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July 18, 2003

Original: 2290

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† NEW JERSEY
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The Honorable Joseph B. Scarnati, Majority Chair
Senate Labor and Industry Committee
187 Main Capitol Building
Harrisburg, PA 17120

The Honorable Christine M. Tartaglione, Minority Chair
Senate Labor and Industry Committee
458 Capitol Building
Harrisburg, PA 17120-3002

The Honorable Robert Allen, Majority Chair
House of Representatives Labor Relations Committee
218 Ryan Office Building
P.O. Box 202020
Harrisburg, PA 17120-2020

The Honorable Robert E. Belfanti, Jr., Minority Chair
House of Representatives Labor Relations Committee
30 East Wing
P.O. Box 202020
Harrisburg, PA 17120-2020

Re: Final Form Regulations, Department of Labor and Industry, Unemployment
Compensation Board of Review No. 12-59 (Unemployment Compensation
Appeals Regulations)

Dear Senator Scarnotti, Senator Tartaglione, Representative Allen and Representative
Belfanti:

OFFICE OF THE SECRETARY
OF LABOR & INDUSTRY

03 JUL 21 AM 11:13

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REVIEW COMMISSION

2003 AUG -6 AM 10:01

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We represent the Pennsylvania AFL-CIO and, at the request of our client, we have prepared the following comments in opposition to the proposed Unemployment Compensation Appeal Regulations referenced above (Proposed Regulations):

- The Proposed Regulations, while purporting to be neutral in terms of their effect on the parties to unemployment compensation appeal are disproportionately favorable to employers by endorsing the use of methods that are generally not available to unemployed workers after having convenient procedures previously available to unemployed workers eliminated.
- The Proposed Regulations have their genesis in three Commonwealth Court decisions:
 - George v. Unemployment Compensation Board of Review, 767 A.2d 1124 (Pa. Cmwlth. 2001)
 - Copyright, Inc. v. Unemployment Compensation Board of Review, 739 A.2d 219 (Pa. Cmwlth. 1999)
 - UGI Utilities, Inc. v. Unemployment Compensation Board of Review, 776 A.2d 344 (Pa. Cmwlth. 2001)
- The circumstances of these cases are as follows:
 - George, a voluntary termination case, involved a faxed appeal by the employer from a referee's decision
 - Claimant argued that the faxed appeal was inappropriate, but the Court concluded that the Board's interpretation of current regulations to accept a faxed appeal as within the meaning of the term "delivery" of the appeal form to unemployment compensation authorities is a reasonable and legally acceptable interpretation.
 - Court found no legal impropriety in Board's current practice of accepting faxed appeal documents.
 - Court affirmed the denial of benefits on the merits.
 - In footnote 8 of its opinion, however, Court recognized that the date and time stamp placed on a fax by the sending machine is as inherently unreliable as a private postage meter, which, prior hereto, has been consistently rejected as establishing the mailing date of an appeal.

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- Despite this judicial recognition of Inherent unreliability the Proposed Regulations allow a private postage meter and sender's fax imprint to establish the timeliness of an appeal (sections 101.82(b)(1)(II) and 101.82(b)(3)(A)(iii))
- The preliminary comments to the Proposed Regulations are internally inconsistent in attempting to justify adoption of these methods

- On the second page of preliminary comments under the heading "Compliance with Executive Order 1996-1, . . ." is the following:

The Board considered the stake holders' concerns regarding the potential fraud. However, the interest in providing parties with additional methods for filing appeals outweighs the potential for fraud. Expeditious resolution of unemployment compensation claims and development of an appeal system that assists claimants and businesses that often are not represented is important. Additionally, there are laws and rules of professional conduct that would deter and punish fraudulent conduct.

