MONTANA ADMINISTRATIVE REGISTER

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MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 3

The Montana Administrative Register (MAR), a twice-monthly publication, has three sections. The notice section contains state agencies' proposed new, amended or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted. The rule section indicates that the proposed rule action is adopted and lists any changes made since the proposed stage. The interpretation section contains the attorney general's opinions and state declaratory rulings. Special notices and tables are inserted at the back of each register.

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BEFORE THE BOARD OF NURSING HOME ADMINISTRATORS
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the proposed amendment, repeal and adoption of rules pertaining to nursing home administrators	)))))	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT, REPEAL AND ADOPTION OF RULES PERTAINING TO NURSING HOME ADMINISTRATORS

TO: All Interested Persons:

1. On December 19, 1996, the Board of Nursing Home Administrators published a notice of proposed amendment, repeal and adoption of rules pertaining to nursing home administrators, at page 3174, 1996 Montana Administrative Register, issue number 24. On January 3, 1997, the Board published an amended notice extending the comment date at page 1, 1997 Montana Administrative Register, issue number 1.

2. The Board received a sufficient number of requests from qualifying individuals for a public hearing on the proposed amendment, repeal and adoption. The Board will hold a hearing on March 10, 1997, at 9:00 a.m. in the Professional and Occupational Licensing Conference Room, 111 N. Jackson, Helena, Montana.

3. The Department of Commerce will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing. If you request an accommodation, contact the Department no later than 5:00 p.m., February 24, 1997, to advise us of the nature of the accommodation that you need. Please contact Terry Knerr, Board of Nursing Home Administrators, 111 N. Jackson, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 444-3728; Montana Relay 1-800-253-4091; TDD (406) 444-2978; facsimile (406) 444-1667. Persons with disabilities who need an alternative accessible format of this document in order to participate in this rule-making process should contact Terry Knerr.

4. Interested persons may present their data, views or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to Terry Knerr, Board of Nursing Home Administrators, 111 N. Jackson, P.O. Box 200513, Helena, Montana 59620-0513, and must be received no later than 5:00 p.m. on March 10, 1997.

5. Perry Eskridge, attorney, has been designated to preside over and conduct this hearing.

BOARD OF NURSING HOME
ADMINISTRATORS
RAYMOND HOFFMAN, CHAIRMAN

BY:
ANNIE M. BARTOS, CHIEF COUNSEL
DEPARTMENT OF COMMERCE

ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, January 27, 1997.

BEFORE THE BOARD OF SOCIAL WORK EXAMINERS
AND PROFESSIONAL COUNSELORS
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the proposed amendment and adoption of rules pertaining to the practice of social work and licensed professional counseling	NOTICE OF PROPOSED AMENDMENT AND ADOPTION OF RULES PERTAINING TO THE PRACTICE OF SOCIAL WORK AND LICENSED PROFESSIONAL COUNSELING

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On March 12, 1997, the Board of Social Work Examiners and Professional Counselors proposes to amend ARM 8.61.403, 8.61.405, 8.61.406, 8.61.601, 8.61.602, 8.61.604, 8.61.1201, 8.61.1202, 8.61.1204, 8.61.1205, 8.61.1601, 8.61.1602 and 8.61.1604 and adopt new rules pertaining to the practice of social work and licensed professional counseling.

2. The proposed amendments will read as follows: (new matter underlined, deleted matter interlined)

"8.61.403 APPLICATION PROCEDURE FOR SOCIAL WORK (1) Any person seeking licensure must apply on the board's official forms which may be obtained through the department. All requirements with documentation must be met at the time of application. Incomplete applications will not be considered by the board.

(2) through (2)(c) will remain the same.

(c)(i) through (v) will remain the same, but the ending commas will be changed to semi-colons.

(3) will remain the same.

(4) The license will be effective as of the date all requirements, including payment of the original license fee, are met. An applicant shall not work as a licensed social worker until the effective date of the license."

Auth: Sec. 37-22-201, MCA; IMP, Sec. 37-22-301, MCA

"8.61.405 ~~ETHICAL STANDARDS~~ UNPROFESSIONAL CONDUCT

(1) Violation of any of the following constitutes a ~~breach of professional ethics~~ unprofessional conduct:

(a) and (b) will remain the same.

