: jaclyn\_brillling@dps.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**

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.

(09-E-0608SP1)

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

**Increase in the Non-Bypassable Charge Implemented by RG&E on June 1, 2009**

**I.D. No.** PSC-36-09-00008-P

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

**Proposed Action:** The Commission is considering a complaint from the Pactiv Corporation asking that it and similarly situated customers be exempted from the increase in the non-bypassable charge implemented by Rochester Gas and Electric Corporation (RG&E) on June 1, 2009.

**Statutory authority:** Public Service Law, sections 64, 65(1), (2), (3), (5) and 66(1), (2), (5), (8), (9), (10) and (12)

**Subject:** The increase in the non-bypassable charge implemented by RG&E on June 1, 2009.

**Purpose:** Considering exemptions from the increase in the non-bypassable charge implemented by RG&E on June 1, 2009.

**Substance of proposed rule:** The Public Service Commission is considering a complaint from the Pactiv Corporation asking that it and similarly situated customers be exempted from the increase in the non-bypassable charge implemented by Rochester Gas and Electric Corporation (RG&E) on June 1, 2009. The Commission may adopt, reject or modify, in whole or in part, the relief proposed.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany,

New York 12223-1350, (518) 486-2655, email: leann\_ayer@dps.state.ny.us

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: jaclyn\_brillling@dps.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**

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. (09-E-0626SP1)

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

**Street Lighting**

**I.D. No.** PSC-36-09-00009-P

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

**Proposed Action:** The Commission is considering a proposed filing by Niagara Mohawk Power Corporation d/b/a National Grid to make various changes in the rates, charges, rules and regulations contained in its Schedule for Electric Service, PSC No. 214 - Street Lighting.

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

**Subject:** Street Lighting.

**Purpose:** To make minor conforming changes to its street lighting tariff schedule.

**Substance of proposed rule:** The Commission is considering whether to approve, modify or reject, in whole or in part, a proposed filing by Niagara Mohawk Power Corporation d/b/a National Grid. The proposed filing makes minor conforming modifications to the current street lighting tariff, Schedule P.S.C. 214. These modifications propose a consistent format for all information and pricing within each service classification. The proposed filing has an effective date of November 16, 2009.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: leann\_ayer@dps.state.ny.us

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: jaclyn\_brillling@dps.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**

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. (09-E-0633SP1)

**Department of State**

**EMERGENCY  
RULE MAKING**

**Qualifying Experience and Education for Real Estate Appraisers**

**I.D. No.** DOS-36-09-00002-E

**Filing No.** 983

**Filing Date:** 2009-08-19

**Effective Date:** 2009-08-19

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

**Action taken:** Amendment of sections 1103.1, 1103.3, 1103.7, 1103.8, 1103.10, 1103.12(a), 1103.21, 1103.22(f), 1107.2, 1107.4(b)-(d), 1107.5 and 1107.9; repeal of sections 1103.9, 1105.1, 1105.2, 1105.3, 1105.4, 1105.5, 1105.6, 1105.7 and 1105.8; and addition of new sections 1103.9, 1105.1, 1105.2, 1105.3, 1105.4, 1105.5, 1105.6 and 1105.7 of Title 19 NYCRR.

**Statutory authority:** Executive Law, section 160-d

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

**Specific reasons underlying the finding of necessity:** The Federal Appraisal Qualifications Board (AQB), in accordance with the authority granted to said body pursuant to Title XI of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), establishes the minimum education, experience and examination requirements for real property appraisers to obtain state certification. States are required to implement appraiser certification requirements that are no less stringent than those issued by the AQB.

In 2004, the AQB adopted significant revisions to the education requirements for real estate appraisers. States were required to adopt these requirements by January 1, 2008. A failure to do would have resulted in the State losing Federal recognition of the State program. Legislation was therefore passed permitting the Department of State to adopt the required revisions by rule making. The Department has adopted emergency rules which have been in place since January 1, 2008 so that New York's appraiser program would not lose federal recognition.

If New York were to lose Federal recognition of its appraiser program, federal financial institutions and many State financial institutions would be prohibited from accepting appraisals from New York real estate appraisers. This would include virtually all mortgage and refinance transactions. Appraisers licensed or certified by the State of New York would be prohibited from preparing an appraisal for any such transaction and New York consumers would be forced to go out of state in order to obtain an appraisal. The hardship and disruption for the State's financial community, as well as for buyers and sellers of real estate within the State would be significant.