- The rules of Professional Conduct are exclusively applicable to members of the bar. Inasmuch as the preliminary comments acknowledge that parties in unemployment compensation cases "often are not represented," it seems that reliance on rules of professional conduct to deter such fraud is ill-founded and the Commonwealth Court's recognition of the inherent unreliability of accepting private postage meter date stamp and sending fax machine date and time stamp compels the conclusion that the potential for fraud cannot be capriciously dismissed as the preliminary comments attempt to do.
- The second decision cited by the preliminary comments is Copyright, Inc.
- This is a discharge case and the Job Center granted benefits
- According to the usual practice, the Job Center notice of determination advised the employer that the fifteen day appeal period would expire on October 1 and that an appeal could be filed personally at the Job Center or mailed with a U.S. Postal Service postmark on or before October 1.
- The employer chose to utilize a private delivery service and the appeal was delivered to the Job Center on October 2.

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- The employer argued that the private delivery service tracking document showing the pick up of the appeal document on October 1 should be accepted as the legal equivalent of a U.S. Postal Service postmark.
- The argument properly was rejected by the referee, the board and the Court; however, the Court, in dicta, expressed sympathy for the employer's position.
- As is the case with the private postage meter, reliance on the tracking document of a private delivery service as the legal equivalent of a U.S. Postal Service postmark is ill-founded. The private delivery service, operating on a profit motive, is inherently less reliable in such circumstances than the totally disinterested handling of mail by the government's mail service.
- The final case referenced in the preliminary summary is UGI, Inc.
- This case involved an employer's reliance on a private postal meter.
- The referee, the Board and the Commonwealth Court followed the binding legal precedent of the Pennsylvania Supreme Court, Lin v. Unemployment Compensation Board of Review, 735 A.2d 697 (1999) (private postage meter not acceptable to establish a timely appeal) and rejected the employer's appeal.
- The employer also contended that the bar code which the U.S. Postal Service placed on the envelope should be accepted as the legal equivalent of a U.S. Postal Service postmark, but, inasmuch as the bar code is not a patent indication of a timely appeal and requires explanatory testimony, the purpose of the expeditious resolution of appeal timeliness disputes would be defeated.
- Again, however, the Commonwealth Court, in dicta, in its opinion, which was authored by the same Judge who wrote the Copyright, Inc. opinion, expressed sympathy for the employer's position.
- These expressions of sympathy for employers who have deliberately decided to utilize non traditional, inherently unreliable for date verification methods of conveying appeals to the unemployment compensation authorities ring hollow when it is considered that, at the same time, these proposed

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regulations are attempting to expand the number of methods to file appeals by ways and means typically available to, and utilized by, employers and businesses while the method of filing an appeal most widely available to claimants has been eliminated, i.e., personal filing at a local unemployment office. These proposed regulations compound this inequity by eliminating the requirement that staff of the offices, which under this proposal will accept personal filing, will no longer be required to assist in the filing of an appeal. (See, section 101.81(b).)

- The Pennsylvania AFL-CIO objects to the distortion of the historical equilibrium between the rights of unemployed workers and employers in the unemployment compensation appeal system which these proposed regulations effectuates.

Accordingly, the Pennsylvania AFL-CIO respectfully requests that the standing committees take the necessary steps to prevent the final adoption and implementation of these proposed regulations.

Very truly yours,



IRWIN W. ARONSON

IWA/mjy

- cc: William George
David Wilderman
The Honorable Steven M. Schmerin, Secretary, Department of Labor and Industry
The Honorable Laura E. Reohr, Deputy Secretary for Unemployment Compensation Programs, Department of Labor and Industry
Neil Cashman
Don Koickler
Vicki DeLeo
Travis Messinger



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GENERAL COUNSEL

OFFICE OF CHIEF COUNSEL
UNEMPLOYMENT COMPENSATION BOARD
OF REVIEW DIVISION
10TH FLOOR, LABOR & INDUSTRY BUILDING
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DEPARTMENT OF
LABOR & INDUSTRY
COMMONWEALTH OF PENNSYLVANIA

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FACSIMILE TRANSMITTAL COVER SHEET

