

# 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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## Department of Civil Service

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### NOTICE OF ADOPTION

#### Jurisdictional Classification

**I.D. No.** CVS-06-12-00004-A

**Filing No.** 989

**Filing Date:** 2012-09-28

**Effective Date:** 2012-10-17

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

**Action taken:** Amendment of Appendix 2 of Title 4 NYCRR.

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

**Subject:** Jurisdictional Classification.

**Purpose:** To delete positions from and classify positions in the non-competitive class.

**Text or summary was published** in the February 8, 2012 issue of the Register, I.D. No. CVS-06-12-00004-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Shirley LaPlante, NYS Department of Civil Service, AESSOB, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us

#### Assessment of Public Comment

The agency received no public comment.

### NOTICE OF ADOPTION

#### Jurisdictional Classification

**I.D. No.** CVS-06-12-00006-A

**Filing No.** 988

**Filing Date:** 2012-09-28

**Effective Date:** 2012-10-17

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

**Action taken:** Amendment of Appendixes 1 and 2 of Title 4 NYCRR.

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

**Subject:** Jurisdictional Classification.

**Purpose:** Add subheading in exempt and non-competitive classes; classify and delete positions in the exempt and non-competitive classes.

**Text or summary was published** in the February 8, 2012 issue of the Register, I.D. No. CVS-06-12-00006-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Shirley LaPlante, NYS Department of Civil Service, AESSOB, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us

#### Assessment of Public Comment

The agency received no public comment.

### NOTICE OF ADOPTION

#### Supplemental Military Leave Benefits

**I.D. No.** CVS-08-12-00022-A

**Filing No.** 990

**Filing Date:** 2012-09-28

**Effective Date:** 2012-10-17

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

**Action taken:** Amendment of sections 21.15 and 28-1.17 of Title 4 NYCRR.

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

**Subject:** Supplemental military leave benefits.

**Purpose:** To extend the availability of supplemental military leave benefits for certain New York State employees until December 31, 2012.

**Text or summary was published** in the February 22, 2012 issue of the Register, I.D. No. CVS-08-12-00022-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Shirley LaPlante, NYS Department of Civil Service, AESSOB, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us

#### Assessment of Public Comment

The agency received no public comment.

## NOTICE OF ADOPTION

**Jurisdictional Classification****I.D. No.** CVS-11-12-00012-A**Filing No.** 987**Filing Date:** 2012-09-28**Effective Date:** 2012-10-17

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

**Action taken:** Amendment of Appendixes 1 and 2 of Title 4 NYCRR.

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

**Subject:** Jurisdictional Classification.

**Purpose:** Delete and classify headings in exempt and non-competitive class, delete and classify positions in exempt and non-competitive class.

**Text or summary was published** in the March 14, 2012 issue of the Register, I.D. No. CVS-11-12-00012-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Shirley LaPlante, NYS Department of Civil Service, AESSOB, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

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## Division of Housing and Community Renewal

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## NOTICE OF ADOPTION

**Regulations Govern the Implementation of the Rent Stabilization Laws****I.D. No.** HCR-28-12-00002-A**Filing No.** 994**Filing Date:** 2012-10-02**Effective Date:** 2012-10-17

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

**Action taken:** Amendment of sections 2520.11(1)(i)(c)(1), (iv)(a), (r), (s), 2522.4(a)(4), 2522.8(a)(3), 2526.2(c), 2531.2, 2531.3, 2531.4 and 2531.5 of Title 9 NYCRR.

**Statutory authority:** L. 1974, ch. 576, section 10a; NYC Admin Code section 26-511(b), as recodified by L. 1985, ch.907, section 1 as added by L. 1985, ch. 888, section 8, and L. 2011, ch. 97, section 44, part B

**Subject:** Regulations govern the implementation of the Rent Stabilization Laws.

**Purpose:** To comply with L. 2011, ch. 97, section 44, part B and L. 2009, ch. 480.

**Text or summary was published** in the July 11, 2012 issue of the Register, I.D. No. HCR-28-12-00002-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Gary R. Connor, General Counsel, Division of Housing and Community Renewal, 25 Beaver Street, 7th Floor, New York, New York 10004, (212) 480-6707, email: gconnor@nyshcr.org

**Assessment of Public Comment**

A Notice of Proposed Rule Making was published in the State Register on July 11, 2012. The Division of Housing and Community Renewal (DHCR) received comments submitted to the agency and/or presented at the public hearing held on the proposed rules by the agency on August 28, 2012. The comments were from individual tenants, tenant advocacy organizations, and landlord advocacy organizations. None of the comments were specifically related to the proposed amendments. Instead, most of the comments expressed that the proposed amendments were merely technical changes made in order to conform to the change in the rent laws pursuant to the 2011 and 2009 Laws. Although the comments were not specifically related to the proposed amendments, a summary of

the predominant issues raised by the comments is provided below. While these comments do not specifically relate to the proposed amendments, DHCR will take into consideration these comments for any future amendments.

**Issue #1:**

**Major Capital Improvements (MCI):** Most of the comments on this issue expressed the importance of changes to the MCI system by having greater oversight by DHCR. Some of the frequent suggestions include not allowing an MCI increase based on cosmetic improvements or where based on past landlord negligence; not allowing an MCI increase where more than two hazardous conditions or immediately hazardous conditions exist at the premises; not allowing an MCI where a landlord had been found guilty of tenant harassment; not allowing an MCI increase where there is a rent reduction order in place, or a reduction in services complaint is under investigation at the time of the application; not allowing an MCI where the improvements can be funded through other governmental agencies. Some comments suggested that the MCI increases should be a temporary surcharge until the work is paid for instead of a permanent increase to the rent and that DHCR should facilitate tenant participation in the MCI review process and provide easy access to relevant documents. Finally, there was a suggestion that DHCR better clarify the nature and extent of improvements which will and will not be granted.

**Issue #2**

**Individual Apartment Improvements (IAI):** Most of the comments on this issue expressed the importance of more oversight by DHCR of the IAI system which permits increases to the rent based on improvements done in an apartment usually when the apartment is vacant without first requiring DHCR's approval. Some of the frequent suggestions include; requiring the landlord to apply to DHCR for pre-approval where the vacancy improvements would increase the rent by more than 20%; requiring the landlord to submit documentation of the type and costs of all IAIs and DHCR should conduct random audits of the documentation; disallowing increases for cosmetic improvements or for correction of prior neglect; establishing price guidelines for work and material based on the reasonable cost of the work; requiring the use of licensed contractors; DHCR should provide tenants with written notice of the apartment rent history, detailed descriptions of the work claimed by the landlord, and notice of the right to file a Complaint of Rent Overcharge or alternatively landlords should be required to provide such written notice.

**Issue #3**

**Rent Registrations:** Most of the comments on this issue expressed the importance of eliminating the changes to the regulations in 2000. Frequently suggested were the following; that the base date rent should be the rent listed in the most recent prior registration; require full documentation to support amended registrations and require notice to tenants of such amendments; permit challenges to late and amended registrations filed after the base date; repeated failure to register by a landlord should lead to investigations and possible fines.

**Issue #4**

**Roberts v. Tishman Speyer decision/J-51:** Most of the comments on this issue expressed the importance of DHCR taking action to re-regulate unlawfully deregulated apartments in J-51 buildings impacted by Roberts v. Tishman Speyer and that DHCR should work to develop a method for coordinating its tracking systems with the systems maintained by NYC agencies to identify apartments that were improperly deregulated.

**Issue #5**

**Remaining Family Members:** the comments on this issue expressed the idea that DHCR should amend the regulations to supersede recent court decisions that have denied claims by tenants' family members. The comments suggested that DHCR should specifically permit succession based on co-occupancy prior to the tenant of record's physical vacature of the apartment, regardless of whether the tenant formally surrendered his tenancy rights to the landlord.

**Issue #6**

**High-income deregulation:** The comment on this issue expressed that DHCR's processing of the income certification routinely takes longer than the time required by statute. It was proposed that DHCR explore changes in operations and procedures so the process can better reflect statutory time frames. Also suggested was that DHCR use its resources to prevent over-income tenants from shielding income from the determination of household income so high income tenants cannot manipulate the rent regulation system.

**Issue #7**

**Four Year Rule:** The comment on this issue suggested the following: DHCR should restore the original legislative intent, which was that the rent be determined in accordance with the registration documents that are a matter of public record, as long as they remain unchallenged for four years; DHCR's orders and prior rent registration records, no matter how long ago they were issued, should be considered in determining the legal regulated rent.

## Issue #8

**Owner Use Evictions:** The comment on this issue suggested that DHCR amend the language which allows an owner to take over “one or more” regulated apartments for owner occupancy. The suggestion was that DHCR limit the definition of “more” to a definite and reasonable number, such as three apartments in a building containing twenty or fewer units, with a slightly higher number in larger buildings.

## Issue #9

**Preferential Rents:** The comment on this issue suggested that DHCR amend the regulation so that it is consistent with recent court decisions and make clear that in order to “establish” a legal regulated rent that is higher than the rent charged, landlords must set forth both the legal regulated rent and the preferential rent in all leases and registration statements. Further, it was suggested that DHCR amend the regulations to state that preferential rents are permanent when there is language in a tenant’s lease stating that it is permanent and landlords should be required to inform tenants that they have four years to challenge the first non-preferential rent.

## Issue #10

**Overcharge complaints:** The comment on this issue suggested that DHCR alter its processing procedures for overcharge complaints so that delays are eliminated and immediate action be taken to eliminate the extensive backlog of cases. Further, it was suggested that DHCR move from strictly responding to rent overcharge complaints from individual tenants to proactively investigating entire buildings where multiple and/or repeated overcharges are likely taking place.

## Issue #11

**Vacancy Decontrol:** The comment on this issue suggested the following changes to reduce the frequency of illegal vacancy deregulation: significant penalties against owners who illegally decontrol units based on fraudulent claims; owners must apply for permission to deregulate units based on vacancy decontrol; random audits of applications for vacancy decontrol conducted and DHCR should use its subpoena powers to evaluate questionable cases; owner required to provide first non-regulated tenant of decontrolled units written notice explaining that the apartment was deregulated and that the tenant has the right to appeal the decision to DHCR; if owner fails to apply for deregulation within four years after the prior stabilized rent registration, the owner loses the right to apply.

## Issue #12

**Rent Restorations:** The comment on this issue suggested that DHCR rescind the 2000 amendment which created a rebuttable presumption that a service has been restored when an owner submits an engineer’s or architect’s affidavit. Also suggested was that a restoration application should not be granted while hazardous or immediately hazardous violations placed by other agencies that are the subject of the rent reduction remain.

## Issue #13

**Demolitions:** The comment on this issue suggested the following: when an owner submits a demolition application, he/she must be required to submit approved building plans and proof of financial ability to demolish the existing building and construct a new one; for an application to be approved, the owner must propose to raze the entire building to the ground; the owner must prove that the building being considered for demolition is unsafe; DHCR should restore the tenants’ right to a hearing; if it is established that the owner harassed tenants in order to force them from the units, the owner’s application should be denied; discovery should be permitted in demolition proceedings.

## Issue #14

**Harassment:** The comment on this issue suggested the following: DHCR must prioritize and expedite cases that significantly affect the tenant’s use of the apartment or the tenant’s health and safety; complaints should be tracked by building and landlord and the data used to expedite cases involving multiple accusations against the same landlord; an appeals process must be implemented to permit tenants to request a hearing even if DHCR does not recommend one; a fine should be mandatory if the landlord is found guilty and fines should be imposed for every individual act of harassment; the current provision that prohibits owners from collecting rent increases until there is a finding that the harassment has ended must be strictly enforced; the threshold for lifting a harassment finding should be higher; harassment findings must not be lifted simply because the tenant has moved out; tenants should be made aware that they may report incidents and behaviors that they consider harassment, even if not specifically stated on the DHCR form; DHCR should utilize the resources of the housing courts and other agencies to gather proof of landlord’s harassment; DHCR should adopt a definition of harassment that mirrors the definition used in New York City’s Tenant Protection Act.

## NOTICE OF ADOPTION

**Regulations Govern the Implementation of the State Rent Control Laws**

I.D. No. HCR-28-12-00003-A

Filing No. 995

Filing Date: 2012-10-02

Effective Date: 2012-10-17

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

**Action taken:** Amendment of sections 2100.9(v), (w), 2102.3(b)(1)(i)(b), 2110.2, 2110.3, 2110.4 and 2110.5 of Title 9 NYCRR.

**Statutory authority:** Emergency Housing Rent Control Law, L. 1946, ch. 274, subd. 4(a), as amended by L. 1950, ch. 250, as amended by, as transferred to the Division of Housing and Community Renewal by L. 1964, ch. 244 and L. 2011, ch. 97, part B, section 44

**Subject:** Regulations govern the implementation of the State Rent Control Laws.

**Purpose:** To comply with the L. 2011, ch. 97, part B.

**Text or summary was published** in the July 11, 2012 issue of the Register, I.D. No. HCR-28-12-00003-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Gary R. Connor, General Counsel, Division of Housing and Community Renewal, 25 Beaver Street, 7th Floor, New York, New York 10004, (212) 480-6707, email: gconnor@nyshcr.org

**Assessment of Public Comment**

The agency received no public comment.

## NOTICE OF ADOPTION

**Regulations Govern the Implementation of the Emergency Tenant Protection Act**

I.D. No. HCR-28-12-00004-A

Filing No. 996

Filing Date: 2012-10-02

Effective Date: 2012-10-17

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

**Action taken:** Amendment of sections 2500.9(1)(1)(i)(a)(3)(i), (d)(1), (m), (n), 2502.4(a)(4), 2502.7(a), 2506.2(c), 2511.2, 2511.3, 2511.4 and 2511.5 of Title 9 NYCRR.

**Statutory authority:** The Emergency Tenant Protection Act of 1974, L.1974, ch. 576, section 10a and L. 2011, ch. 97, part B, section 44

**Subject:** Regulations govern the implementation of the Emergency Tenant Protection Act.

**Purpose:** To comply with the L. 2011, ch. 97, part B and the L. 2009, ch. 480.

**Text or summary was published** in the July 11, 2012 issue of the Register, I.D. No. HCR-28-12-00004-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Gary R. Connor, General Counsel, Division of Housing and Community Renewal, 25 Beaver Street, 7th Floor, New York, New York 10004, (212) 480-6707, email: gconnor@nyshcr.org

**Assessment of Public Comment**

The agency received no public comment.

## NOTICE OF ADOPTION

**Regulations Govern the Implementation of the New York City Rent Control Laws**

I.D. No. HCR-28-12-00005-A

Filing No. 993

Filing Date: 2012-10-02

Effective Date: 2012-10-17

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

**Action taken:** Amendment of sections 2200.2(f)(19), (20), 2202.4(a)(2), 2206.3, 2211.2, 2211.3, 2211.4 and 2211.5 of Title 9 NYCRR.

**Statutory authority:** The Omnibus Housing Act, L. 1983, ch. 403, section 28(not subdivided); Administrative Code of the City of New York section 26-405g(1); and L. 2011, ch. 97, section 44, part B

**Subject:** Regulations govern the implementation of the New York City Rent Control Laws.

**Purpose:** To comply with L. 2011, ch. 97, part B and L. 2009, ch. 480.

**Text or summary was published** in the July 11, 2012 issue of the Register, I.D. No. HCR-28-12-00005-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Gary R. Connor, General Counsel, Division of Housing and Community Renewal, 25 Beaver St., 7th Fl., New York, NY 10004, (212) 480-6707, email: gconnor@nysdcr.org

#### Assessment of Public Comment

A Notice of Proposed Rule Making was published in the State Register on July 11, 2012. The Division of Housing and Community Renewal (DHCR) received comments submitted to the agency and/or presented at the public hearing held on the proposed rules by the agency on August 28, 2012. The comments were from individual tenants, tenant advocacy organizations, and landlord advocacy organizations. None of the comments were specifically related to the proposed amendments. Instead, most of the comments expressed that the proposed amendments were merely technical changes made in order to conform to the change in the rent laws pursuant to the 2011 and 2009 Laws. Although the comments were not specifically related to the proposed amendments, a summary of the predominant issues raised by the comments is provided below. While these comments do not specifically relate to the proposed amendments, DHCR will take into consideration these comments for any future amendments.

##### Issue #1

**Major Capital Improvements (MCI):** Most of the comments on this issue expressed the importance of changes to the MCI system by having greater oversight by DHCR. Some of the frequent suggestions include not allowing an MCI increase based on cosmetic improvements or where based on past landlord negligence; not allowing an MCI increase where more than two hazardous conditions or immediately hazardous conditions exist at the premises; not allowing an MCI where a landlord had been found guilty of tenant harassment; not allowing an MCI increase where there is a rent reduction order in place, or a reduction in services complaint is under investigation at the time of the application; not allowing an MCI where the improvements can be funded through other governmental agencies. Some comments suggested that the MCI increases should be a temporary surcharge until the work is paid for instead of a permanent increase to the rent and that DHCR should facilitate tenant participation in the MCI review process and provide easy access to relevant documents. Finally, there was a suggestion that DHCR better clarify the nature and extent of improvements which will and will not be granted.

##### Issue #2

**Individual Apartment Improvements (IAI):** Most of the comments on this issue expressed the importance of more oversight by DHCR of the IAI system which permits increases to the rent based on improvements done in an apartment usually when the apartment is vacant without first requiring DHCR's approval. Some of the frequent suggestions include; requiring the landlord to apply to DHCR for pre-approval where the vacancy improvements would increase the rent by more than 20%; requiring the landlord to submit documentation of the type and costs of all IAIs and DHCR should conduct random audits of the documentation; disallowing increases for cosmetic improvements or for correction of prior neglect; establishing price guidelines for work and material based on the reasonable cost of the work; requiring the use of licensed contractors; DHCR should provide tenants with written notice of the apartment rent history, detailed descriptions of the work claimed by the landlord, and notice of the right to file a Complaint of Rent Overcharge or alternatively landlords should be required to provide such written notice.

##### Issue #3

**Rent Registrations:** Most of the comments on this issue expressed the importance of eliminating the changes to the regulations in 2000. Frequently suggested were the following; that the base date rent should be the rent listed in the most recent prior registration; require full documentation to support amended registrations and require notice to tenants of such amendments; permit challenges to late and amended registrations filed after the base date; repeated failure to register by a landlord should lead to investigations and possible fines.

##### Issue #4

**Roberts v. Tishman Speyer decision/J-51:** Most of the comments on this issue expressed the importance of DHCR taking action to re-regulate

unlawfully deregulated apartments in J-51 buildings impacted by Roberts v. Tishman Speyer and that DHCR should work to develop a method for coordinating its tracking systems with the systems maintained by NYC agencies to identify apartments that were improperly deregulated.

##### Issue #5

**Remaining Family Members:** The comments on this issue expressed the idea that DHCR should amend the regulations to supersede recent court decisions that have denied claims by tenants' family members. The comments suggested that DHCR should specifically permit succession based on co-occupancy prior to the tenant of record's physical vacature of the apartment, regardless of whether the tenant formally surrendered his tenancy rights to the landlord.

##### Issue #6

**High-income deregulation:** The comment on this issue expressed that DHCR's processing of the income certification routinely takes longer than the time required by statute. It was proposed that DHCR explore changes in operations and procedures so the process can better reflect statutory time frames. Also suggested was that DHCR use its resources to prevent over-income tenants from shielding income from the determination of household income so high income tenants cannot manipulate the rent regulation system.

##### Issue #7

**Four Year Rule:** The comment on this issue suggested the following: DHCR should restore the original legislative intent, which was that the rent be determined in accordance with the registration documents that are a matter of public record, as long as they remain unchallenged for four years; DHCR's orders and prior rent registration records, no matter how long ago they were issued, should be considered in determining the legal regulated rent.