~~(c) Commit any dishonest, corrupt, or fraudulent act which is substantially related to the qualifications, functions or duties of a licensee.~~

(d) through (h) will remain the same, but will be renumbered (c) through (g).

~~(i) Fail to maintain the confidentiality, except as otherwise required or permitted by law, of all information that has been received from a counselee during the course of~~

~~treatment and all information about the counselee which is obtained from tests or other such means.~~

(j) will remain the same, but will be renumbered (h).

~~(k) Advertise in a manner which is false or misleading.~~"

Auth: Sec. 37-1-131, 37-1-319, 37-22-201, MCA; IMP, Sec. 37-1-306, 37-22-201, ~~37-22-311,~~ MCA

"8.61.406 APPLICATION TO CONVERT AN INACTIVE STATUS LICENSE TO AN ACTIVE STATUS LICENSE (1) and (1)(a) will remain the same.

(b) presents satisfactory evidence that the applicant has not been out of active practice for more than ~~two~~ five years; and that the applicant has attended 20 hours of continuing education per year of inactive status with a maximum of 40 hours of continuing education which comply with the continuing education rules of the board, and is approved by the board. The continuing education hours must have been acquired within the 24 months immediately preceding application to reactivate; and

(c) will remain the same."

Auth: Sec. 37-1-319, 37-22-201, MCA; IMP, Sec. 37-1-319, ~~37-22-306,~~ MCA

"8.61.601 HOURS, CREDITS, AND CARRY OVER (1) through (3) will remain the same.

(4) Any licensee ~~over the age of 70~~ may apply for an exemption from the continuing social worker education requirements of these rules by filing a statement with the board setting forth good faith reasons why he or she is unable to comply with these rules and an exemption may be granted by the board.

(5) will remain the same."

Auth: Sec. 37-1-319, 37-22-201, ~~37-23-201,~~ MCA; IMP, Sec. 37-1-306, ~~37-22-102, 37-23-201,~~ MCA

"8.61.602 ACCREDITATION AND STANDARDS (1) The following standards shall govern the approval of continuing social work education activities by the board:

(1) through (4) will remain the same, but will be renumbered (a) through (d).

(e) The board, in its discretion, may determine the number of hours acceptable for any continuing education credit."

Auth: Sec. 37-1-319, 37-22-201, ~~37-23-201,~~ MCA; IMP, Sec. 37-1-306, ~~37-23-201,~~ MCA

"8.61.604 CONTINUING EDUCATION NONCOMPLIANCE (1) In the event that a licensed social worker shall fail to comply with these continuing education rules in any respect, the board shall promptly send a notice of noncompliance. The notice shall specify the nature of the noncompliance and state that unless the noncompliance is corrected or a request for a

hearing before the board is made within ~~30~~ 60 days, the statement of noncompliance shall be considered grounds for suspension or revocation."

Auth: Sec. 37-1-319, 37-22-201, ~~37-22-311, 37-23-201,~~ MCA; IMP, Sec. 37-1-306, ~~37-22-311, 37-23-201,~~ MCA

"8.61.1201 LICENSURE REQUIREMENTS (1) and (1)(a) will remain the same.

(b) counseling techniques~~,~~; and

(c) supervised counseling experience (this practicum shall be practica taken at the graduate school level which includes supervision by a counselor educator with a minimum of one hour of face-to-face consultation with the supervisor for every 10 hours of practicum site experience) and at least 6 six hours in each of the following areas:

(i) through (2)(b)(ii) will remain the same.

(3) ~~"2,000 hours"~~ (3,000 hours" ~~as of July 1, 1996)~~ is defined as clock hours of experience working in a counseling setting. The hours shall have been completed in their entirety at the time of submission of the application.

(a) At least ~~O~~one-half of the ~~above~~ 3,000 hours must be ~~post degree~~ obtained after the academic requirement has been met.

(b) through (d)(iii) will remain the same.

(iv) ~~must submit~~ a final log detailing dates and durations of supervisory contacts and issues discussed during these contacts may be requested by the board;

(v) and (4) will remain the same."