**Subject:** Qualifying experience and education for real estate appraisers.

**Purpose:** To amend current regulations in order to conform said regulations with recent statutory amendments.

**Substance of emergency rule:** Section 1103.1 of Title 19 NYCRR is amended to specify the course work and education required for licensure as an appraiser assistant, licensed real estate appraiser and certified real estate appraiser.

Section 1103.3(f) of Title 19 NYCRR is amended to specify that course waivers may only be granted in 15 hour segments.

Section 1103.7 of Title 19 NYCRR is amended to permit the Department of State to approve courses of study for appraiser assistants.

Section 1103.8 of Title 19 NYCRR is repealed and a new section 1103.8 is added to specify the course content and hours of study required for licensure as an appraiser assistant, licensed and certified real estate appraiser.

Section 1103.9 of Title 19 NYCRR is repealed and a new section 1103.9 is added to specify the course content and hours of study required for general real estate appraiser certification.

Section 1103.10 of Title 19 NYCRR is amended to specify the educational requirements for the 15 hour National USPAP course.

Section 1103.12(a) of Title 19 NYCRR is amended to provide that students must physically attend 90 percent of each course offering in order to satisfactorily complete said course.

Sections 1103.21 and 1103.22(f) of Title 19 NYCRR is amended to set forth the registration fees for schools and instructors.

Section 1105.1 of Title 19 NYCRR is repealed and a new section 1105.1 is adopted to permit test providers who are approved by the Appraiser Qualifications Board to administer appraiser examinations in New York State.

Section 1105.2 of Title 19 NYCRR is repealed and a new section 1105.2 is adopted to set forth the procedure for test providers to obtain approval from the Department of State to administer appraiser examinations in New York State.

Section 1105.3 of Title 19 NYCRR is repealed and a new section 1103 is adopted to set forth the procedure and requirements for registering and scheduling exam candidates for appraiser examinations.

Section 1105.4 of Title 19 NYCRR is repealed and a new section 1105.4 is adopted to permit the Department to prescribe New York State specific examination questions.

Section 1105.5 of Title 19 NYCRR is repealed and a new section 1105.5 is adopted to require exam providers to report examination results to the

Department of State in such form and manner as prescribed by the Department of State.

Section 1105.6 of Title 19 NYCRR is repealed and a new section 1105.6 is adopted to set forth the procedures associated with suspension and denials of approval to offer appraiser examinations.

Section 1105.7 of Title 19 NYCRR is repealed and a new section 1105.7 is adopted to require test providers to copy the Department of State on any reports sent to the Appraisal Qualifications Board.

Section 1105.8 of Title 19 NYCRR is repealed.

Section 1107.2 of Title 19 NYCRR is amended to specify that licensees must complete 28 hours of approved continuing education every two years, including the 7 hour National USPAP update course in order to renew their license or certification.

Section 1107.4(b)-(d) of Title 19 NYCRR is amended to specify that no more than 14 hours of continuing education credit may be offered for authorship of an appraisal course of study or publication.

Section 1107.5 of Title 19 NYCRR is amended to specify that licensees must complete 28 hours of approved continuing education every two years, including the 7 hour National USPAP update course in order to renew their license or certification.

Section 1107.9 Title 19 NYCRR is amended to remove a dated provision that, for all licenses and certifications expiring on or before December 31, 2003, licensees were required to complete the 15 hour Ethics and Professional Practice Program or a course prescribed by subdivision b of section 1107.9.

**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 November 16, 2009.

**Text of rule and any required statements and analyses may be obtained from:** Whitney A. Clark, Esq., NYS Department of State, Division of Licensing Services, 80 South Swan Street, P.O. Box 22001, Albany, NY 12231, (518) 473-2728.

#### Regulatory Impact Statement

##### 1. Statutory authority:

Executive Law section 160-d authorizes the New York State Board of Real Estate Appraisal to adopt regulations in aid or furtherance of the statute. One of the purposes of Article 6-E is to ensure that licensed and certified real estate appraisers meet certain minimum requirements for licensure. To meet this purpose, the Department of State, in conjunction with the New York State Board of Real Estate Appraisal, has issued rules and regulations which are found at Parts 1103, 1105 and 1107 of Title 19 NYCRR and is proposing this rule making.