##### Issue #8

**Owner Use Evictions:** The comment on this issue suggested that DHCR amend the language which allows an owner to take over "one or more" regulated apartments for owner occupancy. The suggestion was that DHCR limit the definition of "more" to a definite and reasonable number, such as three apartments in a building containing twenty or fewer units, with a slightly higher number in larger buildings.

##### Issue #9

**Preferential Rents:** The comment on this issue suggested that DHCR amend the regulation so that it is consistent with recent court decisions and make clear that in order to "establish" a legal regulated rent that is higher than the rent charged, landlords must set forth both the legal regulated rent and the preferential rent in all leases and registration statements. Further, it was suggested that DHCR amend the regulations to state that preferential rents are permanent when there is language in a tenant's lease stating that it is permanent and landlords should be required to inform tenants that they have four years to challenge the first non-preferential rent.

##### Issue #10

**Overcharge complaints:** The comment on this issue suggested that DHCR alter its processing procedures for overcharge complaints so that delays are eliminated and immediate action be taken to eliminate the extensive backlog of cases. Further, it was suggested that DHCR move from strictly responding to rent overcharge complaints from individual tenants to proactively investigating entire buildings where multiple and/or repeated overcharges are likely taking place.

##### Issue #11

**Vacancy Decontrol:** The comment on this issue suggested the following changes to reduce the frequency of illegal vacancy deregulation: significant penalties against owners who illegally decontrol units based on fraudulent claims; owners must apply for permission to deregulate units based on vacancy decontrol; random audits of applications for vacancy decontrol conducted and DHCR should use its subpoena powers to evaluate questionable cases; owner required to provide first non-regulated tenant of decontrolled units written notice explaining that the apartment was deregulated and that the tenant has the right to appeal the decision to DHCR; if owner fails to apply for deregulation within four years after the prior stabilized rent registration, the owner loses the right to apply.

##### Issue #12

**Rent Restorations:** The comment on this issue suggested that DHCR rescind the 2000 amendment which created a rebuttable presumption that a service has been restored when an owner submits an engineer's or architect's affidavit. Also suggested was that a restoration application should not be granted while hazardous or immediately hazardous violations placed by other agencies that are the subject of the rent reduction remain.

##### Issue #13

**Demolitions:** The comment on this issue suggested the following: when an owner submits a demolition application, he/she must be required to submit approved building plans and proof of financial ability to demolish the existing building and construct a new one; for an application to be ap-

proved, the owner must propose to raze the entire building to the ground; the owner must prove that the building being considered for demolition is unsafe; DHCR should restore the tenants' right to a hearing; if it is established that the owner harassed tenants in order to force them from the units, the owner's application should be denied; discovery should be permitted in demolition proceedings.

**Issue #14**

**Harassment:** The comment on this issue suggested the following: DHCR must prioritize and expedite cases that significantly affect the tenant's use of the apartment or the tenant's health and safety; complaints should be tracked by building and landlord and the data used to expedite cases involving multiple accusations against the same landlord; an appeals process must be implemented to permit tenants to request a hearing even if DHCR does not recommend one; a fine should be mandatory if the landlord is found guilty and fines should be imposed for every individual act of harassment; the current provision that prohibits owners from collecting rent increases until there is a finding that the harassment has ended must be strictly enforced; the threshold for lifting a harassment finding should be higher; harassment findings must not be lifted simply because the tenant has moved out; tenants should be made aware that they may report incidents and behaviors that they consider harassment, even if not specifically stated on the DHCR form; DHCR should utilize the resources of the housing courts and other agencies to gather proof of landlord's harassment; DHCR should adopt a definition of harassment that mirrors the definition used in New York City's Tenant Protection Act.

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## Long Island Power Authority

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### NOTICE OF ADOPTION

**Remote Net Metering**

**I.D. No.** LPA-29-12-00012-A  
**Filing Date:** 2012-10-02  
**Effective Date:** 2012-10-02

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

**Action taken:** The Long Island Power Authority adopted a proposal to modify its Tariff for Electric Service ("Tariff") to implement remote net metering and to increase the cap within the Tariff on participation in net metering.

**Statutory authority:** Public Authorities Law, section 1020-f(z) and (u); and Public Service Law, sections 66-j and 66-l

**Subject:** Remote net metering.

**Purpose:** To implement remote net metering and to increase the cap within the Tariff on participation in net metering.

**Text or summary was published** in the July 18, 2012 issue of the Register, I.D. No. LPA-29-12-00012-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Andrew McCabe, Long Island Power Authority, 333 Earle Ovington Blvd., Suite 403, Uniondale, NY 11553, (516) 222-7700, email: amccabe@lipower.org

**Revised Regulatory Impact Statement**

A revised regulatory impact statement 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.

**Revised Regulatory Flexibility Analysis**

A revised regulatory flexibility analysis 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.

**Revised Rural Area Flexibility Analysis**

A revised rural area flexibility analysis 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.

**Revised Job Impact Statement**

A revised job impact statement 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.

**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.

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## Office of Mental Health

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### NOTICE OF ADOPTION

**Rates of Reimbursement - Hospitals Licensed by the Office of Mental Health**

**I.D. No.** OMH-33-12-00004-A  
**Filing No.** 998  
**Filing Date:** 2012-10-02  
**Effective Date:** 2012-10-17

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

**Action taken:** Amendment of Part 577 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 7.09 and 43.02; L. 2012, ch.56

**Subject:** Rates of Reimbursement - Hospitals Licensed by the Office of Mental Health.

**Purpose:** To amend the audit protocol for hospitals licensed by OMH pursuant to article 31 of the Mental Hygiene Law.

**Text or summary was published** in the August 15, 2012 issue of the Register, I.D. No. OMH-33-12-00004-EP.

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

**Text of rule and any required statements and analyses may be obtained from:** Sue Watson, NYS Office of Mental Health, 44 Holland Ave., Albany, NY 12229, (518) 474-1331, email: Sue.Watson@omh.ny.gov

**Assessment of Public Comment**

The agency received no public comment.

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

**Clinic Treatment Programs**

**I.D. No.** OMH-42-12-00002-P

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

**Proposed Action:** This is a consensus rule making to amend Part 599 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 7.09 and 31.04

**Subject:** Clinic Treatment Programs.

**Purpose:** Make a minor technical change and correct small inaccuracies in existing regulation.

**Text of proposed rule:** 1. Subdivision (ao) of section 599.4 of Title 14 NYCRR is repealed and the remainder of the section is re-lettered accordingly.

2. Subdivision (d) and paragraphs (1), (2) and (3) of section 599.8 of Title 14 NYCRR are repealed.

3. Subdivision (c) of section 599.9 of Title 14 NYCRR is amended to read as follows:

(c) All clinic staff of providers licensed solely under Article 31 of the Mental Hygiene Law who are directly involved in providing services shall submit to criminal background checks. All clinic staff with the potential for regular and substantial contact with children in performance of their duties shall submit to clearance by the New York Statewide Central Register of Child Abuse and Maltreatment. Clinic staff members who have not been screened by the New York Statewide Central Register of Child Abuse and Maltreatment[,] shall not perform duties requiring contact with children unless there is another staff member present.

4. Subdivision (e) of section 599.14 of Title 14 NYCRR is amended to read as follows:

Modifier Chart for Services Provided On-Site

Office of Mental Health Service Name	After Hours	Language other than English	Physician/ NPP
Complex Care Management	X	X	

Crisis Intervention Service - Per 15 minutes	X	X	
Crisis Intervention Service - Per Hour	X	X	
Crisis Intervention Service - Per Diem	X	X	
Developmental and Psychological Testing	X	X	
[Injectable Psychotropic Medication Administration - when medication is obtained without cost to clinic - No Time Limit]	[X]		
Injectable Psychotropic Medication Administration with Monitoring and Education - Minimum of 15 Minutes	X	X	
Psychotropic Medication Treatment - Minimum of 15 Minutes	X	X	
Initial Mental Health Assessment, Diagnostic Interview, and Treatment Plan Development	X	X	X
Psychiatric Assessment - Minimum of 30 Minutes	X	X	
Psychiatric Assessment - Minimum of 45 Minutes	X	X	
Individual Psychotherapy - Minimum of 30 Minutes	X	X	X
Individual Psychotherapy - Minimum of 45 Minutes	X	X	X
Group and Multifamily/Collateral Group Psychotherapy - Minimum of 60 Minutes	X	X	X
Family Therapy/Collateral without patient - Minimum of 30 minutes	X	X	X
Family Therapy/Collateral with patient - Minimum of 60 minutes	X	X	X

**Text of proposed rule and any required statements and analyses may be obtained from:** Sue Watson, NYS Office of Mental Health, 44 Holland Avenue, Albany, NY 12229, (518) 474-1331, email: Sue.Watson@omh.ny.gov

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

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

**Consensus Rule Making Determination**

This rule making is filed as a Consensus rule on the grounds that its purpose is to make a technical change and correct minor inaccuracies in the existing regulations.

Part 599 establishes the standards for the certification, operation and reimbursement of clinic treatment programs serving adults and children. The Office of Mental Health (Office) has determined that a few small changes are necessary to clarify issues or correct minor inaccuracies as follows:

(1) The modifier chart in Section 599.14 incorrectly indicates that providers may submit claims using the billing modifier for Injectable Psychotropic Medication Administration services provided after hours. The Office has no choice in this matter as the billing system (eMedNY) does not allow the use of the after-hours modifier for this service.

(2) The existing regulations include a definition of "Physician fee schedule", which is an outdated term that is not mentioned at any point in the regulations. The definition is unnecessary and could be confusing to providers if not eliminated.

(3) The existing regulations list the services that must be provided by a Child and Family Clinic-Plus provider. As this program is no longer in existence, the language is not necessary.

(4) Lastly, a grammatical error in Section 599.9 will be corrected by this rule making.

Statutory Authority: Sections 7.09 and 31.04 of the Mental Hygiene Law grant the Commissioner of Mental Health the power and responsibility to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction, and to set standards of quality and adequacy of facilities, equipment, personnel, services, records and programs for the rendition of services for adults diagnosed with mental illness or children diagnosed with emotional disturbance, pursuant to an operating certificate.

**Job Impact Statement**

A Job Impact Statement is not submitted with this notice because it is evident from the subject matter of the rule making that there will be no impact upon jobs and employment opportunities. The rule making merely serves to make a small technical change and correct minor inaccuracies in the existing regulation.

**Department of Motor Vehicles**

**NOTICE OF ADOPTION**

**Rockland County Motor Vehicle Use Tax**

**I.D. No.** MTV-33-12-00013-A

**Filing No.** 997

**Filing Date:** 2012-10-02

**Effective Date:** 2012-10-17

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

**Action taken:** Amendment of section 29.12(ak) of Title 15 NYCRR.

**Statutory authority:** Vehicle and Traffic Law, sections 215(a) and 401(6)(d)(ii); and Tax Law, section 1202(c)

**Subject:** Rockland County motor vehicle use tax.

**Purpose:** To impose a Rockland County motor vehicle use tax.

**Text or summary was published** in the August 15, 2012 issue of the Register, I.D. No. MTV-33-12-00013-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Heidi Bazicki, DMV, 6 Empire State Plaza, Rm. 522A, Albany, NY 12228, (518) 474-0871, email: heidi.bazicki@dmv.ny.gov

**Assessment of Public Comment**

The agency received no public comment.

**Office for People with Developmental Disabilities**

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

**Person-Centered Behavioral Intervention**

**I.D. No.** PDD-52-11-00020-RP

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

**Proposed Action:** Addition of section 633.16; and amendment of Parts 81, 624, 633 and 681 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 13.07, 13.09(b) and 16.00

**Subject:** Person-Centered Behavioral Intervention.

**Purpose:** To establish requirements for interventions used in the OPWDD system to modify or control challenging behavior.

**Substance of revised rule:** The revised proposed regulations establish new requirements concerning behavioral interventions in the OPWDD system. OPWDD is proposing the addition of a new 14 NYCRR Section 633.16, which contains comprehensive requirements for supports and interventions related to challenging behavior. These new requirements will help agencies provide high quality services, and will protect the rights and welfare of individuals receiving services.

The new Section 633.16 contains a number of provisions to protect the health, safety and rights of individuals who engage in challenging behaviors. Among the provisions of Section 633.16 are the following:

- Aversive conditioning is prohibited.
- Agencies must conduct a functional behavioral assessment to obtain relevant information for effective intervention planning before a behavior

support plan is developed to address challenging behavior. Specific components must be addressed or included in the functional behavioral assessment.

- Behavior support plans must be developed that are specific to each person who exhibits challenging behavior. These plans specify the interventions that may be used. The regulations establish a number of components that must be included in the plan. Among the specific required components of behavior support plans is the inclusion of a hierarchy of behavioral approaches, strategies, and supports to address the behavior(s) requiring intervention, with the preferred methods being positive approaches, strategies and supports.

- Additional safeguards are established for plans that contain “restrictive/intrusive interventions” or limitations on a person’s rights.” “Restrictive/intrusive interventions” are defined in the regulation and include specific behavioral interventions such as “intermediate” and “restrictive” physical intervention techniques (hands-on techniques), use of “time-out,” use of mechanical restraining devices, and use of medication to modify or control challenging behavior.

- Safeguards and protections related to restrictive/intrusive interventions and limitations on a person’s rights include:

- Additional components must be included in the person’s behavior support plan. Plans must be developed or supervised by a licensed psychologist, licensed clinical social worker, or behavioral intervention specialist (either Level 1 or 2, with the appropriate supervision outlined in the regulation). Those providers who demonstrate sustained hardship in recruiting employees or contractors who meet the specified qualifications, may apply to OPWDD for a waiver.

- Plans must be reviewed and sanctioned before implementation by a behavior plan review /human rights committee. Required membership and procedures for these committees are established. (The requirement for committee review does not apply to monitoring plans that include medication to treat a co-occurring diagnosed psychiatric condition. The regulations describe standards for determining what constitutes a “co-occurring diagnosed psychiatric disorder”)

- Informed consent is required for the use of restrictive/intrusive interventions and for the use of psychotropic medications. Procedures are established to determine whether the person receiving services is capable of providing informed consent. If an individual is not capable of providing informed consent, procedures are established for obtaining informed consent from designated surrogate decision makers (e.g. actively involved parents and actively involved family members). In the event that no other surrogate is reasonably available and willing, consent can be sought from the Willowbrook Consumer Advisory Board or an informed consent committee. Required membership and procedures are established for the informed consent committee. Consent can also be obtained from a court.

- Procedures are established for objecting to interventions in behavior support plans, and addressing a lack of informed consent. Procedures are also established concerning refusal by the individual receiving services to take medication.

- Requirements are included for training of staff, family care providers and respite substitute providers.

- Additional safeguards are established for the use of physical intervention techniques (hands-on techniques). Physical intervention techniques are categorized as protective, intermediate or restrictive. Among these safeguards are requirements for training and certification in the use of the techniques.

- Additional safeguards are established for the limitations on a person’s rights.

- Additional safeguards are established for the use of “time-out.” “Time-out” includes both exclusionary time-out (placing a person in a specific time-out room), and non-exclusionary time-out (removing the positively reinforcing environment from the individual.) Environmental requirements are established for time-out rooms.

- Additional safeguards are established for the use of mechanical restraining devices.

- Additional safeguards are established for the use of medication to modify or control challenging behavior, and/or to treat a diagnosed co-occurring psychiatric disorder. Safeguards include monitoring plans to be completed when medication is used to treat co-occurring diagnosed psychiatric conditions.

- The new Section 633.16 references existing requirements in Section 633.17(a)(18) concerning medication regimen reviews. Results of these reviews must be provided to prescribers and the program planning team.

- The regulations specify that restrictive/intrusive interventions cannot be used in an emergency, except for intermediate and restrictive physical intervention techniques and the use of medication. Limitations on a person’s rights can also be used in an emergency.

- Provisions are established for phasing-in the requirements. Requirements for new behavior support plans (and associated informed consent)

are applied 45 days after the regulation becomes effective, and requirements for existing plans (and associated informed consent) are applied a year after that. This will enable agencies to apply the new development standards to existing behavior support plans during regularly scheduled reviews.

The regulation also amends 14 NYCRR Section 681.13, which contains requirements applicable to behavior management in ICF/DD facilities. The provisions of this section address many of the same issues that are addressed in Section 633.16. The amendments to Section 681.13 phase out the requirements of that section in conjunction with the phase-in of the requirements of the new Section 633.16. Once Section 633.16 is fully phased in, Section 681.13 will no longer be effective. Outdated and duplicative requirements in Part 81 are deleted.

14 NYCRR Part 624 is amended so that new definitions of categories of abuse become effective once Section 633.16 is fully phased in. These new definitions conform to Section 633.16 so that if interventions are used which are not in accordance with the requirements of the new section, their use is considered to be abuse (unless actions were taken that were necessary to address an immediate risk to the health or safety of the person or others). Definitions in the glossary of Part 624 are also changed to conform to the new definitions in Section 633.16.

14 NYCRR Part 633 is amended to enhance protections related to limiting the rights of a person receiving services and to conform to protections related to limitation of rights in the new Section 633.16. Definitions in Section 633.99 are also changed to conform to the new definitions used in Section 633.16.

**Revised rule compared with proposed rule:** Substantial revisions were made in sections 633.16, 633.17 and 633.99.

**Text of revised proposed rule and any required statements and analyses may be obtained from** Barbara Brundage, Director, Regulatory Affairs Unit, Office for People With Developmental Disabilities, 44 Holland Ave., 3rd floor, Albany, NY 12229, (518) 474-1830, email: barbara.brundage@opwdd.ny.gov

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

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

**Additional matter required by statute:** Pursuant to the requirements of the State Environmental Quality Review Act, OPWDD, as lead agency, has determined that the action described herein will have no effect on the environment, and an E.I.S. is not needed.

#### **Revised Regulatory Impact Statement**

##### 1. Statutory Authority:

a. OPWDD has the statutory responsibility to provide and encourage the provision of appropriate programs and services in the area of care, treatment, rehabilitation, education and training of persons with developmental disabilities, as stated in the New York State Mental Hygiene Law Section 13.07.

b. OPWDD has the statutory authority to adopt rules and regulations necessary and proper to implement any matter under its jurisdiction as stated in the New York State Mental Hygiene Law Section 13.09(b).

c. OPWDD has the statutory authority to adopt regulations concerning the operation of programs, provision of services and facilities pursuant to the New York State Mental Hygiene Law Section 16.00.

2. Legislative Objectives: These proposed amendments further the legislative objectives embodied in sections 13.07, 13.09(b), and 16.00 of the Mental Hygiene Law. The proposed amendments would improve the quality of services in the OPWDD system by establishing protections for individuals with challenging behaviors and/or diagnosed psychiatric disorders.

3. Needs and Benefits: Interventions for challenging behaviors are an important component of the OPWDD system. Appropriate, person-centered behavioral supports and interventions can significantly enrich the lives of individuals with developmental disabilities, and enable them to become more independent and successful in many aspects of their lives. Further, poor behavioral intervention practices can have tragic consequences, and have been a contributing factor in serious injuries and deaths in the OPWDD system.

OPWDD is proposing the addition of a new section containing comprehensive requirements for behavioral supports and interventions in response to challenging behavior and symptoms of diagnosed psychiatric disorders. These new requirements will help agencies provide higher quality services and will protect the rights and welfare of individuals receiving services.

The regulation emphasizes that positive approaches, strategies, and supports are always the preferred method of intervention for challenging behavior. In addition, the regulation establishes specific procedures that must be followed in order to actively monitor and control the use of specific behavioral interventions that limit rights or have potential adverse impacts.