Auth: Sec. 37-1-131, 37-23-103, MCA; IMP, Sec. 37-23-202, MCA

"8.61.1202 APPLICATION PROCEDURE (1) Any person seeking licensure as a professional counselor must apply on the board's official forms which may be obtained through the board office. All requirements with documentation must be met at the time of application. Incomplete applications will not be considered by the board.

(2) through (3) will remain the same.

(4) The license will be effective as of the date all requirements, including payment of the original license fee, are met. An applicant shall not work as a licensed professional counselor until the effective date of the license."

Auth: Sec. 37-23-103, ~~37-23-201,~~ MCA; IMP, Sec. ~~37-23-102,~~ 37-23-202, MCA

"8.61.1204 ~~ETHICAL STANDARDS~~ UNPROFESSIONAL CONDUCT (1) Violation of any of the following constitutes ~~a breach of professional ethics~~ unprofessional conduct:

(a) and (b) will remain the same.

~~(c) Commit any dishonest, corrupt, or fraudulent act which is substantially related to the qualifications, functions or duties of a licensee.~~

(d) through (h) will remain the same, but will be renumbered (c) through (g).

~~(i) Fail to maintain the confidentiality, except as otherwise required or permitted by law, of all information that has been received from a counselee during the course of treatment and all information about the counselee which is obtained from tests or other such means.~~

(j) will remain the same, but will be renumbered (h).

~~(k) Advertise in a manner which is false or misleading.~~"

Auth: Sec. 37-1-319, 37-23-103, MCA; IMP, Sec. 37-1-316, 37-1-319, ~~37-23-103,~~ MCA

"8.61.1205 APPLICATION TO CONVERT AN INACTIVE STATUS LICENSE TO AN ACTIVE STATUS LICENSE (1) and (1)(a) will remain the same.

(b) presents satisfactory evidence that the applicant has not been out of active practice for more than ~~two~~ five years; and that the applicant has attended 20 hours of continuing education per year of inactive status with a maximum of 40 hours of continuing education which comply with the continuing education rules of the board, and is approved by the board. The continuing education hours must have been acquired within the 24 months immediately preceding application to reactivate;

(c) will remain the same."

Auth: Sec. 37-1-319, 37-23-103, MCA; IMP, Sec. 37-1-319, ~~37-23-207,~~ MCA

"8.61.1601 HOURS, CREDITS AND CARRY OVER (1) through (3) will remain the same.

(4) Any licensee ~~over the age of 70~~ may apply for an exemption from the continuing professional counselor education requirements of these rules by filing a statement with the board setting forth good faith reasons why he or she is unable to comply with these rules and an exemption may be granted by the board.

(5) will remain the same."

Auth: Sec. 37-1-131, 37-1-319, ~~37-23-103,~~ MCA; IMP, Sec. 37-1-306, ~~37-23-101, 37-23-103, 37-23-201, 37-23-205, 37-23-211,~~ MCA

"8.61.1602 ACCREDITATION AND STANDARDS (1) The following standards shall govern the approval of continuing professional counselor education activities by the board:

(1) through (4) will remain the same, but will be renumbered (a) through (d).

(e) The board, in its discretion, may determine the number of hours acceptable for any continuing education credit."

Auth: Sec. 37-1-319, ~~37-1-121, 37-23-103,~~ MCA; IMP, Sec. 37-1-306, ~~37-23-101, 37-23-103, 37-23-205, 37-23-211,~~ MCA

"8.61.1604 CONTINUING EDUCATION NONCOMPLIANCE (1) In the event that a licensed professional counselor shall fail to comply with these continuing education rules in any respect, the board shall promptly send a notice of noncompliance. The notice shall specify the nature of the noncompliance and state that unless the noncompliance is corrected or a request for a hearing before the board is made within ~~30~~ 60 days, the statement of noncompliance shall be considered grounds for suspension or revocation."

Auth: Sec. 37-1-319, ~~37-1-131, 37-23-103, 37-23-201,~~ MCA; IMP, Sec. 37-1-306, ~~37-23-101, 37-23-103, 37-23-205, 37-23-211,~~ MCA

REASON: The proposed amendments will implement changes mandated by passage of the Uniform Professional Licensing and Regulation Procedures Act (HB 518) by the 1995 Legislature.