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|--|--|---|---|
| To: Mary Wyatte Fax: 3-2664 Phone: | | From: Kelly Smith Direct-Dial Phone No.: | |
| Subj.: Final Form Regulation 12-59 | | Date: 8/6/03 Time: 10 ⁰⁰ AM | Total No. of Pages (including cover): 6 |
| <input type="checkbox"/> urgent/please call upon receipt <input type="checkbox"/> via fax only <input type="checkbox"/> via fax and mail <input type="checkbox"/> enclosures via mail <input type="checkbox"/> please call to discuss <input type="checkbox"/> originals to follow via overnight mail | | <input checked="" type="checkbox"/> as discussed <input type="checkbox"/> response requested <input type="checkbox"/> FYI and file/no response expected <input type="checkbox"/> per request <input type="checkbox"/> necessary action <input type="checkbox"/> for your review/ approval/ comment | |
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No. 1275 P. 2



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Phone: 215.981.3700, Fax: 215.981.0434
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By Fax (717) 783-2664 and Regular Mail

August 6, 2003

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2003 AUG -6 PM 2:51

INDEPENDENT REGULATORY REVIEW COMMISSION

Independent Regulatory Review Commission

Attn: Scott Schalles

333 Market Street, 14th Floor
Harrisburg, PA 17101

Original: 2290

Re: Final Form Reg. No. 12-59,
Department of Labor and Industry,
Appeals from Determinations of Department

Dear Mr. Schalles:

On behalf of my clients, the Philadelphia Unemployment Project (PUP) and the Mon Valley Unemployed Committee (MVUC), and with the input of the legal services field programs in Pennsylvania, I am writing to state our opposition to adoption of the final form regulations governing unemployment compensation (UC) appeals.

Let me begin by noting that we are not opposed to the overall concept of the regulations. As we indicated in our comments on the proposed regulations, we support the concept of broadening permitted methods of filing appeals. Moreover, we note several small positive changes in the final form version:

1. Certified mail receipts will count as proof of timely mailing;
2. The regulations would mandate that instructions on filing appeals and where and how to do so would be included with determinations; and
3. Appeals can be faxed up to midnight of the 15th day of the appeal period, rather than being limited to the business day.

Nevertheless, there are several deeply problematic parts of the regulations to which we find the Department's response to our comments to the proposed regulations completely unsatisfactory. Our comments were based upon our experience with the unemployment compensation system since the local offices were closed and claimants have had to deal with the Unemployment Compensation Service Centers by telephone, fax, or the internet. Our primary concerns are the following.

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1. The regulations would not commit to providing an appeal form with an adverse determination.

In final form Section 101.81(b), the Department commits to providing appeal instructions with each determination. This is certainly an improvement over the original proposed regulations, which simply indicated that a party could obtain information about filing an appeal from the Department. However, we do not believe that providing only appeal instructions is adequate. The Department should commit in the regulations that it will provide appeal forms with adverse determinations. For the IRC's edification, a copy of such an appeals form is attached.

PUP, MVUC and the legal services community all provide assistance to UC claimants, many of whom have limited abilities to prepare documents on their own. If these persons are not provided appeal forms, it follows that in order to appeal, they will be required to prepare a letter which sets forth the information required in Section 101.81(c), all of which the Department indicates will be mandatory. While probably the majority of UC claimants would be able to do so, our experience is that a significant number will not be able to prepare an acceptable letter in the absence of a form, because they are inhibited by limited education, literacy and writing skills, limited English proficiency, and/or disability.

Before the Department closed the local unemployment offices during the period of 1999-2001, a claimant who wished to file an appeal would typically go to the local office and receive a form. At the request of the legal services community, the Department agreed to mail these appeal forms to claimants with determinations so that they would have a means of obtaining them. This simple step eases the burden of filing an appeal for persons who would otherwise have trouble composing a letter.

In its response to comments in the preamble of the final form regulations, the Department states the following on this issue:

Community Legal Services (CLS) urged that the regulations require that the Department mail an appeal form to any aggrieved party with the adverse determination. However, Section 101.81(b) of the regulation will memorialize the Department's current practice of mailing instructions to the parties with each determination. The Department's current practice is to mail appeal forms to all parties with each determination, with appropriate instructions.

This language makes clear that the Department rejects CLS' request that it be committed to mailing appeal forms, committing instead only to mailing instructions.