The implementation of the new provisions would require that agencies

incur additional expenses and redirect existing staff resources toward compliance activities. OPWDD considers that the additional costs and staff time involved are more than justified by the enhanced protections afforded to individuals receiving services. Further, OPWDD is phasing-in the new requirements so that agencies will have adequate time to hire the necessary staff and integrate the new required processes into existing agency procedures. OPWDD has also delayed the imposition of the new planning requirements on existing behavior support plans so that the new requirements can be implemented during regularly scheduled reviews of the current plans. OPWDD realizes that some rural areas may be unable to access the full range of staffing qualifications set in the regulations. In an effort to assist providers in those areas, OPWDD has included a hardship waiver in the revised proposed regulations. Voluntary agencies may apply for the waiver, demonstrating a good faith effort in recruiting the necessary staff, and individual approvals for waivers will be determined by the Commissioner.

Among its provisions, the proposed regulations prohibit aversive conditioning. OPWDD considers that the use of behavior modification techniques that involve deliberately inflicting sensations that are uncomfortable, painful or noxious is inappropriate and unnecessary.

The regulations also modify the definitions of abuse in Part 624 to conform to the provisions of the new behavioral intervention requirements and add additional clarity.

The new Section 633.16 also references existing regulations in Section 633.17(a)(18), which requires the review of medications prescribed for and taken by individuals receiving services (including psychotropic medications). The results of these reviews must be documented and shared with the prescriber and the program planning team. This will assist healthcare providers and the team to evaluate whether the benefits of continuing the medication(s) outweigh the risk inherent in potential side effects.

The provisions of Section 681.13 are phased out in conjunction with the phase-in of the new Section 633.16. These provisions contain requirements for behavior management in Intermediate Care Facilities (ICF/DDs). Since ICF/DDs are required to comply with the provisions of Section 633.16 concerning behavior management, these requirements are duplicative and are therefore being phased out.

Outdated and duplicative requirements contained in Part 81 which concerned review of "untoward incidents" and "extra risk procedures" in "Schools for the Mentally Retarded" have been deleted. These areas are addressed in Part 624 and the new Section 633.16.

#### 4. Costs:

a. Costs to the Agency and to the State and its local governments: There are no anticipated impacts on Medicaid rates, prices or fees. Consequently, there is no impact on the federal government, New York State or local governments due to changes in Medicaid expenditures. As a provider of services, OPWDD will need to redirect staff resources to compliance activities required by the proposed regulations. State-operated services have already instituted many of the new required procedures and OPWDD expects that the enhanced requirements in the proposed regulations can be implemented with existing staff in state-operated services. Consequently, OPWDD does not expect to incur any additional costs.

b. Costs to private regulated parties: There are no initial capital investment costs. There may be initial non-capital expenses related to the costs of hiring or retaining new psychologists, licensed clinical social workers, behavioral intervention specialists, and other clinicians. OPWDD estimates that the aggregate annual expense for agencies to hire or retain the necessary clinicians will be approximately \$10.1 million. However, as stated earlier, agencies will have the option to apply for a hardship waiver, subject to approval by the Commissioner.

5. Local Governmental Mandates: There are no new requirements imposed by the rule on any county, city, town, village; or school, fire, or other special district.

6. Paperwork: The regulation includes significant new paperwork requirements. For example, it requires the development of policies and procedures, creation or revision of functional behavioral assessments and written behavior support plans for individuals who have challenging behaviors, and monitoring plans for individuals with diagnosed psychiatric disorders all of which address a number of specific elements. The regulation also requires documentation of the individual's behavior(s) and use of specific behavioral interventions. In some instances, the use of behavioral interventions must be reported to OPWDD. The regulation requires training, which would involve the dissemination of training materials and documentation of training. In some cases, these requirements can be met through electronic reporting and record-keeping. OPWDD considers that the increased paperwork is justified by the need for additional protections for individuals receiving services concerning behavioral intervention.

7. Duplication: The proposed amendments do not duplicate any existing State or Federal requirements that are applicable to services for persons with developmental disabilities.

8. Alternatives: OPWDD considered applying all regulatory requirements imposed for restrictive/intrusive interventions to medications used to treat a diagnosed psychiatric disorder. However, upon reflection, OPWDD determined that that not all requirements were necessary to safeguard individuals who are prescribed these medications. The requirement for review by the behavior plan review/human rights committee was consequently removed.

9. Federal Standards: The proposed amendments do not exceed any minimum standards of the federal government for the same or similar subject areas.

10. Compliance Schedule: OPWDD plans to promulgate these regulations effective January 1, 2013. OPWDD may delay the effective date of the regulation to accommodate the need for agencies to hire staff (especially psychologists, licensed clinical social workers, and behavioral intervention specialists), and for other changes necessary for agencies to come into compliance, such as training staff, establishing the required committees, and creating or changing policies and procedures. The proposed regulation incorporates delays in the timeframe for implementation after the effective date for specific requirements that necessitate a more involved level of compliance activities. In addition, requirements applicable to the development of behavior support plans and obtaining informed consent will be phased in so that existing behavior support plans can be revised at the time of regularly scheduled reviews. Delays in the timeframe for implementation of the conforming changes have also been incorporated for consistency during the transition.

#### *Revised Regulatory Flexibility Analysis*

1. Effect on small business: OPWDD has determined, through a review of the certified cost reports, that most OPWDD-funded services are provided by non-profit agencies which employ more than 100 people overall. However, some smaller agencies which employ fewer than 100 employees overall would be classified as small businesses. Currently, there are 670 agencies which provide one or more of the facilities and services which are required to comply with the proposed regulations. These are agencies which operate any facility certified by OPWDD (except for free-standing respite facilities), which provide day habilitation or prevocational services regardless of whether the services are certified, and which provide hourly community habilitation. OPWDD is unable to estimate the portion of these providers that may be considered to be small businesses.

The proposed regulations impose significant compliance requirements on these providers, if they serve individuals with challenging behaviors. Many agencies have current policies which incorporate some of these requirements, however, in nearly all instances agencies will need to institute or enhance current policies and procedures related to behavioral intervention.

2. Compliance requirements: Specific compliance requirements imposed on providers (including small businesses) by the proposed regulations include: the development of policies/procedures, conducting functional behavioral assessments, developing behavior support plans and monitoring plans (including reviews and updates), convening a behavior plan review/human rights committee, documenting the work of the committee and use of behavioral interventions, obtaining informed consent for "restrictive/intrusive interventions," training staff in the use of specific supports and interventions, training staff in the use of "physical intervention techniques" (hands-on techniques), reporting the use of restrictive physical interventions to OPWDD, and complying with a number of requirements applicable to specific interventions (physical intervention techniques, rights limitations, use of "time-out," use of mechanical restraining devices, and use of medication to modify or control challenging behavior. The provider is also required to document these activities.

The proposed regulations have no impact on local governments.

3. Professional services: The proposed regulations specify certain functions that must be performed by clinicians, such as the development and/or approval of behavior support plans and evaluation of the capacity of individuals to provide informed consent in some circumstances. Various functions are required to be performed by licensed psychologists, licensed clinical social workers (LCSWs), and/or behavioral intervention specialists (BIS), and/or clinicians with training in behavioral intervention techniques. In addition, the regulation requires the supervision of BIS (some Level 1 and all Level 2) by a licensed psychologist or licensed clinical social worker, which may mean that a supervising licensed psychologist or LCSW must be hired or retained. Although many agencies already employ or retain these professionals, and in some instances the clinicians already perform some or many of the functions that will be required, OPWDD expects that some agencies will need to hire more of these clinicians, or make arrangements for their services, in order to comply with the new requirements.

Other regulatory requirements require the involvement of health care professionals. While OPWDD generally expects that agencies will be able to comply using existing staff, in some instances agencies may need to

hire or increase arrangements for contractors or consultants who are clinicians or other professionals to satisfy these requirements.

The proposed regulations will not add to the professional service needs of local governments.

4. Compliance costs: No increased capital costs will be incurred. Some agencies will incur costs to hire or arrange for clinicians as discussed above. OPWDD estimates that the aggregate annual expense for agencies to hire or retain the necessary clinicians will be approximately \$10.1 million.

5. Economic and technological feasibility: The proposed amendments do not impose on regulated parties, the use of any new technological processes.

6. Minimizing adverse impact: In general, individuals with more significant challenging behaviors are served by agencies which are not small businesses. Further, the development of related policies and procedures are only required for agencies which serve individuals in need of behavior support plans. Smaller providers which do not serve individuals in need of behavior support plans will not need to undertake any of the compliance activities, including the development of related agency policies and procedures. OPWDD expects that even if small providers serve individuals who need behavior support plans, that the plans will typically be less complex and will typically not include "restrictive/intrusive interventions" (except for the use of medication to treat a diagnosed mental illness), and that the agencies can consequently forgo compliance with many of the specific provisions applicable to those interventions. OPWDD has specifically exempted use of medication to treat a diagnosed mental illness from review by a behavior plan review/human rights committee, recognizing that small business providers are more likely to serve these individuals than individuals who need medication or other interventions solely to address challenging behavior, and thereby offering some relief to small providers. Further, OPWDD recognizes that it could be difficult for each smaller agency to convene the required behavior plan review/human rights committee. The regulations specifically allow agencies to coordinate with other agencies in the creation of a shared behavior plan review/human rights committee.

Due to the fact that more rural communities may not have access to appropriately licensed professionals, OPWDD has developed a hardship waiver regarding compliance with requirements for specific qualifications of those who may develop a behavior support plan, including those containing restrictive/intrusive interventions, and/or the supervision of a BIS (Level 1 or 2) who develops such a plan. Agencies who demonstrate a sustained hardship will have the option to apply for such a waiver, pending the individual review and approval by the Commissioner. OPWDD expects that some of these providers will be small businesses.

7. Small business participation: The proposed regulations were discussed with representatives of providers, including the New York State Association of Community and Residential Agencies (NYSACRA), at several meetings. In addition, draft proposed regulations were sent to selected reviewers in October 2011 and July 2012, including NYSACRA and other provider associations. Some of the members of NYSACRA have fewer than 100 employees. OPWDD mailed the proposed regulations to approximately 700 providers (including small businesses) in January, 2012, and received over 100 comments regarding the proposed regulations. Finally, OPWDD will be mailing these revised proposed amendments to all providers, including providers that are small businesses.

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

1. Description of the types and estimation of the number of rural areas in which the rule will apply: OPWDD services are provided in every county in New York State. 44 counties have a population less than 200,000: Allegany, Cattaraugus, Cayuga, Chautauqua, Chemung, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Genesee, Greene, Hamilton, Herkimer, Jefferson, Lewis, Livingston, Madison, Montgomery, Ontario, Orleans, Oswego, Otsego, Putnam, Rensselaer, St. Lawrence, Saratoga, Schenectady, Schoharie, Schuyler, Seneca, Steuben, Sullivan, Tioga, Tompkins, Ulster, Warren, Washington, Wayne, Wyoming and Yates. 9 counties with certain townships have a population density of 150 persons or less per square mile: Albany, Broome, Dutchess, Erie, Monroe, Niagara, Oneida, Onondaga and Orange.

The proposed amendments have been reviewed by OPWDD in light of their impact on entities in rural areas. The proposed amendments are expected to result in additional expenditures of approximately \$10.1 million for non-state providers of services in the OPWDD system for all of New York State. Due to the additional requirements and the possible difficulty of recruiting certain professionals for the more rural counties and/or the adverse fiscal impact on providers, the geographic location of any given program (urban or rural) may contribute to any such impact. In such cases, the regulation will allow some providers to apply for a hardship waiver from the Commissioner. If such a waiver request is approved, a provider in a more rural county may not have to comply with some of the qualification requirements applying to those who may develop or supervise

the development of behavior support plans containing restrictive intrusive interventions.

2. Compliance requirements: Specific compliance requirements imposed on providers (including small businesses) by the proposed regulations include: the development of policies/procedures, conducting, revising, or updating functional behavioral assessments, developing, revising, or updating behavior support plans, convening a behavior plan review/human rights committee, documenting the work of the committee and use of behavioral interventions, obtaining informed consent for "restrictive/intrusive interventions," including medications, training staff in the use of specific interventions, training staff in the use of "physical intervention techniques" (hands-on techniques), reporting the use of restrictive physical interventions to OPWDD, and complying with a number of requirements applicable to specific interventions (physical intervention techniques, rights limitations, use of "time-out," use of mechanical restraining devices, and use of medication to modify or control maladaptive or inappropriate behavior to treat a diagnosed psychiatric disorder. The provider is also required to document these activities.

The proposed regulations have no impact on local governments.

3. Professional services: The proposed regulations specify certain functions that must be performed by clinicians, such as the development and/or approval of behavior support plans and evaluation of individuals' capacity to provide informed consent in some circumstances. Various functions are required to be performed by licensed psychologists, licensed clinical social workers (LCSWs), and/or behavioral intervention specialists (BIS) (Level 1 or Level 2 with a Master's degree) and/or clinicians with specific training in behavior assessment and management techniques. In addition, the regulation requires the supervision of a BIS (some Level 1 and all Level 2) by a licensed psychologist or LCSW, which may mean that the supervising licensed psychologist or LCSW must be hired or retained to provide contracted services. Although many agencies already employ or retain these professionals and, in some instances, the clinicians already perform some or many of the functions that will be required, OPWDD expects that some agencies may need to hire more of these clinicians or contract for their services to comply with the new requirements.

Other regulatory conditions require the involvement of health care professionals. While OPWDD generally expects that agencies will be able to comply using existing staff, in some instances agencies may need to hire or increase arrangements for contractors or consultants who are clinicians or other professionals to satisfy these requirements.

The proposed regulations will not add to the professional service needs of local governments.

4. Compliance costs: The estimated cost of compliance is \$10.1 million for all voluntary providers statewide (not just those in rural areas). There are no costs to local governments.

5. Minimizing adverse economic impact: OPWDD has reviewed and considered the approaches for minimizing adverse economic impact as suggested in section 202-bb(2)(b) of the State Administrative Procedure Act. OPWDD recognizes that agencies in rural areas may be smaller in size than other agencies in general. The economic impact of the proposed regulations is attributable to the need for additional clinicians, especially licensed psychologists, LCSWs, and Behavioral Intervention Specialists. Smaller providers which do not serve individuals who need behavior support plans will not need to undertake any of the compliance activities, including the work that would have to be performed by these clinicians. OPWDD expects that even if small providers serve individuals who need behavior support plans, that the plans will typically be less complex and will typically not include "restrictive/intrusive interventions" (except for the use of medication to treat a diagnosed psychiatric disorder), and that the agencies can consequently forgo compliance with many of the specific provisions applicable to those interventions. OPWDD has specifically exempted use of medication to treat a diagnosed mental illness from review by a behavior plan review/human rights committee, recognizing that small service providers (including those in rural areas) are more likely to serve these individuals, than individuals who need medication or other interventions to address challenging behavior. This exemption thereby offers some relief to small providers (including those in rural areas). Further, OPWDD recognizes that it could be difficult for each smaller agency to convene the required behavior plan review/human rights committee. Thus, the regulations specifically allow agencies to coordinate with other agencies in the creation of a shared behavior plan review /human rights committee.

Given that providers in some rural areas may have limited access to certain licensed professionals, OPWDD has developed a hardship waiver that would afford some flexibility, or alternatives, regarding compliance with specific qualification requirements for those who may provide certain assessments, or develop behavior support plans, including those containing restrictive intrusive interventions, and/or supervise a BIS (Level 1 or 2). Agencies will have the option to apply for such a waiver, subject to individual review prior to any determination of approval by OPWDD.

6. Participation of public and private interests in rural areas: The proposed regulations were discussed with representatives of providers at several meetings. In addition, draft proposed regulations were sent to selected reviewers in October 2011 and July 2012, including provider associations. Provider associations include those, such as NYSARC, the NYS Association of Community and Residential Agencies, NYS Catholic Conference, and CP Association of NYS, which represent providers throughout New York State including those in rural areas. In addition, OPWDD sent proposed regulations to approximately 700 providers, including those in rural areas. OPWDD will be mailing these revised proposed amendments to all providers, including providers that are located in rural areas.

#### **Revised Job Impact Statement**

A Job Impact Statement for these proposed amendments is not being submitted because OPWDD does not anticipate a substantial adverse impact on jobs and employment opportunities. The proposed amendments require agencies to institute new protections for individuals related to behavior management. As noted in the other impact statements, there may be a modest increase in job opportunities for clinicians, especially psychologists and licensed clinical social workers, as a result of these amendments. To the extent that agencies implement new efficiencies to compensate for the cost of retaining the necessary clinicians, this might decrease staff performing other functions which would likely be less compensated at a lower level. In this case, there could be a minor overall decrease in jobs and employment opportunities. However, OPWDD would not expect that any overall decrease would result in a loss of more than 100 jobs statewide.

#### **Assessment of Public Comment**

OPWDD received more than 100 comments from multiple sources, including: self-advocates, family members, agency and not-for-profit provider representatives, and public advocates. In response to the comments received, OPWDD has revised selected language, terms, and requirements contained within the original proposed regulation. Below is a summary of the comments received and OPWDD's responses. A more detailed assessment of the Public Comments received is available on the OPWDD website at [www.opwdd.ny.gov](http://www.opwdd.ny.gov).

##### **I. Comments on specific subdivisions of Section 633.16.**

###### **A. Applicability**

One comment recommended that this regulation apply to all developmentally disabled individuals receiving services in any setting, including those located outside New York State. The scope of OPWDD's regulatory authority was clarified: the legislature gives the agency authority to regulate only the programs which are operated and/or certified by OPWDD.

###### **B. Definitions**

There were a number of helpful comments received regarding suggestions for revisions to specific definitions (e.g., Functional Behavioral Assessment; membership of the program planning team, etc.). Review of the public comments resulted in some significant changes being made to the language and/or terms in the proposed regulation, including: clarifying the distinction between medication prescribed solely for the purpose of behavioral control, and medication prescribed for co-occurring diagnosed psychiatric disorders; emphasis on an active approval of behavior support plans by the Behavior Plan/Human Rights Committee; the required title, scope, and qualifications levels for Behavior Intervention Specialists and their supervisors.

###### **C. General Provisions**

In this subdivision, the primary issue focused on the question of whether there is an actual need for a functional behavioral assessment and behavior support plan for individuals who may only take medication for a co-occurring diagnosed psychiatric condition and do not display challenging behaviors. OPWDD clarified its position regarding the use and review of psychiatric medications and made changes throughout the regulation to reflect this view.

###### **D. Functional Behavioral Assessment**

Several comments supported OPWDD's requirement for a functional behavioral assessment when planning interventions to prevent, modify or control challenging behaviors. The adequacy of the required time frame for completion of these assessments was questioned; in response, OPWDD increased the time allowed for completion. Some comments expressed concern that when this regulation is implemented, existing assessments would no longer be valid, OPWDD clarified that there is a one-year grace period for update or revision of existing behavior support plans. The functional behavior assessment is the basis for developing such a plan, and is included in that grace period.

###### **E. Behavior Support Plan**

Some agencies expressed concern about a potential for conflict when more than one agency provides services for an individual in different settings. OPWDD supports a collaborative approach in these situations,

and expects that agencies will reach an agreement regarding interventions, in order to provide consistency and prevent confusion in behavioral interventions for the individual.

###### **F. Behavior Plan/Human Rights Committee (BP/HRC)**

There were concerns raised regarding the qualifications, and function of the BP/HRC membership. OPWDD clarified who may serve on the BP/HRC and review plans that include medications.

###### **G. Written Informed Consent**

Although some agency representatives expressed the view that a "detailed written opinion and analysis" is unnecessary to support a determination of an individual's lack of capacity, OPWDD disagrees. It is necessary for the program planning team to document specifically which elements of capacity the individual lacks.

Agencies noted the difficulty that they often experience in obtaining written informed consent within the original proposed 30-day timeframe following a witnessed verbal consent. OPWDD extended the time frame for valid verbal consent to 45 days.

OPWDD determined that if a New York State licensed psychologist or licensed physician was a member of the individual's program planning team determining that individual's capacity, and the team was unanimous in its finding of lack of capacity, no further review was needed by an independent licensed psychologist.