3. The proposed new rules will read as follows:

"I LICENSURE OF OUT-OF-STATE SOCIAL WORKER APPLICANTS (1) A license to practice as a social worker in the state of Montana may be issued to the holder of an out-of-state social worker license at the discretion of the board, provided the applicant completes and files with the board an application for licensure and the required application fee. The candidate must meet the following requirements:

(a) The candidate holds a valid and unrestricted license to practice as a social worker in another state or jurisdiction, which was issued under standards equivalent to or greater than current standards in this state. Official written verification of such licensure status must be received by the board directly from the other state(s) or jurisdiction(s);

(b) The candidate holds a MSW or equivalent council on social work education (CSWE) approved degree, and shall supply a copy of the certified transcript sent directly from a college, university or institution accredited by the CSWE;

(c) The candidate shall supply proof of successful completion of the American association of state social work boards (AASSWB) advanced or clinical examination or another board-approved licensing examination. Candidate scores on the examination must be forwarded directly to the board.

(d)(i) The candidate shall submit proof the candidate has previously completed 3,000 hours of supervised social work experience as defined in 37-22-301, MCA. The candidate may verify the experience hours by affidavit, and need not supply a supervisor's signature upon reasonable explanation of why the supervisor's signature is unavailable to the candidate; or

(ii) The candidate shall submit proof the candidate has been in continuous practice as a social worker in another jurisdiction for the two years immediately preceding the date of application in Montana."

Auth: Sec. 37-22-201, MCA; IMP, Sec. 37-1-304, MCA

"II LICENSURE OF OUT-OF-STATE LICENSED PROFESSIONAL COUNSELOR APPLICANTS (1) A license to practice as a licensed professional counselor in the state of Montana may be issued to the holder of an out-of-state licensed professional counselor or equivalent license at the discretion of the board, provided the applicant completes and files with the board an application for licensure and the required application fee. The candidate must meet the following requirements:

(a) The candidate holds a valid and unrestricted license to practice as a licensed professional counselor or equivalent in another state or jurisdiction, which was issued under standards substantially equivalent to or greater than current standards in this state. Official written verification of such licensure status must be received by the board directly from the other state(s) or jurisdiction(s);

(b) The candidate holds a graduate degree which meets the requirements of 37-23-202, MCA, and shall supply a copy of the certified transcript sent directly from an accredited college, university or institution, and shall complete the degree summary sheet provided by the board;

(c) The candidate shall supply proof of successful completion of the national counselor examination or another board-approved licensing examination. Candidate scores on the examination must be forwarded directly to the board.

(d)(i) The candidate shall submit proof the candidate has previously completed 3,000 hours of supervised counseling practice as defined in 37-23-202, MCA. The candidate may verify the experience hours by affidavit, and need not supply a supervisor's signature upon reasonable explanation of why the supervisor's signature is unavailable to the candidate; or

(ii) The candidate shall submit proof the candidate has been in continuous practice as a licensed professional counselor or equivalent in another jurisdiction for the two years immediately preceding the date of application in Montana."

Auth: Sec. 37-23-103, MCA; IMP, Sec. 37-1-304, MCA

"III SCREENING PANEL (1) The board screening panel shall consist of a minimum of three board members, as chosen by the chairman. The chairman may reappoint screening panel members, or replace screening panel members as necessary at the chairman's discretion."

Auth: Sec. 37-22-201, 37-23-103, MCA; IMP, Sec. 37-1-307, MCA

"IV COMPLAINT PROCEDURE (1) A person, government or private entity may submit a written complaint to the board charging a licensee or license applicant with a violation of board statute or rules, and specifying the grounds for the complaint.

(2) Complaints must be in writing, and shall be filed on the proper complaint form prescribed by the board, which shall include a statement on release of confidentiality and shall require a notarized signature by complainant.