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We are not mollified by the Department's suggestion that it will continue to mail appeal forms with determinations. For more than a year, the Department has struggled with a backlog of UC appeals resulting in delays in decisionmaking, and it has indicated that it believes a major reason for the backlog is that provision of the appeal form to parties with the determinations has increased its volume of appeals (a conclusion with which we disagree). In the context of discussing the backlog, we have been repeatedly asked whether we would agree to discontinuance of the practice of providing the appeal form. For the reasons explained above, we believe the appeal form is necessary for some claimants to exercise their right to appeal, and we have not so agreed. We are concerned that the past practice will not be continued by the Department.

We recognize that Section 101.81(a) has been amended to provide that appeal forms will be available on the Department's website, as well as from several other sources. However, the claimants who are unable to easily prepare correspondence to perfect an appeal are not the claimants likely to have access to and experience with the internet.

The suggestion in the preamble that appeal forms will continue to be mailed to the parties does not have the force of law. Accordingly, it is essential that this practice be codified in the regulations.

2. The regulatory guarantee of assistance in completing and perfecting an appeal should not be eliminated.

Existing Section 101.81(b) provides in pertinent part, "Assistance in completing the appeal form and perfecting the appeal may be obtained at a local employment office or at an office of the Board" We recognize that this regulation requires updating, given that the local unemployment offices no longer exist. However, we strenuously object to the removal of the guarantee of assistance from the regulations.

As explained above, some UC claimants will have limitations such that they will require assistance in filing an appeal. This assistance previously was easily found by going to the local employment offices. Now that claimants are not permitted to have face-to-face contact with UC staff, they need assistance more than ever. This mandate should not be taken out of the regulations.

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Community Legal
Aug. 6. 2003 2:39PM

In its responses to comments, the Department indicates that parties are "instructed" to contact UC Service Centers by telephone for assistance. Again, the preamble does not have the force of law, nor is the source or method of this instruction identified. If the Department intends to provide assistance, then surely it can live with that requirement remaining in the regulations.

The Department also insists that the workforce investment offices cannot provide this assistance. It states, "Workforce investment offices are not able to reliably provide assistance in unemployment compensation matters, because these offices do not have the expertise, funding or staff to provide assistance with unemployment compensation appeals." This statement is made despite the fact that the regulations do provide a role for workforce investment offices in providing appeal forms, providing appeal instructions, and accepting appeals for filing, as well as the fact that much of the staff of the workforce investment offices were involved with the unemployment compensation system before the closing of the local offices (when the UC and workforce development functions were co-located). It should also be remembered that we are not talking about rendering complicated technical UC advice; rather, we are talking about helping a claimant complete a form. It is difficult to understand why, for instance, a UC claimant with limited English proficiency who has been sent an English language form should not be able to get help from Department staff in completing it. In fact, the absence of assistance in such a case would implicate Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.

3. The regulation should codify a system of docketing appeals.

The Department simply dismisses our request that a system of docketing appeals be codified, stating only that Section 101.81(d) provides reasonable docketing requirements and procedures. It should be noted that final form Section 101.81(d) provides no procedures whatsoever, stating simply, "Upon receipt of an appeal, the Department or the Board will docket and process the appeal form."

In our comments to the proposed regulations, we set forth five cases in which appeals were mishandled and/or lost by the UC Service Centers. We also provided the Connecticut regulation on the docketing of UC appeals as a model for how such language could be prepared. In light of the demonstrated problem we have experienced, we are unsatisfied by the Department's unresponsive action.

* * * * *

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These are not our sole points of dissatisfaction with the regulations. For instance, it is extraordinary that the Department believes parties should place a phone call to the Public Utilities Commission to find out whether their "common carrier" will qualify under Section 101.82(b)(2). Nevertheless, the three complaints enumerated above are our primary reasons for urging that the final form regulations be rejected. These three points go to the rendering of adequate customer service in the new UC Service Center system.

Finally, we wish to strongly reiterate the point we made in our comments to the proposed regulations that the UC regulations need a thorough revision beyond the narrow issue of filing appeals. We have identified numerous regulations which are patently obsolete since the implementation of the UC Service Centers, internet initial claims filing and automated telephone filing of continuing claims. We also identified operational difficulties claimants have encountered since these new systems began operation which should be addressed in regulations. A reprint of these comments is attached. We ask that the IRRC strongly advise the Department to begin such a revision at the earliest possible time, given that it has been almost four years since the first closures of local offices.