###### **H. Objections**

There were concerns raised by a few agencies concerning the notification requirements, particularly with regard to notification given to the surrogate consent-givers when an individual refuses medication. Some felt it would be too burdensome to notify the consent-giver at each instance of refusal. OPWDD disagrees and believes that there are instances when immediate notification is necessary.

###### **I. Training**

There appeared to be some confusion regarding the purpose, type and documentation for training staff the proper use of restrictive/intrusive and other intervention techniques. Guidance documents and a curriculum are currently being developed to assist with this process. Further, the Quality Assurance protocols used for evaluating agencies and providers will be developed to coincide with the regulations once they are implemented.

###### **J. Specific Interventions**

###### **1) Physical Intervention Techniques:**

Several commenters expressed concern about the proposed time frame for reporting physical interventions to OPWDD, with most indicating that the time frame proposed (24 hours or by close of next business day) was too short. A number of agencies proposed alternate reporting time frames ranging from 72 hours to quarterly. After reviewing all the suggestions, OPWDD adjusted the reporting time to conform to the current reporting requirement of ADM 2012-03, which is 5 business days.

In addition, there were concerns expressed regarding how soon the individual should be checked for injuries following a physical intervention. In response, the language of the regulation was modified to allow for some flexibility regarding a specific time frame, while still ensuring that the individual is checked for injuries and that medical care is provided when an injury is suspected following a physical intervention.

###### **2) Rights Limitations:**

There was a specific request for the regulations to state that informed consent is required for any and all rights limitations included in an individual's behavior support plan.

###### **3) Time Out:**

There were a number of comments regarding the use of Time Out. A few of these comments were related to a simple clarification of the definition of Time Out (that it is the temporary removal of positive reinforcement), and OPWDD modified the definition in response. Other comments were mixed. Some advocated for banning the use of Time Out rooms or reducing the maximum amount of time allowable for usage, others specifically requested that existing Time Out rooms not be subject to the physical plant requirements set forth in the regulation. In addition, the requirement that program planning teams review Time Out room use if it is used 5 or more times in a 24-hour period generated a number of comments with both higher and lower thresholds suggested. OPWDD is committed to reducing or eliminating the use of restrictive interventions, including time out, whenever possible. The emphasis in the regulation on positive behavior supports and the increased reporting and accountability requirements will allow for greater tracking and oversight, but it would be imprudent to prohibit Time Out suddenly without possibly increasing the risk for harm. In terms of the maximum time allowable and the requirement for program planning team review, OPWDD believes that the parameters identified in the regulation are appropriate. Nonetheless, nothing would prevent agencies from setting more stringent parameters as part of their policy.

###### **4) Mechanical Restraints:**

The most prominent objection was expressed by two parents and two agencies who believe that, despite the prohibition of aversive condition-

ing, by this paragraph the regulations still appear to permit what they consider to be harmful, abusive interventions. In these regulations, OPWDD specifically requires informed consent, and significant levels of scrutiny, approval, oversight, limits and documentation regarding any plan that includes a restrictive or intrusive intervention, including rights restrictions. The expectation is that staff will be trained to follow plans that use primarily positive behavioral approaches. OPWDD did not agree with an observation that designating a “senior staff person” for oversight of these and other interventions would be an increased financial and staffing burden; all agencies currently have an equivalent of “senior staff.” Comments for this paragraph also included suggestions of alternatives to the required frequency for reviewing the use of these devices and specific monitoring activities when such devices are used. The current time frames for reviewing use and for monitoring conditions during actual usage conform to federal regulations. The language of the regulation was revised to require OPWDD approval of devices that are not commercially produced, or are not designed specifically for human use.

5) Medications:

There were multiple concerns and objections raised regarding the requirement of a separate consultative panel to perform a semi-annual review of psychotropic medications. In response, OPWDD has incorporated in 633.16 the required review as outlined in Section 633.17; the results of this review will be provided to the prescriber and to the program planning team. Questions regarding the monitoring of and notification about emergency medication use were addressed. Finally, OPWDD recognizes that not every co-occurring psychiatric disorder for which medication is prescribed would be expressed in challenging behavior or require a behavior support plan. The regulatory requirements for behavior support plans and supportive monitoring plans were designed to provide clinical flexibility and distinction of approaches to differing circumstances and treatment needs.

II. General Comments

Concern was expressed by many of the commenters that implementation of Section 633.16 would be costly and would provide little benefit to individuals with disabilities. OPWDD believes that these regulations are needed – to enable providers to identify the true needs and potential, and protect the rights of individuals with disabilities. These regulations maintain a strong emphasis on conducting person-centered assessments, and encouraging positive behavioral supports when addressing challenging behavior. The regulations also clearly articulate the parameters regarding interventions for challenging behaviors. OPWDD believes that there will be many tangible benefits and protections for individuals with disabilities when the proposed regulations are adopted.

There were also concerns expressed that the regulation as a whole was “anachronistic,” “regressive,” and reflected a “hierarchical approach used over 20 years ago.” OPWDD notes that a regulation is not a surrogate or substitute for an agency’s policy statements and practices regarding the philosophy of care on which the agency’s approach to behavioral supports and intervention is based. A regulation simply sets forth certain standards and parameters that must be met under specific circumstances. At the basis of these regulations, there is an expectation that the individual being served, and those with whom he or she may have close personal ties and/or shared advocacy goals, will be included to the fullest extent possible in the development of services, opportunities, and behavior support or monitoring plans. Agency policies are free to eschew restrictive/intrusive interventions without penalty from OPWDD.

OPWDD would like to thank those who provided their comments and suggestions for these regulations.

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## Public Service Commission

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### PROPOSED RULE MAKING HEARING(S) SCHEDULED

**Major Gas Rate Filing**

**I.D. No.** PSC-42-12-00008-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 proposal filed 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 Gas Service, P.S.C. No. 219.

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

**Subject:** Major gas rate filing.

**Purpose:** To consider a proposal to increase annual gas revenues.

**Public hearing(s) will be held at:** 10:00 a.m., October 23, 2012 and continuing daily as needed, at Department of Public Service, Three Empire State Plaza, 3rd Fl. Hearing Rm., Albany, NY. (Evidentiary Hearing)\*

\*On occasion, there are requests to reschedule or postpone evidentiary hearing dates. If such a request is granted, notification of any subsequent scheduling changes will be available at the DPS Website ([www.dps.ny.gov](http://www.dps.ny.gov)) under Cases 12-E-0201 and 12-G-0202.

**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:** The Commission is considering a proposal filed by Niagara Mohawk Power Corporation d/b/a National Grid (Niagara Mohawk) to increase the Niagara Mohawk gas delivery base revenues for the rate year ending March 31, 2014, by \$24.5 million. Niagara Mohawk proposes to utilize rate payer credits, which will be amortized over three years, to mitigate the requested revenue increase by approximately \$14.1 million each year of the three year period. As a result, the net gas delivery base revenue increase represents a total bill increase of 2.3% for the typical residential customer. The statutory suspension period for the proposed filing runs through March 28, 2013. The Commission may adopt, in whole or in part, modify or reject terms set forth in Niagara Mohawk’s proposal or other negotiated proposals.

**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.ny.gov/f96dir.htm>. For questions, contact:** Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, NY 12223-1350, (518) 486-2655, email: [leann.ayer@dps.ny.gov](mailto:leann.ayer@dps.ny.gov)

**Data, views or arguments may be submitted to:** Jaclyn A. Brilling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530, email: [secretary@dps.ny.gov](mailto:secretary@dps.ny.gov)

**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.

(12-G-0202SP1)

### PROPOSED RULE MAKING HEARING(S) SCHEDULED

**Major Electric Rate Filing**

**I.D. No.** PSC-42-12-00010-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 proposal filed by Niagara Mohawk Power Corporation d/b/a National Grid to make various changes in the rates, charges, rules and regulations contained in its Schedules for Electric Service, P.S.C. Nos. 220 and 214.

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

**Subject:** Major electric rate filing.

**Purpose:** To consider a proposal to increase annual electric revenues.

**Public hearing(s) will be held at:** 10:00 a.m., October 23, 2012 and continuing daily as needed, at Department of Public Service, Three Empire State Plaza, 3rd Fl. Hearing Rm., Albany, NY. (Evidentiary Hearing)\*

\*On occasion, there are requests to reschedule or postpone evidentiary hearing dates. If such a request is granted, notification of any subsequent scheduling changes will be available at the DPS Website ([www.dps.ny.gov](http://www.dps.ny.gov)) under Cases 12-E-0201 and 12-G-0202.

**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:** The Commission is considering a proposal filed by Niagara Mohawk Power Corporation d/b/a National Grid (Niagara Mohawk) to increase the Niagara Mohawk electric delivery base revenues for the rate year ending March 31, 2014, by \$130.7 million, which is a 6.9% increase in delivery revenues. According to the Niagara Mohawk, the bill impact associated with increasing electric delivery base revenue will be offset by the elimination of approximately \$190 million of deferral recoveries, resulting in a total bill decrease of 2.1% for a typical residential customer. The statutory suspension period for the proposed filing runs through March 28, 2013. The Commission may adopt, in whole or in part, modify or reject terms set forth in Niagara Mohawk's proposal or other negotiated proposals.

**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.ny.gov/f96dir.htm>. For questions, contact:** Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, NY 12223-1350, (518) 486-2655, email: leann.ayer@dps.ny.gov

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530, email: secretary@dps.ny.gov

**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.

(12-E-0201SP1)

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

**Amendments to 16 NYCRR Part 255**

**I.D. No.** PSC-42-12-00006-P

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

**Proposed Action:** This is a consensus rule making to amend Part 255 of Title 16 NYCRR.

**Statutory authority:** Public Service Law, sections 4(1), 66(1), 64, 65, 71, 72, 72-a, 75, 79 and 210

**Subject:** Amendments to 16 NYCRR Part 255.

**Purpose:** To adopt amendments to 16 NYCRR Part 255.

**Text of proposed rule:** RESOLVED: That the provisions of Section 202(1) of the State Administrative Procedure Act and Section 101-a (2) of the Executive Law having been complied with, Title 16 of the Official Compilation of Codes, Rules and Regulations of the State of New York is amended, effective upon publication of a Notice of Adoption in the *State Register*, by revising Chapter III, Gas Utilities, Subchapter C, Safety, Part 255, Transmission and Distribution of Gas; by adding Sections 255.1001, 255.1003, 255.1005, 255.1007, 255.1009, 255.1011, 255.1013 and 255.1015, to read as follows:

§ 255.1001 Definitions that apply to sections 255.1003 through 255.1015.

The following definitions apply to a GDPIM plan:

(a) Excavation Damage.

(1) Excavation means any operation for the purpose of movement or removal of earth, rock, pavement or other materials in or on the ground by use of mechanized equipment or by blasting, including but not limited to, digging, auguring, backfilling, boring, drilling, grading, plowing in, pulling in, fence post or pile driving, tree root removal, sawcutting, jackhammering, trenching and tunneling; provided, however, that the following shall not be deemed excavation: the movement of earth by tools manipulated only by human or animal power; the tilling of soil for agricultural purposes; vacuum excavation; and sawcutting and jackhammering in connection with pavement restoration of a previous excavation where only the pavement is involved.

(2) Damage means any destruction or severance of any underground facility or its protective coating, housing or other protective device or any displacement of or removal of support from any underground facility which would necessitate repair of such facility.

(b) Hazardous Leak means a leak as defined in section 255.811 of this Part.

(c) Gas Distribution Pipeline Integrity Management Plan or GDPIM plan means a written explanation of the mechanisms or procedures the operator will use to implement its GDPIM management program and to ensure compliance with sections 255.1003 through 255.1015.

(d) Gas Distribution Pipeline Integrity Management Program or GDPIM program means an overall approach by an operator to ensure the integrity of its gas distribution system.

(e) Mechanical fitting means a mechanical device used to connect sections of pipe. The term "Mechanical fitting" applies only to:

(1) Stab Type fittings;

(2) Nut Follower Type fittings;

(3) Bolted Type fittings; or

(4) Other Compression Type fittings.

(f) Small LPG Operator means an operator of a liquefied petroleum gas (LPG) distribution pipeline that serves fewer than 100 customers from a single source.

§ 255.1003 General requirements of a GDPIM plan.

Sections 255.1003 through 255.1015 prescribe the minimum requirements for a GDPIM program for any gas distribution pipeline covered under this part, including liquefied petroleum gas systems. A gas distribution operator, other than a small LPG operator, must follow the requirements in sections 255.1005 through 255.1013. A small LPG operator of a gas distribution pipeline must follow the requirements in section 255.1015.

§ 255.1005 Implementation requirements of a GDPIM plan.

No later than August 2, 2011 a gas distribution operator must develop and implement an GDPIM program that includes a written GDPIM plan as specified in section 255.1007.

§ 255.1007 Required elements of a GDPIM plan.

A written GDPIM plan must contain procedures for developing and implementing the following elements:

(a) Knowledge. An operator must demonstrate an understanding of its gas distribution system developed from reasonably available information.

(1) Identification of the characteristics of the pipeline's design and operations and the environmental factors that are necessary to assess the applicable threats and risks to its gas distribution pipeline.

(2) Consideration of the information gained from past design, operations, and maintenance.

(3) Identification of the additional information needed and provide a plan for gaining that information over time through normal activities conducted on the pipeline (for example, design, construction, operations or maintenance activities).

(4) Development and implementation of a process by which the GDPIM program will be reviewed periodically and refined and improved as needed.

(5) Provision for the capture and retention of data on any new pipeline installed. The data must include, at a minimum, the location where the new pipeline is installed and the material of which it is constructed.

(b) Identify threats. The operator must consider the following categories of threats to each gas distribution pipeline:

(1) corrosion;

(2) natural forces;

(3) excavation damage;

(4) other outside force damage;

(5) material, weld or joint failure (including compression coupling);

(6) equipment failure;

(7) incorrect operation; and

(8) other concerns that could threaten the integrity of its pipeline.

An operator must consider reasonably available information to identify existing and potential threats. Sources of data may include, but are not limited to, incident and leak history, corrosion control records, continuing surveillance records, patrolling records, maintenance history, and excavation damage experience.

(c) Evaluate and rank risk. An operator must evaluate the risks associated with its distribution pipeline. In this evaluation, the operator must determine the relative importance of each threat and estimate and rank the risks posed to its pipeline. This evaluation must consider each applicable current and potential threat, the likelihood of failure associated with each threat, and the potential consequences of such a failure. An operator may subdivide its pipeline into regions with similar characteristics (e.g., contiguous areas within a distribution pipeline consisting of mains, services and other appurtenances; areas with common materials or environmental factors), and for which similar actions likely would be effective in reducing risk.

(d) Identify and implement measures to address risks. Determine and implement measures designed to reduce the risks from failure of its gas distribution pipeline. These measures would include an effective leak management program as required by sections 255.805 through 255.821, unless all leaks are repaired when found.

(e) Measure performance, monitor results, and evaluate effectiveness.

(1) Develop and monitor performance measures from an established baseline to evaluate the effectiveness of its GDPIM program. An operator must consider the results of its performance monitoring in periodically re-evaluating the threats and risks. These performance measures must include the following:

(i) Number of hazardous leaks either eliminated or repaired or total number of leaks if all leaks are repaired when found, categorized by cause;

(ii) Number of excavation damages;

(iii) Number of excavation tickets (receipt of information by the underground facility operator from the one-call notification center pursuant to Part 753 Protection of Underground Facilities, Subpart 753-5 One-Call Notification Systems of this Title);

(iv) Total number of leaks either eliminated or repaired, categorized by cause;

(v) Number of hazardous leaks either eliminated or repaired or total number of leaks if all leaks are repaired when found, categorized by material; and

(vi) Any additional measures the operator determines are needed to evaluate the effectiveness of the operator's GDPIM program in controlling each identified threat.

(f) **Periodic Evaluation and Improvement.** An operator must reevaluate threats and risks on its entire pipeline and consider the relevance of threats in one location to other areas. Each operator must determine the appropriate period for conducting complete program evaluations based on the complexity of its system and changes in factors affecting the risk of failure. An operator must conduct a complete program re-evaluation at least every five years. The operator must consider the results of the performance monitoring in these evaluations.

(g) **Report results.** Report, on an annual basis, the four measures listed in paragraphs (e)(1)(i) through (e)(1)(iv) of this section, as part of the annual report required by 49 CFR Part 191.11.

§ 255.1009 Required report when compression couplings fail.

(a) Except as provided in paragraph (b) of this section, each operator of a distribution pipeline system must submit a report on each mechanical fitting failure, excluding any failure that results only in a nonhazardous leak, on a Department of Transportation Form PHMSA F-7100.1-2. The report(s) must be submitted in accordance with 49 CFR 191.12.

(b) The mechanical fitting failure reporting requirements in paragraph (a) of this section do not apply to the following:

- (1) Small LPG operator as defined in section 255.1001; or
- (2) LNG facilities.

§ 255.1011 Records an operator must keep.

An operator must maintain records demonstrating compliance with the requirements of sections 255.1003 through 255.1015 for at least 10 years. The records must include copies of superseded GDPIM plans developed under sections 255.1003 through 255.1015.

§ 255.1013 Deviations from required periodic inspections.

(a) An operator may propose to reduce the frequency of periodic inspections and tests required in this part on the basis of the engineering analysis and risk assessment required by this subpart.

(b) An operator must submit its proposal to the Public Service Commission as prescribed in 255.13(c). The Public Service Commission may accept the proposal on its own authority, with or without conditions and limitations, on a showing that the operator's proposal, which includes the adjusted interval, will provide an equal or greater overall level of safety.

(c) An operator may implement an approved reduction in the frequency of a periodic inspection or test only where the operator has developed and implemented an integrity management program that provides an equal or improved overall level of safety despite the reduced frequency of periodic inspections.

§ 255.1015 Requirements a small liquefied petroleum gas (LPG) operator must satisfy to implement a GDPIM plan.

(a) **General.** No later than August 2, 2011 the operator of a small LPG operator must develop and implement an GDPIM program that includes a written GDPIM plan as specified in paragraph (b) of this section. The GDPIM program for these pipelines should reflect the relative simplicity of these types of pipelines.

(b) **Elements.** A written GDPIM plan must address, at a minimum, the following elements:

(1) **Knowledge.** The operator must demonstrate knowledge of its pipeline, which, to the extent known, should include the approximate location and material of its pipeline. The operator must identify additional information needed and provide a plan for gaining knowledge over time through normal activities conducted on the pipeline (for example, design, construction, operations or maintenance activities).

(2) **Identify threats.** The operator must consider, at minimum, the following categories of threats (existing and potential): Corrosion, natural forces, excavation damage, other outside force damage, material or weld failure, equipment failure, and incorrect operation.

(3) **Rank risks.** The operator must evaluate the risks to its pipeline and estimate the relative importance of each identified threat.

(4) **Identify and implement measures to mitigate risks.** The operator must determine and implement measures designed to reduce the risks from failure of its pipeline.

(5) **Measure performance, monitor results, and evaluate effectiveness.** The operator must monitor, as a performance measure, the number of leaks eliminated or repaired on its pipeline and their causes.

(6) **Periodic evaluation and improvement.** The operator must determine the appropriate period for conducting GDPIM program evaluations based on the complexity of its pipeline and changes in factors affecting the risk of failure. An operator must re-evaluate its entire GDPIM program at least every five years. The operator must consider the results of the performance monitoring in these evaluations.