##### 2. Legislative objectives:

Executive Law, Article 6-E, requires the Department of State to license and regulate real estate appraisers. The statute requires prospective licensees to meet certain minimum requirements for licensure, including completion of approved qualifying education. These statutory requirements were changed during the 2007 Legislative Session in order to require the Department of State to implement such minimum requirements for licensure as are imposed on the State by the Federal Appraisal Subcommittee. Effective January 1, 2008, the Appraisal Subcommittee required States to enact such minimum standards for licensure and/or certification. The rule making advances the legislative objective by conforming the education regulations with the requirements of the Appraisal Subcommittee in accordance with the 2007 statutory amendment.

##### 3. Needs and benefits:

The Federal Appraisal Qualifications Board (AQB), in accordance with the authority granted to said body pursuant to Title XI of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), establishes the minimum education, experience and examination requirements for real property appraisers to obtain state certification. States are required to implement appraiser certification requirements that are no less stringent than those issued by the AQB.

In 2004, the AQB adopted significant revisions to the education requirements for real estate appraisers. States were required to adopt these requirements by January 1, 2008. A failure to have done so would have resulted in the State losing Federal recognition of the State program.

During the 2007 legislative session, a bill was passed to require the Department of State to adopt education requirements that are no less stringent than those required by the AQB. In response to this bill, the

Department has adopted emergency rules which have been in effect since January 1, 2008. If the Department had failed to adopt these requirements, the New York appraisal program would have lost Federal recognition. This would have resulted in federal financial institutions and many State financial institutions being prohibited from accepting appraisals from New York real estate appraisers. This would include virtually all mortgage and refinance transactions. Appraisers licensed or certified by the State of New York would have been prohibited from preparing an appraisal for any such transaction and New York consumers would have been forced to go out of state in order to obtain an appraisal. The hardship and disruption for the State's financial community, as well as for buyers and sellers of real estate within the State would have been significant.

To ensure that the AQB mandate is met, and to conform the existing education regulations with the statutory amendments, this rule making is necessary.

##### 4. Costs:

###### a. Costs to regulated parties:

The Department of State currently licenses and certifies 7,311 real estate appraisers. Prospective licensees will face increased education costs due to a greater number of required course hours. Currently, each appraiser course costs approximately \$300 resulting in an anticipated cost of \$2,100 for the assistant appraiser courses, \$3,000 for the certified residential courses and \$3,300 for the certified general courses. The costs for continuing education are not expected to increase as a result of this rule making.

###### b. Costs to the Department of State:

The rule does not impose any costs to the agency, the state or local government for the implementation and continuation of the rule.

##### 5. Local government mandates:

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

##### 6. Paperwork:

The rule does not impose any new paperwork requirements. Insofar as prospective licensees are already required to satisfactorily complete qualifying education, conforming the regulations with the recent statutory amendments will not result in additional paperwork requirements.

##### 7. Duplication:

This rule does not duplicate, overlap or conflict with any other state or federal requirement.

##### 8. Alternatives:

The Department of State discussed the need to adopt the rule making at several meetings of the New York State Appraisal Board. Few comments were received that suggested alternatives to the current proposal. General comments were received, including the expressed concern that increasing the educational hours required for certification and licensure would make it more difficult to become licensed and certified. Because the Department is required to propose this rule making by Federal mandate, the hour requirements as set forth in the rule making could not be reduced.

One alternative that is being considered is a legislative amendment to permit on-line qualifying education. While this would not decrease the hours of education required for certification and licensure, it would provide an educational option and flexibility to prospective students.

##### 9. Federal standards:

Title XI of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 establishes the Appraisal Qualifications Board (AQB) which establishes the minimum education, experience and examination requirements for real property appraisers to obtain state certification. States are required to implement appraiser certification requirements that are no less stringent than those issued by the AQB. This rule making conforms the education regulations with the required federal standard.

##### 10. Compliance schedule:

Prospective licensees were required to comply with the rule on January 1, 2008. Insofar as the AQB conducted outreach to the regulated public about the relevant changes effected by this rule mak-

ing, licensees and prospective licensees were notified about the changes and have been able to comply with the rule on the effective dates found in previous emergency adoptions of the rule.