Thank you for your consideration of these comments. Should you wish to discuss them, I can be reached at (215) 981-3719.

Very truly yours,



SHARON M. DIETRICH

SMD:gt

cc: Kelly K. Smith, Assistant Counsel (By Fax (717) 783-5027 and Regular Mail)
William Hawkins, Chair, U.C. Board of Review
Laura Reehr, Deputy Secretary for Unemployment Compensation
Dorana Cooper, Director, Governor's Policy Office
Honorable Joseph B. Scarnati, Majority Chair
Honorable Christine M. Tartaglione, Minority Chair
Honorable Robert Allen, Majority Chair
Honorable Robert E. Belfanti, Jr., Minority Chair
Mr. John Dodds, Philadelphia Unemployment Project
Paul Lodico/Barney Oursler, Co-Directors, Mon Valley Unemployed Committee
David Wilderman, Director, Pennsylvania AFL-CIO
Legal Services Colleagues

INFORMATION ABOUT THIS FORM

If the front of this form is blank, you may use this form to file an appeal from an unemployment compensation (UC) determination or decision. To file an appeal, please complete Section 1 on the front of this form and return the form to the UC Service Center or Job Center/CareerLink in accordance with the Appeal Instructions shown on the determination or decision being appealed. You may file an appeal in person at the nearest Job Center/CareerLink. Appeals cannot be filed in person at UC Service Centers. If an appeal is filed, a copy of this completed form will be sent to all parties.

If you received a completed copy of this form, you are being advised that an appeal has been filed from the determination or decision indicated in Item 3 of Section 1 on the front of this form.

TO CLAIMANT

If you remain partially or fully unemployed while an appeal concerning your eligibility is still pending, continue to file your claims for benefits as instructed by the UC Service Center or other UC office where you file your claims. Your UC Service Center or UC office can provide further information regarding your eligibility for benefits.

Also, to take full advantage of the wide range of reemployment services that are available to assist you in your job search, please visit the nearest CareerLink. For the location of the CareerLink nearest you, please refer to your Claim Confirmation Letter or local telephone directory.

APPEAL FILED FROM AN UNEMPLOYMENT COMPENSATION (UC) DETERMINATION

The Referee's office notifies the interested parties of the date, time, and location of the hearing when it is scheduled. It is important for the parties and any other witnesses with firsthand knowledge of the facts or issues on appeal to appear and testify in person. Firsthand knowledge means that witnesses directly observed, heard, or participated in the matters about which they are to testify. What witnesses learned secondhand may not, depending on the circumstances, be considered at the hearing.

If you need an interpreter or assistance for the UC hearing due to a disability, please notify the Referee.

The Referee makes every reasonable effort to obtain all necessary evidence bearing on the appeal and then renders an appropriate decision. A copy of the Referee's decision is mailed to the parties as soon as it is available for release.

APPEAL FILED FROM A REFEREE'S DECISION TO THE UC BOARD OF REVIEW

The Board Members review the previously established record bearing on the appeal. The Board may allow or disallow any petition based solely on this review; an additional hearing is not required.

If the Board disallows the petition, it so notifies the interested parties.

If the Board allows the petition, it may proceed to dispose of the case on the basis of the previously established record, without an additional hearing.

It may also direct that an additional hearing be held and will remand the case to a Referee to schedule that hearing. At such a hearing, the Referee serves only as a Hearing Officer for the Board and receives from the parties the additional information required for the Board's consideration. After the record is completed, the Board reviews the entire file and record of evidence and then takes appropriate action.

Notice of the Board's ruling is mailed to the parties as soon as it is available for release.

No. 1275 P. 9

Community Legal

Aug. 6. 2003 2:40PM

The UC Regulations Need a Thorough Revision
From Sharon M. Dietrich, Community Legal Services, Inc.