(c) **Records.** The operator must maintain, for a period of at least 10 years, the following records:

(1) A written GDPIM plan in accordance with this section, including superseded GDPIM plans;

(2) Documents supporting threat identification; and

(3) Documents showing the location and material of all piping and appurtenances that are installed after the effective date of the operator's GDPIM program and, to the extent known, the location and material of all pipe and appurtenances that were existing on the effective date of the operator's GDPIM 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, NY 12223-1350, (518) 486-2655, email: leann.ayer@dps.ny.gov**

**Data, views or arguments may be submitted to:** Jaclyn A. Brillings, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530, email: Secretary@dps.ny.gov

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

#### Consensus Rule Making Determination

This rule is being proposed as a consensus rule because, in accordance with State Administrative Procedure Act § 102(11)(b) and (c), it implements or conforms to non-discretionary provisions and makes technical changes or is otherwise non-controversial. This rulemaking proposes to amend Title 16 NYCRR Part 255, Transmission and Distribution of Gas, to conform with the Distribution Integrity management Rule (DIMR), which was adopted in Title 49, Code of Federal Regulations, Part 192, Transportation of Natural and Other Gas by Pipeline (49 CFR Part 192).

Title 16 NYCRR Part 255 is amended with the addition of sections 255.1001 through 255.1015 as follows:

- 16 NYCRR Part 255.1001 provides definitions that apply to the cited sections.

- 16 NYCRR Part 255.1003 sets forth the general requirements of a Gas Distribution Pipeline Integrity Management (GDPIM) program that must be followed by a gas distribution operator.

- 16 NYCRR Part 255.1005 requires development and implementation of GDPIM plan by a gas distribution operator.

- 16 NYCRR Part 255.1007 sets forth the required elements of GDPIM plan, which are to include:

- Demonstration by an operator of an understanding of its gas distribution system developed from reasonably available information.

- Identification by an operator of threats to each gas distribution pipeline with consideration of reasonably available information.

- Evaluation and determination of relative level by an operator of risks associated with its distribution pipeline.

- Identification and implementation by an operator of measures to address risks from failure of its distribution pipeline.

- Monitoring of results, measurement of performance, and evaluation of effectiveness by an operator of its GDPIM program.

- Periodic evaluation of threats and risk by an operator of the GDPIM program.

- Reporting by an operator of results.

- 16 NYCRR Part 255.1009 requires reports by an operator when compression couplings fail.

- 16 NYCRR Part 255.1011 enumerates records an operator must keep.

- 16 NYCRR Part 255.1013 establishes procedure to propose deviations from required periodic inspections.

- 16 NYCRR Part 255.1015 establishes modified requirements for small liquefied petroleum gas (LPG) operators for implementation of a satisfactory GDPIM plan.

The language of the proposed regulation differs from the Federal Regulation in minor part in:

- The definition of "hazardous leak" which cross references the definition of that term with that which appears in other areas of Part 255 in order to maintain consistency.

- The waiver process to recognize the authority and established procedures of the Public Service Commission.

- Utilization of the One-Call Notification System as the "notification

center” for increased efficiency because Local Distribution Companies are required to participate in that system.

• The term “master meter” is removed because sub-metering is not recognized as a valid method of service.

The proposed rule will identify, and take measures to reduce, integrity risks to gas pipelines. It conforms the Commission’s regulations to federal regulations with which operators of gas distribution pipelines and small LPG operators must currently comply. Staff has discussed these proposed revisions with various stakeholders. Based on communications with stakeholders, no person is likely to object to the adoption of the proposed rule as written. In accordance with the provisions of the State Administrative Procedure Act (SAPA) § 202(1)(b)(2)(i), this therefore, should be considered a consensus rule making.

#### **Job Impact Statement**

The Department of Public Service (DPS) projects that there will be no adverse impact on jobs or employment opportunities in the State of New York as a result of this proposed rule change. This proposed rule change simply conforms 16 NYCRR Part 255 with the Distribution Integrity Management Rule adopted in Title 49, Code of Federal Regulations, Part 192, Transportation of Natural Gas, with which gas operators and small liquid propane operators are currently required to comply. Nothing in this proposed rule change will create any adverse impacts on jobs or employment opportunities in the state. No further steps were needed to ascertain these facts and none were taken. As apparent from the nature and purpose of this proposed rule change, a full Job Impact Statement is not required and therefore one has not been prepared.

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

#### **Petition for the Submetering of Electricity**

**I.D. No.** PSC-42-12-00007-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 grant, deny or modify, in whole or part, the petition filed by 215 West 91st Street Corp. to submeter electricity at 215 West 91st Street, New York, New York.

**Statutory authority:** Public Service Law, sections 2, 4(1), 30, 32-48, 52, 53, 65(1), 66(1), (2), (3), (4), (12) and (14).

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

**Purpose:** To consider the request of 215 West 91st Street Corp. to submeter electricity at 215 West 91st Street, New York, New York.

**Substance of proposed rule:** The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by 215 West 91st Street Corp. to submeter electricity at 215 West 91st Street, New York, New York, located in the territory of Consolidated Edison Company of New York, Inc.

**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.ny.gov/f96dir.htm>. For questions, contact:** Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, NY 12223-1350, (518) 486-2655, email: leann.ayer@dps.ny.gov

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530, email: secretary@dps.ny.gov

**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.

(12-E-0430SP1)

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

#### **Regulation of Gypsy Trail Club, Inc.’s Long-Term Financing Agreements**

**I.D. No.** PSC-42-12-00009-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 whether to exempt Gypsy Trail Club, Inc., a homeowners association, from regulation of future long-term financing arrangements.

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

**Subject:** Regulation of Gypsy Trail Club, Inc.’s long-term financing agreements.

**Purpose:** To exempt Gypsy Trail Club, Inc. from Commission regulation of its financing agreements.

**Substance of proposed rule:** On April 26, 2012, Gypsy Trail Club, Inc. (Gypsy Trail) filed a petition requesting Commission permission under Public Service Law § 89-f to enter into a long-term loan agreement with the Environmental Facilities Corporation (EFC) for a loan from the Drinking Water State Revolving Fund (DWSRF) to finance improvements to its water system.

Gypsy Trail is a social club that provides residential water service to 72 of its members who own homes in its territory. The Commission recognized Gypsy Trail as a homeowners association (HOA) in 1980, and exempted Gypsy Trail from rate regulation under PSL § 5(4). In 2002, Gypsy Trail received Commission approval for a 20 year DWSRV loan from EFC for replacement of its distribution system.

The Commission is considering the question of whether it is in the public interest to exempt Gypsy Trail from regulation of its long-term financing agreements. The Commission generally regulates utilities’ long-term financing to ensure rates are not negatively affected. Since the Commission has exempted Gypsy Trail from rate regulation, and the ratepayers control Gypsy Trail’s financial decisions, the Commission is considering the need for continued long-term financing regulation, and may resolve related matters, and may take this action for other utilities.

**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.ny.gov/f96dir.htm>. For questions, contact:** Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, NY 12223-1350, (518) 486-2655, email: leann.ayer@dps.ny.gov

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530, email: secretary@dps.ny.gov

**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.

(12-W-0207SP2)

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## **Racing and Wagering Board**

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### **NOTICE OF ADOPTION**

#### **Claims of Thoroughbred Horses That Die on the Track During or After a Race**

**I.D. No.** RWB-29-12-00007-A

**Filing No.** 991

**Filing Date:** 2012-10-01

**Effective Date:** 2012-10-17

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

**Action taken:** Amendment of section 4038.5 of Title 9 NYCRR.

**Statutory authority:** Racing, Pari-Mutuel Wagering and Breeding Law, section 101(1)

**Subject:** Claims of thoroughbred horses that die on the track during or after a race.

**Purpose:** Reduce fatalities of thoroughbred horses and injuries to jockeys.

**Text or summary was published** in the July 18, 2012 issue of the Register, I.D. No. RWB-29-12-00007-EP.

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

**Text of rule and any required statements and analyses may be obtained from:** John Googas, New York State Racing and Wagering Board, One Broadway Center, Suite 600, Schenectady, NY 12305-2553, (518) 395-5400, email: info@racing.ny.gov

**Assessment of Public Comment**

During the 45-day public comment period required for a Proposed Rulemaking, only one comment was received from Finger Lakes Race Track, which supported the proposed amendment. The letter of support was similar to a one sent by Finger Lakes Race Track in June 2012 as a result of an emergency rulemaking in April 2012. No other comments were received during the 45-day public comment period.

**NOTICE OF ADOPTION**

**Procedures and Penalties for the Testing of Thoroughbred and Harness Race Horses for the Presence of Excess TCO2 Levels**

**I.D. No.** RWB-30-12-00001-A

**Filing No.** 992

**Filing Date:** 2012-10-01

**Effective Date:** 2012-10-17

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

**Action taken:** Amendment of sections 4043.8(a), (b) and (e), 4043.9(a) and (b), 4120.13(a), (b) and (e), 4120.14(a) and (b); and addition of sections 4043.9(c) and 4120.14(c) to Title 9 NYCRR.

**Statutory authority:** Racing, Pari-Mutuel Wagering and Breeding Law, sections 101(1), 301(1), (2)(a) and 902(1)

**Subject:** Procedures and penalties for the testing of thoroughbred and harness race horses for the presence of excess TCO2 levels.

**Purpose:** To revise the TCO2 testing rule to reflect current scientific developments and revise penalties to best deter violations.

**Text or summary was published** in the July 25, 2012 issue of the Register, I.D. No. RWB-30-12-00001-P.

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

**Text of rule and any required statements and analyses may be obtained from:** John Googas, New York State Racing and Wagering Board, One Broadway Plaza, Suite 600, Schenectady, New York 12305-2553, (518) 395-5400, email: info@racing.ny.gov

**Assessment of Public Comment**

The agency received no public comment.

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**Office of Temporary and Disability Assistance**

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

**Standard Utility Allowances for the Supplemental Nutrition Assistance Program**

**I.D. No.** TDA-42-12-00001-EP

**Filing No.** 983

**Filing Date:** 2012-09-27

**Effective Date:** 2012-10-01

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

**Proposed Action:** Amendment of section 387.12 of Title 18 NYCRR.

**Statutory authority:** Social Services Law, sections 20(3)(d) and 95; 7 USC, section 2014(e)(6)(C); 7 CFR section 273.9(d)(6)(iii)

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

**Specific reasons underlying the finding of necessity:** It is of great importance that the federally mandated and approved standard utility allowances for the Supplemental Nutrition Assistance Program (SNAP) are applied to SNAP benefit calculations effective October 1, 2012 and thereafter until new amounts eventually are approved by the United States Department of Agriculture. If past standard utility allowances were to be used, in the absence of federal authority, in calculating ongoing SNAP

benefits, thousands of SNAP households would receive SNAP overpayments each month. Households receiving such overpayments could be subject to an extended period of SNAP recoupments at the rate of 10% of their monthly SNAP benefits to recover the resulting overpayment of SNAP benefits. Approximately 357,000 SNAP households throughout New York State could be adversely affected. Such recoupments would constitute hardships to these households and impact their ability to purchase needed food, for as long as the recoupment is in effect. These emergency amendments protect the public interest by setting forth the federally approved standard utility allowances as of October 1, 2012 and by helping to prevent future recoupments and hardships.

If New York State were judicially precluded from implementing the federally mandated adjustment to the standard allowances placing the State out of compliance with federal statutory and regulatory requirements, the State option to use the standard utility allowance in lieu of the actual utility cost portion of their shelter expenses would not have the required approval of the United States Department of Agriculture. Without federal approval of this State option, the State may be forced to use the actual utility cost portion of the shelter expenses of each individual SNAP household. This would necessitate all 58 social services districts in New York State to require all 1.65 million SNAP households to provide verification of the actual utility cost portions of their shelter expenses. This would create a tremendous burden on both social services districts and recipient households. In addition, as actual utility costs are generally significantly less than the standard utility allowances, SNAP households would have a much smaller shelter deduction resulting in a sizeable reduction in their SNAP benefits. This reduction in SNAP benefits for up to 1.65 million SNAP households would result in significant harm to the health and welfare of these households.

It is noted that the amendments are being promulgated pursuant to a combined "Notice of Emergency Adoption and Proposed Rule Making," instead of a "Notice of Proposed Rule Making," due to time constraints. On August 6, 2012, the United States Department of Agriculture approved the Office of Temporary and Disability Assistance's (OTDA's) proposed federal fiscal year 2013 standard utility allowances, effective October 1, 2012. The approval was then mailed to OTDA. Even if OTDA had received the approval on August 6, 2012, this would not have provided sufficient time for OTDA to publish a "Notice of Proposed Rule Making" and have the new standard utility allowances be effective on October 1, 2012. An emergency adoption was necessary to have the new standard utility allowances be effective on October 1, 2012. Although these regulations are being promulgated on an emergency basis to protect the public interest, OTDA will receive public comments on its combined "Notice of Emergency Adoption and Proposed Rule Making" until 45 days after publication of this notice.

**Subject:** Standard Utility Allowances for the Supplemental Nutrition Assistance Program.

**Purpose:** These regulatory amendments set forth the federally mandated and approved standard utility allowances as of October 1, 2012.

**Text of emergency/proposed rule:** Subparagraph (iii) of paragraph (3) of subdivision (f) of section 387.12 of Title 18 NYCRR is amended to read as follows:

(iii) Costs for the home if temporarily not occupied by the household because of employment or training away from the home, illness or abandonment caused by a natural disaster or casualty loss. The members of the household must intend to return to the home. The current occupant, if any, is not permitted to claim the shelter expenses for [food stamp] Supplemental Nutrition Assistance Program (SNAP) purposes and the home must not be leased or rented during the absence of the household.

Subparagraph (v) of paragraph (3) of subdivision (f) of section 387.12 of Title 18 NYCRR is amended to read as follows:

(v) Standard allowances. A household which is billed separately and on a recurring basis for heating and/or cooling costs, other utility costs and/or a telephone cost, or is entitled to a Home Energy Assistance Program (HEAP) payment or other Low Income Home Energy Assistance Act (LIHEAA) payment must use the standard allowances in calculating shelter expenses. If actual documented expenses exceed the standard allowances, the actual costs may be used. When a household lives with other households and shares heating and/or cooling, utility and/or telephone expenses with such households and is otherwise eligible to claim a standard allowance, the allowance must be divided equally among the number of households which contribute towards payment of the bill whether or not all households participate in [the food stamp program] SNAP. Such household may claim its prorated share of the standard or its actual expenses, whichever is greater. If a prorated share of the standard is used, the amount of the prorated share amount may not exceed the total actual expense incurred for this item by the entire group which shares the expense. Households will be advised of the right to switch between the use of actual documented expenses and the standard allowance. House-

holds will be permitted to switch between actual costs and the standard allowance for heating/cooling at the time of recertification and one additional time thereafter during each 12-month period.

(a) The standard allowance for heating/cooling consists of the costs for heating and/or cooling the residence, electricity not used to heat or cool the residence, cooking fuel, sewage, trash collection, water fees, fuel for heating hot water and basic service for one telephone. The standard allowance for heating/cooling is available to households which incur heating and/or cooling costs separate and apart from rent and are billed separately from rent or mortgage on a regular basis for heating and/or cooling their residence, or to households entitled to a Home Energy Assistance Program (HEAP) payment or other Low Income Home Energy Assistance Act (LIHEAA) payment. A household living in public housing or other rental housing which has central utility meters and which charges the household for excess heating or cooling costs only is not entitled to the standard allowance for heating/cooling unless they are entitled to a HEAP or LIHEAA payment. Such a household may claim actual costs which are paid separately. Households which do not qualify for the standard allowance for heating/cooling may be allowed to use the standard allowance for utilities or the standard allowance for telephone. As of [April] *October 1, [2011] 2012*, but subject to subsequent adjustments as required by the United States Department of Agriculture (“USDA”), the standard allowance for heating/cooling for [food stamp] *SNAP* applicant and recipient households residing in New York City is [\$718] \$725; for households residing in either Suffolk or Nassau Counties, it is [\$669] \$675; and for households residing in any other county of New York State, it is [\$593] \$599.

(b) The standard allowance for utilities consists of the costs for electricity not used to heat or cool the residence, cooking fuel, sewage, trash collection, water fees, fuel for heating hot water and basic service for one telephone. It is available to households billed separately from rent or mortgage for one or more of these utilities other than telephone. The standard allowance for utilities is available to households which do not qualify for the standard allowance for heating/cooling. Households which do not qualify for the standard allowance for utilities may be allowed to use the standard allowance for telephone. As of [April] *October 1, [2011] 2012*, but subject to subsequent adjustments as required by the USDA, the standard allowance for utilities for [food stamp] *SNAP* applicant and recipient households residing in New York City is [\$284] \$287; for households residing in either Suffolk or Nassau Counties, it is [\$263] \$265; and for households residing in any other county of New York State, it is [\$240] \$242.

(c) The standard allowance for telephone consists of the cost for basic service for one telephone. The standard allowance for telephone is available to households which do not qualify for the standard allowance for heating/cooling or the standard allowance for utilities. As of April 1, 2011, but subject to subsequent adjustment as required by the USDA, the standard allowance for telephone for all [food stamp] *SNAP* applicant and recipient households residing in New York State is \$33.

(d) OTDA must review the standard utility allowances annually, or at such time as otherwise directed by the USDA, and make adjustments to reflect changes in costs subject to the approval and direction of the USDA. Households whose [food stamp] *SNAP* benefits are reduced due to such changes shall receive notification of the changes in accordance with section 358-3.3 of this Title.

**This notice is intended:** to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire December 25, 2012.

**Text of rule and any required statements and analyses may be obtained from:** Jeanine S. Behuniak, New York State Office of Temporary and Disability Assistance, 40 North Pearl Street, Albany, New York 12243-0001, (518) 474-9779, email: Jeanine.Behuniak@otda.ny.gov

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

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

**Regulatory Impact Statement**

1. Statutory authority:

Federal statute at 7 USC § 2014(e)(6)(C) provides that in computing shelter expenses for budgeting under the federal Supplemental Nutrition Assistance Program (SNAP), a State agency may use a standard utility allowance as provided in federal regulations.

Federal regulation at 7 CFR § 273.9(d)(6)(iii) provides for standard utility allowances in accordance with SNAP. Clause (A) of this subparagraph states that with federal approval from the Food and Nutrition Services (FNS) of the United States Department of Agriculture, a State agency may develop standard utility allowances to be used in place of actual costs in calculating a household’s excess shelter deduction. Federal regulations allow for the following types of standard utility allowances: a standard utility allowance for all utilities that includes heating or cooling costs; a

limited utility allowance that includes electricity and fuel for purposes other than heating or cooling, water, sewerage, well and septic tank installation and maintenance, telephone, and garbage or trash collection; and an individual standard for each type of utility expense. Clause (B) of the subparagraph provides that a State agency must review the standard utility allowances annually and make adjustments to reflect changes in costs, rounded to the nearest whole dollar. Also State agencies must provide the amounts of the standard utility allowances to the FNS when they are changed and submit methodologies used in developing and updating the standard utility allowances to the FNS for approval whenever the methodologies are developed or changed.

Social Services Law (SSL) § 20(3)(d) authorizes the New York State Office of Temporary and Disability Assistance (OTDA) to promulgate regulations to carry out its powers and duties.

SSL § 95 authorizes OTDA to administer SNAP, formerly known as the Food Stamp Program, in New York State and to perform such functions as may be appropriate, permitted or required by or pursuant to federal law.

2. Legislative objectives:

It was the intent of the Legislature to implement the federal SNAP Act in New York State in order to provide SNAP benefits to eligible New York State residents.

3. Needs and benefits:

The regulatory amendments set forth the standard utility allowances within New York State as of October 1, 2012. OTDA is amending its standard utility allowances in 18 NYCRR § 387.12(f)(3)(v)(a) and (b) to reflect a decrease in fuel and utility costs, which is indicated in the Consumer Price Index (CPI) fuel and utilities values (which includes components for water, sewage and trash collection).