#### **Regulatory Flexibility Analysis**

##### **1. Effect of rule:**

The rule will apply to prospective real estate appraisers who are applying for licensure pursuant to Article 6-E of the Executive Law after January 1, 2008. During the 2007 legislative session, a bill was passed to amend Article 6-E of the Executive Law to require the Department of State to enact such education and experience requirements for licensure or certification as a real estate appraiser that are no less stringent than those requirements imposed on States by the Federal Appraisal Subcommittee. Effective January 1, 2008, the Appraisal Subcommittee required States to enact certain minimum requirements for licensure and/or certification as a real estate appraiser. The rule making merely conforms existing education regulations to the new statutory amendment and requirements of the Appraisal Subcommittee. The rule making will not have any foreseeable impact on jobs or employment opportunities for real estate appraisers.

The rule does not apply to local governments.

##### **2. Compliance requirements:**

Inssofar as the existing statute and regulations already require minimum education and experience requirements for licensure, the rule making will not add any new reporting, record-keeping or other compliance requirements.

The rule does not impose any compliance requirements on local governments.

##### **3. Professional services:**

Licensees will not need to rely on any new professional services in order to comply with the rule. Licensees are already required to satisfy minimum education and experience qualifications pursuant to Article 6-E of the Executive Law. Inssofar as licensees must already attend and complete approved education courses, conforming the regulations with the statute will not result in the need to rely on any new professional services. The Department expects existing education providers to begin offering new approved courses in accordance with the amended statute and the rule making.

The rule does not impose any compliance requirements on local governments.

##### **4. Compliance costs:**

The rule making will not result in any new compliance costs. Prospective licensees are already required to complete, and pay for, qualifying education pursuant to Article 6-E of the Executive Law. Inssofar as licensees must already complete and pay for approved education courses, conforming the education regulations with the recent statutory amendments will not result in any new compliance costs.

The rule does not impose any compliance costs on local governments.

##### **5. Economic and technological feasibility:**

Since the rule does not provide any new record keeping requirements on prospective licensees, it will be technologically feasible for these persons to comply with the rule.

##### **6. Minimizing adverse economic impact:**

The Department of State has not identified any adverse economic impact of this rule. The rule does not impose any additional reporting or record keeping requirements on licensees and does not require prospective licensees to take any affirmative acts to comply with the rule other than those acts that are already required pursuant to Executive Law, Article 6-E.

##### **7. Small business participation:**

Prior to proposing the rule, the Department discussed the proposal at numerous public meetings of the New York State Real Estate Appraisal Board, the minutes of which were posted on the Department's website. The public was given an opportunity to issue comments during the public comment period of these meetings. In addition, the Notice of Proposed Rule Making will be published by the Department of State in the State Register. The publication of the rule in the State Register will provide notice to local governments and additional notice to small businesses of the proposed rule making. Additional comments will be received and entertained.

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

A rural flexibility analysis is not required because this rule does not impose any adverse impact on rural areas, and the rule does not impose any new reporting, record keeping or other compliance requirements on public or private entities in rural areas.

Article 6-E of the Executive Law was amended during the 2007 legislative session, to, in relevant part, require the Department of State to enact such education and experience requirements for licensure or certification as a real estate appraiser that are no less stringent than those requirements imposed on States by the Federal Appraisal Subcommittee. Effective January 1, 2008, the Appraisal Subcommittee required States to enact certain

minimum requirements for licensure and/or certification as a real estate appraiser. The rule making merely conforms existing education regulations to the new statutory amendment and requirements of the Appraisal Subcommittee. Inssofar as the existing statute and regulations already require minimum education and experience requirements for licensure, the rule making will not add any new reporting, record-keeping or other compliance requirements on public or private entities in rural areas.

#### **Job Impact Statement**

A job impact statement is not required because this rule will not have any substantial impact on jobs or employment opportunities for licensed or certified real estate appraisers.

During the 2007 legislative session, a bill was passed to amend Article 6-E of the Executive Law. In pertinent part, the bill required the Department of State to enact such education and experience requirements for licensure or certification as a real estate appraiser that are no less stringent than those requirements imposed on States by the Federal Appraisal Subcommittee. Effective January 1, 2008, the Appraisal Subcommittee required States to enact certain minimum requirements for licensure and/or certification as a real estate appraiser. This rule making merely conforms existing education regulations to the new statutory amendment and requirements of the Appraisal Subcommittee. The rule making will not have any foreseeable impact on jobs or employment opportunities for real estate appraisers.