The proposed regulatory changes on unemployment compensation ("UC") appeals should just be the beginning of a regulatory overhaul of the UC rules. In the past several years, the entire claims and appeals processing systems have changed. These changes include:

- The closing of the "local offices" and the implementation of the U.C. Service Centers ("the UCSCs"). No longer can claimants walk into an office in their communities to handle their UC business. Rather, they must communicate with regional UCSCs, which they are forbidden to visit in person. This communication is primarily by telephone, although documents can also be submitted by fax or mail to the UCSCs. The first UCSC was opened in November 1999; the last UCSCs were implemented in October 2001.
- Internet initial claims filing, an alternative to calling the UCSCs, commenced in January 2001.
- "Pennsylvania Teleclaims" or "the PAT system," an automated telephone system for filing "continuing" bi-weekly claims by entering data through the keypad, has replaced either reporting to a UC office or submitting mail claims (except for rare cases in which mail claims are permitted, such as for some limited English proficient claimants).

This implementation of the technology-based systems in lieu of local offices has not been accomplished through regulations. To the contrary, the existing regulations refer throughout to the local offices, which no longer exist, and either permit or require claimants to show up in person. See, for instance, the following non-exclusive list:

- Section 65.1 (defining "registered for work" and "registration for work" as appearing in person at a public employment office);
- Sections 65.13 and 65.33 (providing for pre-dating of claims if the office is inaccessible);
- Section 65.31 (requiring that claims be filed in person at local offices);
- Section 65.41 (procedure for filing applications for benefits); and
- Section 65.63 (providing for filing of appeals at public employment offices).

In addition to correcting these obsolete regulations, new regulations should govern the operations of the UCSCs and the PAT system, in which claimants have encountered a myriad of operational difficulties since their openings. For instance, these problems have include the following:

- During periods of high call volume or technological problems, claimants have not been able to get through to the UCSCs. The regulations should specifically state that backdating will be provided in those circumstances.
- Claimants have called the PAT system to file initial applications, and the recording does not inform them that they are calling the wrong number to initiate a new claim. Backdating should also specifically be allowed in those circumstances.
- Claimants have experienced difficulties in using the PAT system, sometimes resulting in lost weeks of benefits. Such problems should also be rectifiable through backdating of claims.
- Appeals and other documents have been misplaced. Regulations should require that appeals and other documents be stamped and docketed the date they are received.
- Claimants who need in-person help have been unable to receive it. Assistance should be made available at some point in the workforce investment system, such as in the Career Links.
- Persons with limited English proficiency have fared especially poorly in the UCSC/PAT systems. Their particular needs should be addressed in detailed regulations covering the handling of their claims and appeals. Accommodations of this population are required by Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.
- Claims have languished in the UCSCs for lengthy periods of time, in violation of the "when due" requirement of the Social Security Act, 42 U.S.C. § 503(a)(1). The regulations should contain time frames for prompt payments, as there are in federal law. See 20 C.F.R. Part 640.

In our view, the failure to implement properly promulgated regulations violates the Commonwealth Documents Act, 45 P.S. §§ 1102-1602. Moreover, under the rationale of Knizely v. Unemployment Compensation Board of Review, 501 A.2d 1180 (Pa. Commw. 1985), Commonwealth Court may well question the legal integrity of a UCSC system not governed by regulations when operational issues make their way to that court. Ample time has passed since the implementation of the new technology for the regulations to be updated. We urge the Board and the Department to revise the remainder of their regulations to reflect the new administrative regime at the earliest possible date.

Prepared, 8/6/03

No. 1275 P. 1

Aug. 6. 2003 2:37PM Community Legal



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Phone: 215.981.3700
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2003 AUG -6 PM 2: 51

REGULATORY REVIEW COMMISSION

FAX TRANSMITTAL COVER SHEET

FAX NUMBER: 215.981.0434

DATE: 8/6/03

TO: Scott Schaller

FAX NUMBER: 717-783-2664

ORGANIZATION: IRRC

FROM: Sharon M. Dietrich

DIRECT DIAL: 215-981-3719

TOTAL NUMBER OF PAGES (INCLUDING THIS COVER SHEET): 10

MESSAGE: _____

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