The following chart sets forth the standard utility allowance categories; the past standard utility allowances (“Past SUA”) that were in effect for federal fiscal year (FFY) 2012, from October 1, 2011 through September 30, 2012; and the new standard utility allowances (“New SUA”) that are in effect for FFY 2013, effective October 1, 2012:

	New York City		Nassau/Suffolk Counties		Rest of State	
	Past SUA	New SUA	Past SUA	New SUA	Past SUA	New SUA
Heating/Air Conditioning SUA	\$736	\$725	\$685	\$675	\$608	\$599
Basic Utility SUA	\$291	\$287	\$269	\$265	\$246	\$242
Phone SUA	\$33 (Unchanged for all Counties)					

To determine the new standard utility allowance values for FFY 2013, the CPI Fuel and Utility value for June 2012 was compared to the CPI Fuel and Utility value for June 2011, the CPI value that was used to determine the adjustment for the FFY 2012 standard utility allowance values. The percentage change between June 2011 and June 2012 was then applied to the FFY 2012 standard utility allowance figures and rounded to the nearest dollar. The June 2012 CPI Fuel and Utility value was 1.437% lower than the June 2011 value. The June CPI values were used because they were the most recent month for which CPI values were available at the time (early August) when the programming of the new SUA values must be done.

OTDA has all required approvals from the FNS pertaining to these changes and is required to apply the standard utility allowances for FFY 2013 in its SNAP budgeting effective October 1, 2012. As of October 1, 2012, OTDA does not have federal approval or authority to apply past standard utility allowances in its prospective SNAP budgeting.

It is of great importance that the federally mandated and approved standard utility allowances for SNAP are applied to SNAP benefit calculations effective October 1, 2012 and thereafter. If past standard utility allowances were to be used, in the absence of federal authority, in calculating ongoing SNAP benefits, thousands of SNAP households would receive SNAP overpayments each month. Households receiving such overpayments could be subject to an extended period of SNAP recoupments at the rate of 10% of their monthly SNAP benefits to recover the resulting overpayment of SNAP benefits. Approximately 357,000 SNAP households throughout New York State could be adversely affected. Such recoupments would constitute hardships to these households and impact their ability to purchase needed food, for as long as the recoupment is in effect. Thus it is necessary for the preservation of the public health and the general welfare to set forth the federally-approved standard utility allowances as of October 1, 2012 in order to ensure compliance with federal requirements and to help prevent future recoupments and hardships for SNAP households.

In addition, the regulatory amendments replace the name “Food Stamp Program” with the new name “Supplemental Nutrition Assistance Program.” This revision is consistent with Chapter 41 of the Laws of 2012, which amended Social Services Law § 95 to change the name of the “Food Stamp Program” to the “Supplemental Nutrition Assistance Program” effective August 29, 2012.

#### 4. Costs:

The amendments will not result in any impact to the State financial plan, and they will not impose costs upon the social services districts because SNAP benefits are 100 percent federally funded, and these amendments comply with federal statute and regulation to implement federally approved standard utility allowances.

#### 5. Local government mandates:

The amendments do not impose any mandates upon social services districts since the amendments simply set forth the federally approved standard utility allowances, effective October 1, 2012. Also it is noted that the calculation of SNAP budgets, which incorporates the standard utility allowances, and the resulting issuances of SNAP benefits are mostly automated processes in New York City and the rest of the State using OTDA’s Welfare Management System. To the extent that the processes are not automated, the amendments do not impose any additional requirements upon the social services districts than already exist in terms of calculating SNAP budgets.

#### 6. Paperwork:

The amendments do not impose any new forms, new reporting requirements or other paperwork upon the State or the social services districts.

#### 7. Duplication:

The amendments do not duplicate, overlap or conflict with any existing State or federal statutes or regulations.

#### 8. Alternatives:

One alternative is not to implement the revised standard utility allowances. However, this alternative is not a viable option because if New York State were to opt not to implement the new standard utility allowances or was otherwise judicially precluded from doing so, then New York State would be out of compliance with federal statutory and regulatory requirements. In such a circumstance, the State option to use the standard utility allowance in lieu of the actual utility cost portion of the shelter expenses would not have the required approval of the United States Department of Agriculture. Without federal approval of this State option, the State may be forced to use the actual utility cost portion of the shelter expenses of each individual SNAP household. This would necessitate all 58 social services districts in New York State to require all 1.65 million SNAP households provide verification of the actual utility cost portion of their shelter expenses. This would create a tremendous burden on both social services districts and recipient households. In addition, as the actual utility cost portion of the shelter expenses are generally significantly less than the standard utility allowances, most SNAP households would have a much smaller shelter deduction resulting in a sizeable reduction in their SNAP benefits. This reduction in SNAP benefits for up to 1.65 million SNAP households would result in significant harm to the health and welfare of these households.

#### 9. Federal standards:

The amendments do not conflict with or exceed minimum standards of the federal government.

#### 10. Compliance schedule:

Since the amendments set forth the federally approved standard utility allowances effective October 1, 2012, the State and all social services districts will be compliance with the amendments.

### **Regulatory Flexibility Analysis**

#### 1. Effect of Rule:

The amendments will have no effect on small businesses. The amendments do not impose any mandates upon social services districts since the amendments simply set forth the federally approved standard utility allowance amounts, effective October 1, 2012. The calculation of Supplemental Nutrition Assistance Program (SNAP) budgets, which incorporates the standard utility allowances, and the resulting issuances of SNAP benefits are mostly automated processes in New York City and the rest of the State using OTDA’s Welfare Management System, and to the extent the processes are not automated, the amendments do not impose any additional requirements upon the social services districts than already exist in terms of calculating SNAP budgets.

#### 2. Compliance Requirements:

The amendments do not impose any reporting, recordkeeping or other compliance requirements on social services districts.

#### 3. Professional Services:

The amendments do not require social services districts to hire additional professional services to comply with the new regulations.

#### 4. Compliance Costs:

The amendments do not impose initial costs or any annual costs upon social services districts because SNAP benefits are 100 percent federally

funded, and these amendments comply with federal statute and regulation to implement federally approved standard utility allowances.

#### 5. Economic and Technological Feasibility:

All social services districts have the economic and technological ability to comply with these regulations.

#### 6. Minimizing Adverse Impact:

The amendments will not have an adverse impact on social services districts.

#### 7. Small Business and Local Government Participation:

On August 22, 2012, OTDA provided General Information System (GIS) releases, GIS 12 TA/DC 018, to social services districts in New York State setting forth, in part, the new standard utility allowances for SNAP effective October 1, 2012. Social services districts have not raised any concerns or objections related to the implementation of the October 1, 2012 standard utility allowances set forth in the GIS releases. The GIS releases also have been posted to OTDA’s internet site.

### **Rural Area Flexibility Analysis**

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

The amendments will have no effect on small businesses in rural areas. The amendments do not impose any mandates upon the forty-four social services districts in rural areas of the State. Rather, the amendments simply set forth the federally approved standard utility allowance amounts, effective October 1, 2012. The calculation of Supplemental Nutrition Assistance Program (SNAP) budgets, which incorporates the standard utility allowances, and the resulting issuances of SNAP benefits are mostly automated processes in New York City and the rest of the State using OTDA’s Welfare Management System. To the extent the processes are not automated, the amendments do not impose any additional requirements upon the social services districts than already exist in terms of calculating SNAP budgets.

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

The amendments do not impose any reporting, recordkeeping or other compliance requirements on the social services districts in rural areas. Also the social services districts in rural areas do not need to hire additional professional services to comply with the regulations.

#### 3. Costs:

The amendments do not impose initial capital costs or any annual costs upon the social services districts in rural areas because SNAP benefits are 100 percent federally funded, and these amendments comply with federal statute and regulation to implement federally approved standard utility allowances.

#### 4. Minimizing adverse impact:

The amendments will not have an adverse impact on the social services districts in rural areas.

#### 5. Rural area participation:

On August 22, 2012, OTDA provided General Information System (GIS) releases, GIS 12 TA/DC 018, to social services districts in New York State setting forth, in part, the new standard utility allowances for SNAP effective October 1, 2012. The social services districts in rural areas have not raised any concerns or objections related to the implementation of the October 1, 2012 standard utility allowances set forth in the GIS releases. The GIS releases also have been posted to OTDA’s internet site.

### **Job Impact Statement**

A Job Impact Statement is not required for the amendments. It is apparent from the nature and the purpose of the amendments that they will not have a substantial adverse impact on jobs and employment opportunities in either the public or the private sectors. The amendments will have no effect on small businesses. The amendments will not affect in any significant way the jobs of the workers in the social services districts or the State. These regulatory amendments set forth the federally approved standard utility allowances for the Supplemental Nutrition Assistance Program (SNAP) as of October 1, 2012. The calculation of SNAP budgets, which incorporates the standard utility allowances, and the resulting issuances of SNAP benefits are mostly automated processes in New York City and the rest of the State using OTDA’s Welfare Management System. To the extent the processes are not automated, the amendments do not impose any additional requirements upon the social services districts than already exist in terms of calculating SNAP budgets. Thus the changes will not have any adverse impact on jobs and employment opportunities in New York State.

## Urban Development Corporation

### EMERGENCY RULE MAKING

#### Economic Development Fund Program ("EDF")

**I.D. No.** UDC-42-12-00003-E

**Filing No.** 984

**Filing Date:** 2012-09-28

**Effective Date:** 2012-09-28

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

**Action taken:** Addition of sections 4243.36 and 4243.37 to Title 21 NYCRR.

**Statutory authority:** Urban Development Corporation Act, sections 9-c and 16-i; and L. 1968, ch. 174

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

**Specific reasons underlying the finding of necessity:** The modification to the rule facilitates the provision of Economic Development Fund emergency assistance to (i) retail and service businesses ("Retail and Service Businesses") located in the Towns of Crown Point, Moriah, and Ticonderoga, New York, and the Village of Port Henry, New York and agricultural and manufacturing businesses located in Essex County New York ("Agricultural Manufacturing Businesses") and adversely affected by the October 16, 2010 emergency permanent closing of the unsafe Lake Champlain Bridge and (ii) Retail and Service Businesses and Agricultural and Manufacturing Businesses located in Essex County, New York and adversely affected by storms and flooding occurring from and including August 27, 2011 and continuing through and including September 8, 2011.

**Subject:** Economic Development Fund Program ("EDF").

**Purpose:** Provide the basis for administration of The Champlain Bridge and August-September 2011 Storm and Flood Recovery Fund within EDF.

**Text of emergency rule:** CHAMPLAIN BRIDGE AND AUGUST - SEPTEMBER 2011 STORM AND FLOOD, RECOVERY FUND

#### Section 4243.36 Generally

*Champlain Bridge and August - September Storm and Flood Recovery Fund (the "Fund") provides General Development Financing assistance on an emergency basis (i) for retail and service businesses ("Retail and Service Businesses") located in the Towns of Crown Point, Moriah, and Ticonderoga, New York, the Village of Port Henry, New York and agricultural and manufacturing businesses, located in Essex County, New York, ("Agricultural and Manufacturing Businesses") that were adversely affected by the October 16, 2010 emergency permanent closing of the unsafe Lake Champlain Bridge and (ii) Retail and Service Businesses and Agricultural and Manufacturing Businesses located in Essex County, New York that were adversely affected by storms and flooding occurring from and including August 27, 2011 and continuing through and including September 8, 2011.*

*Section 4243.37 Champlain Bridge and August - September 2011 Storm and Flood Recovery Fund Assistance*

*(a) In order to provide General Development Financing assistance to Retail and Service Businesses and Agricultural and Manufacturing Businesses in Eligible Areas (as defined below), the following provisions of the rule are modified as follows solely for Fund assistance.*

*(1) "Eligible Area" shall mean: (i) for assistance with respect to the closure of the Bridge Closure, as defined below, (a) with respect to assistance for Retail and Service Businesses the Towns of Crown Point, Moriah, and Ticonderoga, New York, the Village of Port Henry, New York and (b) with respect to assistance for Agricultural and Manufacturing Businesses, Essex County, New York; and (ii) for assistance with respect to damages and losses caused by or related to storms and flooding occurring from and including August 27, 2011 and continuing through and including September 8, 2011, in Essex County, New York.*

*(2) "Bridge Closure" shall mean the October 16, 2010 emergency permanent closing of the unsafe Lake Champlain Bridge.*

*(3) The term "Distressed Area" in paragraph 4243.2(a)(7) shall also include the Eligible Areas.*

*(4) The term "Eligible Applicant" in paragraph 4243.2(a)(11) shall*

*also include all Retail and Service Businesses and Agricultural and Manufacturing Businesses.*

*(5) The term "Eligible Business" in paragraph 4243.2(a)(12) shall also include all Retail and Service Businesses and Agricultural and Manufacturing Businesses.*

*(6) The term "Eligible Recipient" in paragraph 4243.2(a)(13)(iii) shall also include all Retail and Service Businesses and Agricultural and Manufacturing Businesses.*

*(7) The term "Ineligible Cost" in paragraph 4243.2(a)(22) subparagraph (v) does not apply.*

*(8) The term "Ineligible Recipient" in paragraph 4243.2(a)(23) subparagraphs (i), (ii), (iii) and (iv) does not apply.*

*(9) Section 4243.7 regarding fees does not apply. There are no fees for Fund assistance.*

**This notice is intended** to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires December 26, 2012.

**Text of rule and any required statements and analyses may be obtained from:** Antovk Pidedjian, Sr. Counsel, New York Urban Development Corporation, 633 Third Avenue, 37th Floor, New York, NY 10017, (212) 803-3792, email: apidedjian@esd.ny.gov

#### Regulatory Impact Statement

1. **Statutory Authority:** Section 9-c of the New York State Urban Development Corporation Act Chapter 174 of the Laws of 1968, as amended (the "Act"), provides, in part, that the Corporation shall, assisted by the Commissioner of Economic Development and in consultation with the Department of Economic Development, promulgate rules and regulations in accordance with the State Administrative Procedure Act. Section 16-i of the Act established the Economic Development Fund and authorizes the New York State Urban Development Corporation d/b/a Empire State Development Corporation (the "Corporation"), within available appropriations, to provide grants for the purpose of creating or retaining jobs or preventing, reducing or eliminating unemployment or underemployment. The proposed regulations modify Chapter L, Part 4243 of Title 21 NYCRR.

2. **Legislative Objectives:** Section 16-i of the Act sets forth the Legislative objective of authorizing the Corporation, within available appropriations, to provide grants and loans in order to promote the economic health of New York state by facilitating the creation or retention of jobs and would increase business activity within a municipality or region of the state. The adoption of 21 NYCRR Part 4243.36 and 4243.37 will further these goals by modifying 21 NYCRR Part 4243 in order to provide General Development Financing assistance on an emergency basis to retail and service businesses ("Retail and Service Businesses") located in the Towns of Crown Point, Moriah, and Ticonderoga, New York, and the Village of Port Henry, New York and agricultural and manufacturing businesses located in Essex County New York ("Agricultural Manufacturing Businesses") that were adversely affected by the October 16, 2010 emergency permanent closing of the unsafe Lake Champlain Bridge and Retail and Service Businesses and Agricultural and Manufacturing Businesses located in Essex County, New York that were adversely affected by storms and flooding occurring from and including August 27, 2011 and continuing through and including September 8, 2011, in order to facilitate the retention of jobs and increase business activity within those municipalities and the affected region.

3. **Needs and Benefits:** The Governor declared a state of emergency in Essex County and surrounding areas due to the emergency closure of the unsafe Lake Champlain Bridge (which was subsequently demolished). For nearly eighty years, the bridge had been a major transportation route between the Ticonderoga, Crown Point and Port Henry areas of the State and the Vergennes, Middlebury and Burlington areas of Vermont. The loss of the bridge resulted in a 100 mile detour until a new bridge could be designed and constructed. Even with an emergency ferry service to handle limited traffic, local businesses lost customers and incurred increased costs that would cause business closures, and require layoffs and firing. The Governor also declared a state of emergency in Essex County and surrounding areas due to the storms and flooding occurring from and including August 27, 2011 and continuing through and including September 8, 2011. The modifications to the rule would allow affected businesses to receive economic assistance in order to retain jobs and mitigate layoffs and firings and increase business activity.

4. **Costs:** The Program is funded by a State appropriation for the Economic Development Fund and there are no other costs.

5. **Paperwork / Reporting:** There are no additional reporting or paperwork requirements as a result of this rule on businesses participating in the Program. Standard applications and grant documents used for most other assistance by the Corporation will be employed in keeping with the Corporation's overall effort to facilitate the application process for all of the Corporation's clients.

6. **Local Government Mandates:** The Program imposes no mandates -

program, service, duty, or responsibility - upon any city, county, town, village, school district or other special district.

7. Duplication: The regulations do not duplicate any existing state or federal rule.

8. Alternatives: There are no alternatives to this regulation for providing emergency assistance for business affected by the storms and flooding occurring from and including August 27, 2011 and continuing through and including September 8, 2011 and the closing of the Lake Champlain Bridge in order to retain jobs in the affected area.

9. Federal Standards: There are no minimum federal standards related to this regulation. The regulation is not inconsistent with any federal standards or requirements.

10. Compliance Schedule: The regulation shall take effect immediately upon adoption.

#### **Regulatory Flexibility Analysis**

1. Effects of Rule: The modification of the Rule pursuant to Parts 4243.36 and 4243.37 provides emergency Economic Development Fund General Development Financing assistance to retail and service businesses located in the Towns of Crown Point, Moriah, and Ticonderoga, New York, and the Village of Port Henry, New York and agricultural and manufacturing businesses located in Essex County New York that were adversely affected by the October 16, 2010 emergency permanent closing of the unsafe Lake Champlain Bridge and retail and service businesses and agricultural and manufacturing businesses located in Essex County, New York that were adversely affected by storms and flooding occurring from and including August 27, 2011 and continuing through and including September 8, 2011 in order to preserve business activity and the jobs by these businesses that would otherwise be reduced or lost due to the loss of customers and increased costs arising from the unexpected permanent closing (and subsequent demolition) of the unsafe Lake Champlain Bridge and the August - September 2011 storms and floods.

2. Compliance Requirements: There are no compliance requirements for small businesses and local governments in these regulations.

3. Professional Services: Applicants do not need to obtain professional services to comply with these regulations.

4. Compliance Costs: There are no compliance costs for small businesses and local governments in these regulations.

5. Economic and Technological Feasibility: There are no compliance costs for small businesses and local governments in these regulations so there is no basis for determining the economic and technological feasible for compliance with the rule by small businesses and local governments.

6. Minimizing Adverse Impact: This rule has no adverse impacts on small businesses or local governments because it is designed to provide assistance to the business listed above.

7. Small Business and Local Government Participation: The modification to the rule facilitates emergency assistance to all agricultural, manufacturing, retail, and service small businesses located in the Towns of Crown Point, Moriah, and Ticonderoga, New York, and the Village of Port Henry, New York and Essex County, New York affected by the emergency closing and demolition of the Lake Champlain Bridge and the storms and flooding occurring from and including August 27, 2011 and continuing through and including September 8, 2011.

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

1. Types and Estimated Numbers of Rural Areas: Retail and Service Businesses located in the Towns of Crown Point, Moriah, and Ticonderoga, New York, and the Village of Port Henry, New York and agricultural and manufacturing businesses located in Essex County New York that were adversely affected by the October 16, 2010 emergency permanent closing of the unsafe Lake Champlain Bridge and Retail and Service Businesses and Agricultural and Manufacturing Businesses located in Essex County, New York that were adversely affected by storms and flooding occurring from and including August 27, 2011 and continuing through and including September 8, 2011 are eligible to apply for Economic Development Fund General Development Financing pursuant to the Champlain Bridge Recovery Fund (the "Program").

2. Reporting, Recordkeeping and Other Compliance Requirements and Professional Services: The modification of the rule will not impose any new or additional reporting or recordkeeping requirements; no affirmative acts will be needed to comply; and, it is not anticipated that applicants will have to secure any professional services in order to comply with this rule.

3. Costs: There should be no costs to small businesses receiving assistance other than the minimal costs of preparing a simple application for program assistance.

4. Minimizing Adverse Impact: The purpose of the rule modification is to provide General Development Financing assistance from the Economic Development Fund on an emergency basis for (i) retail and service businesses located in the Towns of Crown Point, Moriah, and Ticonderoga, New York, and the Village of Port Henry, New York and agricultural and manufacturing businesses located in Essex County New York that were

adversely affected by the October 16, 2010 emergency permanent closing of the unsafe Lake Champlain Bridge and (ii) Retail and Service Businesses and Agricultural and Manufacturing Businesses located in Essex County, New York that were adversely affected by storms and flooding occurring from and including August 27, 2011 and continuing through and including September 8, 2011.

5. Rural Area Participation: This rule provides emergency assistance to agricultural, manufacturing, retail and service business in rural Essex County, New York and the Towns of Crown Point, Moriah, and Ticonderoga, New York, and the Village of Port Henry, New York.

#### **Job Impact Statement**

This modification to Part 4243 of Title 21 NYCRR will not adversely affect jobs or employment opportunities in New York State. The regulations are intended to improve the economy of New York, particularly by providing emergency Economic Development Fund assistance to (i) retail and service businesses ("Retail and Service Businesses") located in the Towns of Crown Point, Moriah, and Ticonderoga, New York, and the Village of Port Henry, New York and agricultural and manufacturing businesses located in Essex County New York ("Agricultural Manufacturing Businesses") that were adversely affected by the October 16, 2010 emergency permanent closing of the unsafe Lake Champlain Bridge and (ii) Retail and Service Businesses and Agricultural and Manufacturing Businesses located in Essex County, New York that were adversely affected by storms and flooding occurring from and including August 27, 2011 and continuing through and including September 8, 2011.

There will be no adverse impact on job opportunities in the state.

## **EMERGENCY RULE MAKING**

### **Capital Access Program**

**I.D. No.** UDC-42-12-00004-E

**Filing No.** 985

**Filing Date:** 2012-09-28

**Effective Date:** 2012-09-28

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

**Action taken:** Addition of Part 4251 to Title 21 NYCRR.

**Statutory authority:** Urban Development Corporation Act, section 5(4); L. 2011, ch. 103, section 16-K; and L. 1968, ch. 174

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

**Specific reasons underlying the finding of necessity:** The current economic crisis, including high unemployment and the immediate lack of financing from traditional financial institutions for job generating small business, are the reasons for the emergency adoption of this Rule which is required for the immediate implementation of the Capital Access Program in order to promptly provide assistance to the State's small businesses in order to sustain and increase employment generated by these businesses.

**Subject:** Capital Access Program.

**Purpose:** Provide the basis for administration of the Capital Access Program.

**Substance of emergency rule:** The Capital Access Program (the "Program") was created pursuant to Chapter 103 of the Laws of 2011 (the "Enabling Legislation"). The general purpose of the Program is to promote economic development in the State by assisting small businesses that otherwise find it difficult to obtain regular or sufficient bank financing through the funding of loan loss reserves for loans made to such small businesses by participating financial institutions.

The Enabling Legislation creates Section 16-k of the New York State Urban Development Corporation Act (the "Act"), which governs the Program. The Enabling Legislation requires the New York State Urban Development Corporation (the "Corporation") to promulgate rules and regulations for the Program (the "Rules") in accordance with the provisions of the State Administrative Procedure Act. The Rules set forth the framework for the eligibility, evaluation criteria, application and project process and administrative procedures of the Program as follows:

#### **1. Program Operations:**

A participating financial institution shall provide to the Corporation a plan for the marketing of the Program to eligible small businesses, including small businesses in highly distressed areas and MWBEs, with appropriate lending objectives identified by the participating financial institution for such areas and businesses. Program loans to eligible small businesses shall only be for the purposes of expansion, facility or technol-

ogy upgrading, start-up or working capital purposes. No program loan will exceed five hundred thousand dollars in principal amount. For each program loan, there shall be deposited in the loan loss reserve fund an amount, specified or agreed to in writing by the Corporation, from both the participating financial institution and the eligible small business borrower, aggregating neither less than three percent nor more than seven percent of the principal amount of the program loan, whereby the amount contributed by the eligible small business is not greater than fifty percent of such aggregate. With respect to each program loan, it shall be certified to the Corporation in such a fashion and with such supporting information as the Corporation shall prescribe, that the participating financial institution has made such loan and delivered the aggregate loan loss reserve fund contribution with respect to such loan. The Corporation, after satisfactory certification pursuant to the Rules shall transfer to the loan loss reserve fund an amount, as determined by the Corporation, that is (1) not less than the aggregate contribution of the participating financial institution and the small business with respect to such loan, and (2) not greater than one hundred fifty percent of such aggregate contributions as determined by the Corporation.

#### 2. Program Administration:

The Corporation may administer the Program through a third party agent, which may be the New York Business Development Corporation, established under section 210 of the Banking Law, provided, however, that if the third party agent is to be a financial institution other than the New York Business Development Corporation, then such third party agent will be selected pursuant to a competitive process. With respect to these third party agents, the Rules specify requirements for contract duration, performance evaluation and contract renewals.

#### 3. Application and Approval Process:

The Corporation shall identify, review, and approve eligible participating financial institutions through an open recruitment and enrollment process. Participating financial institutions participating in the Program will possess sufficient commercial lending experience, financial and managerial capabilities, and operational skills to meet the Program objectives. The Rules provide guidance as to what documents can be provided by various lending entities to assist in the Corporation's evaluation of applicants.

#### 4. Auditing, Compliance and Reporting:

The Rules set forth requirements for quarterly and annual reporting from participating financial institutions, including updated specific information regarding loan loss reserve funds and individual program loans. The Corporation may conduct audits of participating financial institutions in order to ensure compliance with the provisions of applicable laws and regulations, and with respect to and agreements between the Participating Financial Institution and the Corporation and the Agent.

**This notice is intended** to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires December 26, 2012.

**Text of rule and any required statements and analyses may be obtained from:** Antovk Pidedjian, Sr. Counsel, New York Urban Development Corporation, 633 Third Avenue, 37th Floor, New York, NY 10017, (212) 803-3792, email: apidedjian@esd.ny.gov

#### Regulatory Impact Statement

1. Statutory Authority: Section 9-c of the New York State Urban Development Corporation Act Chapter 174 of the Laws of 1968 (Uncon. Laws section 6259-c), as amended (the "Act"), provides, in part, that the Corporation shall, assisted by the Commissioner of Economic Development and in consultation with the Department of Economic Development, promulgate rules and regulations in accordance with the State Administrative Procedure Act.

Section 16-k of the Act provides for the creation of the Capital Access Program (the "Program") and authorizes the New York State Urban Development Corporation d/b/a Empire State Development (the "Corporation"), within available appropriations, to provide low interest loans to Community Based Lending Organizations and Participating Financial Institutions, in order to provide funding for those organizations' loans to New York's small businesses that are unable to obtain adequate credit or adequate terms for such credit.

2. Legislative Objectives: Section 16-k of the Act (Uncon. Laws section 6266-k, added by Chapter 103 of the Laws of 2011) sets forth the Legislative objective of authorizing the Corporation, within available appropriations, to provide low interest loans to financial institutions and other community based lending organizations, in order to provide funding for those organizations' loans to New York's small businesses that are unable to obtain adequate credit or adequate terms for such credit. The adoption of 21 NYCRR Part 4251 will further these goals by setting forth the types of available assistance, evaluation criteria, the application process and related matters for the Program.

3. Needs and Benefits: The State has allocated \$18,994,204 of federal funds to provide low interest loans to financial institutions and other com-

munity based lending organizations, in order to provide funding for those organizations' loans to New York's small businesses that are unable to obtain adequate credit or adequate terms for such credit. Small businesses have been determined to be a major source of employment throughout the State. Small businesses have historically had difficulties obtaining financing or refinancing in order to remain competitive and grow their operations, and the current economic difficulties have exacerbated this problem. Providing loans to small businesses should sustain and potentially increase the employment provided by such businesses, especially during this period of historically high unemployment and underemployment. The Program allows the Corporation to use either the New York Business Development Corporation or another third party contracted through a competitive process by the Corporation to administer the Capital Access Program. The rule further facilitates the administration of the Program by defining eligible and ineligible small businesses, eligible uses of the proceeds of loans to small businesses and other criteria to be applied by the institutions in making loans to small businesses.

4. Costs: The Program is funded by a State appropriation of federal funds in the amount of \$18,994,204 dollars. Pursuant to the rule, principal amount of Program Loans will not be greater than \$500,000. The costs to participating financial institutions or community based lending organizations would depend on the extent to which they participate in the Program and their effectiveness and efficiency in making small business loans.

5. Paperwork / Reporting: There are no additional reporting or paperwork requirements as a result of this rule for Program participants except those required by the statute creating the Program such as an annual report on the organization's lending activity and providing information in connection with an audit by the Corporation with respect to the organization's use of Program funds. Standard applications and loan documents used for most other assistance by the Corporation will be employed in keeping with the Corporation's overall effort to facilitate the application process for all of the Corporation's clients.

6. Local Government Mandates: The Program imposes no mandates - program, service, duty, or responsibility - upon any city, county, town, village, school district or other special district.

7. Duplication: The regulations do not duplicate any existing state or federal rule.

8. Alternatives: While larger financial institutions can potentially provide small business financing and the community based lending organizations already provide small business financing, access to financing remains limited. The State has established the Program in order to enhance the access of small businesses to such financing, and the proposed rule provides the regulatory basis for providing low interest loans to community based lending organizations for lending to small businesses in accordance with the statutory requirements of the Program.

9. Federal Standards: There are no minimum federal standards related to this regulation. The regulation is not inconsistent with any federal standards or requirements.

10. Compliance Schedule: The regulation shall take effect immediately upon adoption.

#### Regulatory Flexibility Analysis

1. Effects of Rule: In the rule: "Small business" is defined as a business that is resident and authorized to do business in the State, independently owned and operated, not dominant in its field, and employs one hundred or fewer persons on a full time basis; "Community Based Lending Organization" is defined as including community development financial institutions, small business lending consortia, certified development companies, providers of United States department of Agriculture business and industrial guaranteed loans, United States Small Business Administration loan providers, community development credit unions, and community banks; and "Financial Institution" is defined as any bank, trust company, savings bank, savings and loan association or cooperative bank chartered by the State or any national banking association, federal savings and loan association or federal savings bank or any Community Based Lending Organization, provided, however, that such entity has its principal office located in the State. The rule will facilitate the statutory Program's purpose of having New York State Urban Development Corporation d/b/a Empire State Development (the "Corporation") assist small businesses, that otherwise find it difficult to obtain regular or sufficient bank financing, through the funding of loan loss reserves for loans made to such small businesses by participating financial institutions.

2. Compliance Requirements: There are no compliance requirements for local governments in these regulations. Small businesses must comply with the compliance requirements applicable to all participating lending institutions regardless of size. This is a voluntary program. Lending institution not wishing to undertake the compliance obligations need not participate.

3. Professional Services: Applicants do not need to obtain professional services to comply with these regulations.

4. Compliance Costs: There are no compliance costs for local govern-

ments in these regulations. With respect to small business lending institutions, they must comply with the compliance cost requirements applicable to all participating lending institutions regardless of size. This is a voluntary program. Lending institution not wishing to undertake the compliance obligations need not participate.

5. Economic and Technological Feasibility: There are no compliance costs for small businesses and local governments in these regulations so there is no basis for determining the economic and technological feasibility for compliance with the rule by small businesses and local governments.

6. Minimizing Adverse Impact: This rule has no adverse impacts on small businesses or local governments because it is designed to provide access to capital through the funding of loan loss reserves for loans made to small businesses by participating financial institutions.

7. Small Business and Local Government Participation: A number of banks and community lending organizations were surveyed by the Corporation and were supportive of the program and its structure.

**Rural Area Flexibility Analysis**

1. Types and Estimated Numbers of Rural Areas: Community development financial institutions serving all of the 44 counties defined as rural by the Executive Law § 481(7), are eligible to apply for the Capital Access Program (the “Program”) assistance pursuant to a State-wide request for proposals.

2. Reporting, Recordkeeping and Other Compliance Requirements and Professional Services: The rule will not impose any new or additional reporting or recordkeeping requirements other than those that would be required of any financial institution receiving a similar loan regarding such matters as financial condition, required matching funds, and utilization of Program funds, and the statutorily required annual report on the use of Program funds; no affirmative acts will be needed to comply other than the said reporting requirements and the making of loans to small businesses in the normal course of the business for any financial institution that receives Program assistance; and, it is not anticipated that applicants will have to secure any professional services in order to comply with this rule.

3. Costs: The costs to financial institutions that participate in the Program would depend on the extent to which they choose to participate in the Program, including the amount of required matching funds for their Program loans to small businesses and the administrative costs in connection with such small business loans and the fees, if any, charged to small businesses in connection with loans to such businesses that include Program funds.

4. Minimizing Adverse Impact: The purpose of the Program is to provide loans to financial institutions in order to enhance the ability of these entities to make loans to small businesses, especially those small businesses that may otherwise not be able to borrow funds at acceptable rates. This rule provides a basis for cooperation between the State and financial institutions, including lending institutions that serve rural areas of the State, in order to maximize the Program’s effectiveness and minimize any negative impacts for such financial institutions and the small businesses, including small businesses located in rural areas of the State, that such financial institutions serve.

5. Rural Area Participation: This rule maximizes geographic participation by not limiting applicants to those located only in urban areas or only in rural areas. A number of financial institutions that engage in lending to rural and urban small businesses responded to a survey circulated by the Corporation regarding implementation of the Program. Their comments were considered in the rulemaking process.

**Job Impact Statement**

These regulations will not adversely affect jobs or employment opportunities in New York State. The regulations are intended to improve the economy of New York by providing greater access to capital for main street everyday small businesses. The Program includes minorities, women and other New Yorkers who have difficulty accessing regular credit markets.

There will be no adverse impact on job opportunities in the state.

**EMERGENCY  
RULE MAKING**

**Small Business Revolving Loan Fund**

**I.D. No.** UDC-42-12-00005-E

**Filing No.** 986

**Filing Date:** 2012-09-28

**Effective Date:** 2012-09-28

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

**Action taken:** Addition of Part 4250 to Title 21 NYCRR.

**Statutory authority:** Urban Development Corporation Act, section 5(4); L. 1968, ch. 174; and L. 2010, ch. 59, section 16-t

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

**Specific reasons underlying the finding of necessity:** The delay in the approval of the State budget and the current economic crisis, including high unemployment and the immediate lack of financing from traditional financial institutions for job generating small business, are the reasons for the emergency adoption of this Rule which is required for the immediate implementation of the Small Business Revolving Loan Fund in order to promptly provide assistance to the State’s small businesses in order to sustain and increase employment generated by these businesses.

**Subject:** Small Business Revolving Loan Fund.

**Purpose:** Provide the basis for administration of Small Business Revolving Loan Fund including evaluation criteria and application process.

**Text of emergency rule:** *Small Business Revolving Loan Fund*

*Section 4250.1 Purpose.*

*The purpose of these regulations is to set forth and codify administration by the New York State Urban Development Corporation (the “Corporation”) of the Small Business Revolving Loan Fund (the “Program”) authorized by Section 16-t of the New York State Urban Development Corporation Act (the “Act”) (Uncon. Laws section 6266-t, added by Chapter 59, Part N, section 1, of the Laws of 2010). The Corporation is authorized, within available appropriations, to provide low interest loans to community development financial institutions, in order to provide funding for those lending organizations’ loans to small businesses, located within New York State, that generate economic growth and job creation within New York State but that are unable to obtain adequate credit or adequate terms for such credit. If the use of a community development financial institution is not practicable based upon an assessment of geographic and administrative capacity and other factors as determined by the Corporation, then the Corporation is authorized, within available appropriations, to provide low interest loans to the following other local community based lending organizations: small business lending consortia, certified development companies, providers of United States Department of Agriculture business and industrial guaranteed loans, United States Small Business Administration loan providers, credit unions and community banks.*

*Section 4250.2 Definitions.*

a) *“Administrative Costs” shall mean expenses incurred by a Community Based Lending Organization in its administration of a Program Loan from the Corporation.*

b) *“Administrative Income” shall mean income from (i) fees charged by a Community Based Lending Organization, including application fees, commitment fees and loan guarantee fees related to the Business Loans made to borrowers by the Community Based Lending Organization and (ii) interest income earned on the portion of the Program funds held by the Community Based Lending Organization (whether such funds are undisbursed Program funds or are repayment proceeds of Business Loans made by the Community Based Lending Organization).*

c) *“Business Loan” shall mean a loan made by a Community Based Lending Organization to an Eligible Business for an Eligible Project that is either a Micro-Loan or a Regular Loan.*

d) *“Community Based Lending Organizations” shall mean community development financial institutions, small business lending consortia, certified development companies, providers of United States Department of Agriculture business and industrial guaranteed loans, United States Small Business Administration loan providers, credit unions and community banks.*

e) *“Community Development Financial Institution” or “CDFI” shall mean a community based organization that provides financial services and products to communities, businesses and people underserved by traditional financial institutions.*

f) *“Corporation” shall mean the New York State Urban Development Corporation d/b/a Empire State Development Corporation, a corporate governmental agency constituting a body corporate and politic and a public benefit corporation of the State of New York created by Chapter one hundred seventy-four of the Laws of nineteen hundred sixty-eight, as amended.*

g) *“Eligible Businesses” shall have the meaning given in Section 4250.3 below.*

h) *“Eligible Project” shall have the meaning given in Section 4250.3 below.*

i) *“Eligible Uses” shall have the meaning given in Section 4250.4 below.*

j) *“Ineligible Businesses” shall mean newspapers, broadcasting, or other news media; medical facilities, libraries, community or civic centers. It also means any business relocating from one municipality with the State*

to another, except when the business is relocating within a municipality with a population of at least one million and the governing body of the municipality approves or each municipality from which such business operation will be relocated agrees to such relocation.

k) "Ineligible Projects" shall mean any project that is not an Eligible Project, including, without limiting the foregoing, public infrastructure improvements and funding for providing payment or distribution as a loan to owners, members and partners or shareholders of the applicant business or their family members.

l) "Loan Fund" shall mean the Small Business Revolving Loan Fund created by the Small Business Revolving Loan Fund Legislation.

m) "Loan Fund Account" shall mean each and every account established by the Community Based Lending Organization for the purpose of depositing Program funds.

n) "Loan Fund Legislation" shall mean Section 16-t of the Act.

o) "Loan Fund Proceeds" shall mean any and all monies made available to the Corporation for deposit to the Loan Fund, including monies appropriated by the State and any income earned by, or incremental to, the amount due to the investment of the same, or any repayment of monies advanced from the Loan Fund.

p) "Micro-Loan" shall mean a Small Business loan that has a principal amount that is less than or equal to twenty-five thousand dollars.

q) "Minority Business Enterprise" shall mean a business enterprise which is at least fifty-one percent owned, or in the case of a publicly-owned business at least fifty-one percent of the common stock or other voting interests of which is owned, by one or more minority persons and such ownership must have and exercise the authority to independently control the day to day business decisions of the entity. Minority persons shall mean persons who are:

1. Black;

2. Hispanic persons of Mexican, Puerto Rican, Dominican, Cuban, Central or South American descent or either Indian or Hispanic origin, regardless of race;

3. Asian and Pacific Islander persons having origins in the Far East, Southeast Asia, the Indian sub-continent or the Pacific Islands; or

4. American Indian or Alaskan Native persons having origins in any of the original people of North America and maintaining identifiable tribal affiliations through membership and participation or community identification.

r) "Program Loan Fund Agreement" shall mean the agreement between the Corporation and the Community Based Lending Organization pursuant to which the Program funds will be disbursed to and used by the Community Based Lending Organization.

s) "Program Loan" shall mean a loan made by the Corporation to a Community Based Lending Organization.

t) "Regular Loan" shall mean a Small Business loan that has a principal amount greater than twenty-five thousand dollars.

u) "Service Delivery Area" shall mean one or more contiguous counties or municipalities to be served by the Community Based Lending Organization and described in the Program Loan Fund Agreement between the Corporation, as lender, and the Community Based Lending Organization, as borrower.

v) "Small Business" shall mean a business that is resident and authorized to do business in the State, independently owned and operated, not dominant in its field, and employs one hundred or fewer persons on a full time basis.

w) "State" shall mean the State of New York.

x) "Women Business Enterprise" shall mean a business enterprise that is at least fifty one percent owned, or in the case of a publicly-owned business at least fifty one percent of the common stock or other voting interests of which is owned, by United States citizens or permanent resident aliens, one or more who are women, regardless of race or ethnicity, and such ownership interest is real, substantial and continuing and such woman or women have and exercise the authority to independently control the day to day business decisions of the enterprise.

y) "Working Capital Loans" shall mean short and medium term loans for working capital, revolving lines of credit and seasonal inventory loans made by Community Based Lending Organizations to Eligible Businesses for Eligible Projects.

Section 4250.3 Eligible Business, Eligible Projects and Ineligible Projects.

Business Loans shall be offered by Community Based Lending Organizations on the terms and conditions that are in accordance with and subject to the Act and the provisions of this Part. Business Loans shall be provided by the Community Based Lending Organization only to Eligible Businesses for Eligible Projects and shall not be used for Ineligible Projects. The terms "Eligible Business", "Eligible Projects" and "Ineligible Projects" are defined as follows. An "Eligible Business" is a:

1. business enterprise that is resident in and authorized to do business in New York State,

2. independently owned and operated,

3. not dominant in its field, and

4. employs one hundred or fewer persons.

An "Eligible Project" is a Business Loan from a Community Based Lending Organization to an Eligible Business in the Service Delivery Area for an Eligible Use, whereby the Community Based Lending Organization has reviewed every Business Loan application to determine the feasibility of the proposed Eligible Use(s) of the financing requested by the small business applicant, the likelihood of repayment, and the potential that the loan will generate economic development and jobs within the State. An "Eligible Project" cannot be an "Ineligible Project" as defined below.

An "Ineligible Project" shall mean: (i) a project or use that would result in the relocation of any business operation from one municipality within the state to another, except under one of the following conditions, (A) When a business is relocating within a municipality with a population of at least one million where the governing body of such municipality approves such relocation, or (B) each municipality from which such business operation will be relocated has consented to such relocation; (ii) projects with respect to newspapers, broadcasting or other news media, medical facilities, libraries, community or civic centers, and public infrastructure improvements; (iii) providing funds, directly or indirectly, for payments, distribution or as a loan (except in the case of a loan to a sole proprietor for business use), to owners, members, partners or shareholders of the applicant business, except as ordinary income for services rendered; (iv) any project that results in a Business Loan to a person who is a member of the board or other governing body, officer, employee, or member of a loan committee, or a family member of the Community Based Lending Organization or who shall participate in any decision on the use of Program funds if such person is a party to or has a financial or personal interest in such loan.

Section 4250.4 Eligible Uses.

Eligible Uses of Program funds by a Small Business borrower of the Community Based Lending Organization are:

1. working capital;

2. acquisition and/or improvement of real property;

3. acquisition of machinery and equipment; and

4. refinancing of debt obligations provided that:

a. it does not refinance a loan already in the portfolio of the Community Based Lending Organization;

b. the refinanced loan will provide a tangible benefit to the business borrower as determined by the Corporation in writing; and

c. the aggregate of the principal of all borrower refinancing loan amounts in the Community Based Lending Organization's Program loan portfolio is not greater than twenty-five percent (25%) of the principal amount of the Corporation's Program loan to the Community Based Lending Organization.

Section 4250.5 Fees.

A Community Based Lending Organization may charge application, commitment and loan guarantee fees pursuant to a schedule of fees adopted by the institution and approved in writing by the Corporation.

Section 4250.6 Niagara, St. Lawrence, Erie, and Jefferson Counties.

Notwithstanding anything to the contrary in this rule, the Corporation shall provide at least five hundred thousand dollars in Program funds to Community Based Lending Organizations for the purpose of making loans to small businesses located in each of the following counties: Niagara, St. Lawrence, Erie and Jefferson.

Section 4250.7 Business Loan Types and Limits.

a) There shall be two categories of Business Loans to Eligible Businesses:

1. a microloan that shall have a principal amount that is less than twenty-five thousand dollars; and

2. a regular loan that shall have a principal amount not less than twenty-five thousand dollars.

b) The Program funds amount used by the Community Based Lending Organization to fund a Business Loan shall not be more than fifty percent of the principal amount of such loan and shall not be greater than one hundred and twenty-five thousand dollars.

c) No less than ten percent (10%) of the aggregate Program funds shall be allocated by the Corporation for Microloans.

Section 4250.8 General Evaluation Criteria.

a) In addition to such criteria as may be set forth by the Corporation from time to time in solicitations for applications from Community Based Lending Organizations, the Corporation shall evaluate the Program assistance application of a Community Based Lending Organization in conformance with the Act and in accordance with the criteria set forth in this Part, including as applicable:

1. The ability of the Community Based Lending Organization to analyze small business applications for Business Loans, to evaluate the credit worthiness of small businesses, and to monitor and service Business Loans.

2. The ability of the Community Based Lending Organization to review every Business Loan application in order to determine, among other things, the feasibility of the proposed Eligible Use(s) of the financing requested by the small business applicant, the likelihood of repayment, and the potential that the loan will generate economic development and jobs within the State.

3. The ability of the Community Based Lending Organization to target and market to Minority and Women-Owned Enterprises and other small businesses that are having difficulty accessing traditional credit markets.

b) The Corporation is authorized, within available appropriations, to provide low interest loans to community development financial institutions, in order to provide funding for those lending organizations' loans to small businesses, located within New York State, that generate economic growth and job creation within New York State but that are unable to obtain adequate credit or adequate terms for such credit. If the use of a community development financial institution is not practicable based upon an assessment of geographic and administrative capacity and other factors as determined by the Corporation, then the Corporation is authorized, within available appropriations, to provide low interest loans to the following other local community based lending organizations: small business lending consortia, certified development companies, providers of United States Department of Agriculture business and industrial guaranteed loans, United States Small Business Administration loan providers, credit unions and community banks.

Section 4250.9 General Requirements.

a) Program funds shall be disbursed to a Community Based Lending Organization by the Corporation in the form of a Program Loan.

1. The term of the Program Loan shall commence upon closing of the Program Loan Fund Agreement between the Corporation and the Community Based Lending Organization.

2. The Program Loan shall carry a low interest rate determined by the Corporation based on then prevailing interest rates and the circumstances of the Community Based Lending Organization.

b) Notwithstanding the performance of the Business Loans made by the Community Based Lending Organization using Program funds, the Community Based Lending Organization shall remain liable to the Corporation with respect to any unpaid amounts due from the Community Based Lending Organization pursuant to the terms of the Corporation's Program Loan to the Community Based Lending Organization.

c) At the discretion of the Corporation, a portion of Program loan funds may be disbursed to the Community Based Lending Organization in the form of a grant or forgivable loan provided that those funds are used by the Community Based Lending Organization for administrative expenses associated with Business Loans to Eligible Borrowers for Eligible Projects, loan-loss reserves, or other eligible expenses as may be approved in writing by the Corporation.

d) Notwithstanding any provision of law to the contrary, the Corporation may establish a Program fund for Program use and pay into such fund any funds available to the Corporation from any source that are eligible for Program use, including moneys appropriated by the State.

e) Interest received by the Corporation from Program Loans to Community Based Lending Organizations may be used at the discretion of the Corporation for Program Loans and the management, marketing, and administration of the Program.

f) If the use of a community development financial institution is not practicable based upon an assessment of geographic and administrative capacity and other factors as determined by the Corporation, then the Corporation is authorized, within available appropriations, to provide low interest loans to the following other local community based lending organizations: small business lending consortia, certified development companies, providers of United States Department of Agriculture business and industrial guaranteed loans, United States Small Business Administration loan providers, credit unions and community banks.

Section 4250.10 Loan Fund Accounts.

Each Community Based Lending Organization shall deposit Program funds awarded by the Corporation, repayments, and interest earned into a bank account in a State or Federal chartered banking institution.

Section 4250.11 Application and Approval Process.

The Corporation shall identify eligible Community Based Lending Organizations through one or more competitive statewide or local solicitations.

Section 4250.12 Auditing, Compliance and Reporting.

a) The Community Based Lending Organization shall submit to the Corporation annual reports and additional reports as requested at the discretion of the Corporation stating:

1. The number of Business Loans made;
2. The amount of each Business Loan;
3. The amount of Program Loan proceeds used to fund each Business Loan;
4. The use of Business Loan proceeds by the borrower;

5. The number of jobs created or retained;

6. A description of the economic development generated;

7. The status of each outstanding Business Loan; and

8. Such other information as the Corporation may require.

b) The Corporation may conduct audits of the Community Based Lending Organization in order to ensure compliance with the provisions of this section, any regulations promulgated with respect thereto and agreements between the Community Based Lending Organization and the Corporation of all aspects of the use of Program funds and Business Loan transactions.

c) In the event that the Corporation finds substantive noncompliance, the Corporation may terminate the Community Based Lending Organization's participation in the Program.

d) Upon termination of a Community Based Lending Organization's participation in the Program, the Community Based Lending Organization shall return to the Corporation, promptly after its demand thereof, all Program fund proceeds held by the Community Based Lending Organization; and provide to the Corporation, promptly after its demand thereof, an accounting of all Program funds received by the Community Based Lending Organization, including all currently outstanding Business Loans that were made using Program funds. Notwithstanding such termination, the Community Based Lending Organization shall remain liable to the Corporation with respect to any unpaid amounts due from the Community Based Lending Organization pursuant to the terms of the Corporation's loans to the Community Based Lending Organization.

e) In the event that a Community Based Lending Organization's participation in the Program is terminated, the Corporation, in its discretion, can reassign all or part of the award made to such Community Based Lending Organization to one or more Community Based Lending Organizations that are already administering the Program and that serve the same Service Area or portions thereof without an additional solicitation.

Section 4250.13 Confidentiality.

a) To the extent permitted by law, all information regarding the financial condition, marketing plans, manufacturing processes, production costs, customer lists, or other trade secrets and proprietary information of a person or entity requesting assistance from the Loan Fund administered through the selected Community Based Lending Organizations by the Corporation, shall be confidential and exempt from public disclosures.

b) To the extent permitted by law, no full time employee of the State of New York or any agency, department, authority or public benefit corporation thereof shall be eligible to receive assistance under this Program.

Section 4250.14 Non-Discrimination and Affirmative Action.

The Corporation's affirmative action and non-discrimination policies and programs are grounded in both public policy and applicable law, including but not limited to, Section 2879 of the Public Authorities Law, Article 15-A of the Executive Law and Section 6254 (11) of the Unconsolidated Laws. These laws mandate the Corporation to take affirmative action in implementing programs. The Corporation has charged the affirmative action department with overall responsibility to ensure that the spirit of these mandates is incorporated into the Corporation's policies and projects. Where applicable, the affirmative action department will work with applicants in developing an appropriate Affirmative Action Program for business and employment opportunities generated by the Corporation's participation of the Program.

**This notice is intended** to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires December 26, 2012.

**Text of rule and any required statements and analyses may be obtained from:** Antovk Pidedjian, Sr. Counsel, New York Urban Development Corporation, 633 Third Ave., 37th Fl., New York, NY 10017, (212) 803-3792, email: apidedjian@esd.ny.gov

#### Regulatory Impact Statement

1. Statutory Authority: Section 9-c of the New York State Urban Development Corporation Act Chapter 174 of the Laws of 1968 (Uncon. Laws section 6259-c), as amended (the "Act"), provides, in part, that the Corporation shall, assisted by the Commissioner of Economic Development and in consultation with the Department of Economic Development, promulgate rules and regulations in accordance with the State Administrative Procedure Act.

Section 16-t of the Act provides for the creation of the Small Business Revolving Loan Fund (the "Program") and authorizes the New York State Urban Development Corporation d/b/a Empire State Development Corporation (the "Corporation"), within available appropriations, to provide low interest loans to Community Development Financial Institutions and other Community Based Lending Organizations, in order to provide funding for those organizations' loans to New York's small businesses that are unable to obtain adequate credit or adequate terms for such credit.

2. Legislative Objectives: Section 16-t of the Act (Uncon. Laws section

6266-t, added by Chapter 59, Part N, section 1, of the Laws of 2010) sets forth the Legislative objective of authorizing the Corporation, within available appropriations, to provide low interest loans to community development financial institutions and other community based lending organizations, in order to provide funding for those organizations' loans to New York's small businesses that are unable to obtain adequate credit or adequate terms for such credit. The adoption of 21 NYCRR Part 4250 will further these goals by setting forth the types of available assistance, evaluation criteria, the application process and related matters for the Program.

3. Needs and Benefits: The State has allocated \$25 million to provide low interest loans to community development financial institutions and other community based lending organizations, in order to provide funding for those organizations' loans to New York's small businesses that are unable to obtain adequate credit or adequate terms for such credit. Small businesses have been determined to be a major source of employment throughout the State. Small businesses have historically had difficulties obtaining financing or refinancing in order to remain competitive and grow their operations, and the current economic difficulties have exacerbated this problem. Providing loans to small businesses should sustain and potentially increase the employment provided by such businesses, especially during this period of historically high unemployment and underemployment. The Program (i) allows the Corporation to evaluate the effectiveness of community based lending organizations with respect to their ability to make loans to credit worthy small businesses, (ii) decentralizes to community based lending organizations the evaluation of the credit and operations of small businesses within the respective communities served by such organizations, and (iii) enhances the ability of community based lending organizations to make loans to small businesses in the communities served by such organizations. The rule facilitates these aspects of the Program by providing for a competitive process to select community based financial institutions for Program Loans and defining eligible and ineligible small businesses and eligible uses of the proceeds of loans to small businesses and other criteria to be applied by the community development financial institutions in making loans to small businesses.

4. Costs: The Program is funded by a State appropriation in the amount of twenty-five million dollars. Pursuant to the rule, community based lending organizations must provide not less than fifty percent of the principal amount of each small business loan funded with Program funds. The costs to a community based lending organization involved in the Program would depend on the extent to which they participate in the Program and their effectiveness and efficiency in making small business loans. The rule also provides for approval by the Corporation of fees charged by a community based lending institutions in connection with loans to small businesses that use Program funds.

5. Paperwork/Reporting: There are no additional reporting or paperwork requirements as a result of this rule on community based lending organizations participating in the Program except those required by the statute creating the Program such as an annual report on the organization's lending activity and providing information in connection with an audit by the Corporation with respect to the organization's use of Program funds. Standard applications and loan documents used for most other assistance by the Corporation will be employed in keeping with the Corporation's overall effort to facilitate the application process for all of the Corporation's clients.

6. Local Government Mandates: The Program imposes no mandates – program, service, duty, or responsibility – upon any city, county, town, village, school district or other special district.

7. Duplication: The regulations do not duplicate any existing state or federal rule.

8. Alternatives: While larger financial institutions can potentially provide small business financing and the community based lending organizations already provide small business financing, the State has established the Program in order to enhance the access of small businesses to such financing, and the proposed rule provides the regulatory basis for providing low interest loans to community based lending organizations for lending to small businesses in accordance with the statutory requirements of the Program.

9. Federal Standards: There are no minimum federal standards related to this regulation. The regulation is not inconsistent with any federal standards or requirements.

10. Compliance Schedule: The regulation shall take effect immediately upon adoption.

#### **Regulatory Flexibility Analysis**

1. Effects of Rule: In the rule: "Small business" is defined as a business that is resident and authorized to do business in the State, independently owned and operated, not dominant in its field, and employs one hundred or fewer persons on a full time basis; "Community Development Financial Institution" is defined as community based organization that provides financial services and products to communities, businesses and people underserved by traditional financial institutions; and "Community Based

Lending Organizations" is defined as Community Development Financial Institutions, small business lending consortia, certified development companies, providers of United States Department of Agriculture business and industrial guaranteed loans, United States Small Business Administration loan providers, credit unions and community banks. The rule will facilitate the statutory Program's purpose of having New York State Urban Development Corporation d/b/a Empire State Development Corporation (the "Corporation") make low interest loans to community based lending organizations in order to provide funding for those lending organizations' loans (including microloans in principal amounts equal to or less than twenty-five thousand dollars) to small businesses, located within the State, that are unable to obtain adequate credit or credit terms for such credit.

2. Compliance Requirements: There are no compliance requirements for small businesses and local governments in these regulations.

3. Professional Services: Applicants do not need to obtain professional services to comply with these regulations.

4. Compliance Costs: There are no compliance costs for small businesses and local governments in these regulations.

5. Economic and Technological Feasibility: There are no compliance costs for small businesses and local governments in these regulations so there is no basis for determining the economic and technological feasible for compliance with the rule by small businesses and local governments.

6. Minimizing Adverse Impact: This rule has no adverse impacts on small businesses or local governments because it is designed to provide low interest loans to community based lending organizations in order to enhance the ability of such organizations to fund loans to small businesses.

7. Small Business and Local Government Participation: A number of community based lending organizations that engage in lending to small businesses responded to a survey circulated by the Corporation regarding implementation of the program as reflected in the rule.

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

1. Types and Estimated Numbers of Rural Areas: Community development financial institutions and other community based lending organizations serving all of the 44 counties defined as rural by the Executive Law § 481(7), are eligible to apply for the Small Business Revolving Loan Fund (the "Program") assistance pursuant to a State-wide request for proposals.

2. Reporting, Recordkeeping and Other Compliance Requirements and Professional Services: The rule will not impose any new or additional reporting or recordkeeping requirements other than those that would be required of any community based lending organization receiving a similar loan regarding such matters as financial condition, required matching funds, and utilization of Program funds, and the statutorily required annual report on the use of Program funds; no affirmative acts will be needed to comply other than the said reporting requirements and the making of loans to small businesses in the normal course of the business for any community based lending organization that receives Program assistance; and, it is not anticipated that applicants will have to secure any professional services in order to comply with this rule.

3. Costs: The costs to community based lending organizations that participate in the Program would depend on the extent to which they choose to participate in the Program, including the amount of required matching funds for their Program loans to small businesses and the administrative costs in connection with such small business loans and the fees, if any, charged to small businesses in connection with loans to such businesses that include Program funds.

4. Minimizing Adverse Impact: The purpose of the Program is to provide loans to community based lending organizations in order to enhance the ability of these entities to make loans to small businesses, especially those small businesses that may not be able to borrow funds at acceptable rates from larger financial institutions. This rule provides a basis for cooperation between the State and CBLOs, including CBLO that serve rural areas of the State, in order to maximize the Program's effectiveness and minimize any negative impacts for such CBLO and the small businesses, including small businesses located in rural areas of the State, that such CBLOs serve.

5. Rural Area Participation: This rule maximizes geographic participation by not limiting applicants to those located only in urban areas or only in rural areas. A number of CBLOs that engage in lending to rural and urban small businesses responded to a survey circulated by the Corporation regarding implementation of the Program. Their comments were considered in the rulemaking process.

#### **Job Impact Statement**

These regulations will not adversely affect jobs or employment opportunities in New York State. The regulations are intended to improve the economy of New York by providing greater access to capital for main street everyday small businesses. The Program is targeted to minorities, women and other New Yorkers who have difficulty accessing regular credit markets.

There will be no adverse impact on job opportunities in the state.