(3) Upon receipt of the written complaint form, the board office shall log in the complaint and assign it a complaint number. The complaint shall then be sent to the licensee complained about for a written response to be received within 20 calendar days from the date licensee receives the request for response. Upon receipt of the licensee's written response, both complaint and response shall be considered by the screening panel of the board for appropriate action including dismissal, investigation or a finding of reasonable cause of violation of a statute or rule. The board office shall notify both complainant and licensee of the determination made by the screening panel.

(4) If a reasonable cause violation determination is made by the screening panel, the Montana Administrative Procedure Act shall be followed for all disciplinary proceedings undertaken."

Auth: Sec. 37-22-201, 37-23-103, MCA; IMP, Sec. 37-1-308, 37-1-309, MCA

REASON: The proposed new rules will implement changes mandated by the passage of the Uniform Licensing and Regulation Procedures Act (HB 518) by the 1995 Legislature. The unprofessional conduct sections being deleted are now contained in the statute at 37-1-316, MCA, and it is not necessary to repeat statutory language in the rules. The out-of-state licensure rule is proposed to streamline the out-of-state application procedures.

4. Interested persons may submit their data, views or arguments concerning the proposed amendments and adoptions in writing to the Board of Social Work Examiners and Professional Counselors, 111 N. Jackson, P.O. Box 200513, Helena, Montana 59620-0513, or by facsimile to (406) 444-1667, to be received no later than 5:00 p.m., March 10, 1997.

5. If a person who is directly affected by the proposed amendments and adoptions wishes to present his data, views or arguments orally or in writing at a public hearing, he must make written request for a hearing and submit the request along with any comments he has to the Board of Social Work Examiners and Professional Counselors, 111 N. Jackson, P.O. Box 200513, Helena, Montana 59620-0513, or by facsimile to (406) 444-1667, to be received no later than 5:00 p.m., March 10, 1997.

6. If the Board receives requests for a public hearing on the proposed amendments and adoptions from either 10 percent or 25, whichever is less, of those persons who are directly affected by the proposed amendments and adoptions, from the Administrative Code Committee of the legislature, from a governmental agency or subdivision or from an association having no less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten

percent of those persons directly affected has been determined to be 97 based on the 975 licensees in Montana.

BOARD OF SOCIAL WORK EXAMINERS
AND PROFESSIONAL COUNSELORS
RICHARD SIMONTON, CHAIRMAN

BY: _____
ANNIE M. BARTOS, CHIEF COUNSEL
DEPARTMENT OF COMMERCE

_____
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, January 27, 1997.

BEFORE THE FISH, WILDLIFE AND PARKS COMMISSION
OF THE STATE OF MONTANA

In the matter of proposed amendment of ARM 12.6.101 regarding regulations for ice fishing shelters.	NOTICE OF PROPOSED AMENDMENT OF RULE NO PUBLIC HEARING CONTEMPLATED

To: All Interested Persons.

1. On March 14, 1997, the Fish, Wildlife and Parks Commission (commission) proposes to amend ARM 12.6.101. The amendment will regulate ice fishing shelters on Clark Canyon Reservoir.

2. The rule proposed to be amended provides as follows:

12.6.101 DESIGNATED LOCATIONS (1) Any person who shall use, place, or cause to be placed an ice fishing shelter on the surface of the following bodies of water shall be subject to the provisions of ~~this rule~~ the rules in this subchapter:

(a) Brown's Lake;
(b) Georgetown Lake;
(c) Deadman's Basin;
(d) Lake Frances;
(e) Bearpaw Lake;
(f) Beaver Creek Reservoir;
(g) Hauser Lake;
(h) Lake Helena; and
(i) Clark Canyon Reservoir.

AUTH: 87-1-201 and 87-1-303, MCA
IMP: 87-1-303, MCA

3. Rationale: This proposed amendment is made at the request of the Bureau of Land Management which has had difficulty in recent years managing ice fishing shelters at the Clark Canyon Reservoir. If amended, Clark Canyon Reservoir would be subject to the provisions of 12.6.103, which require ice shelter owners to mark shelters with their name, address and telephone number. The primary purpose of shelter identification is to insure shelters are removed after the season.

4. Interested persons may submit their data, views or arguments concerning the proposed amendment in writing to Jim Satterfield, Department of Fish, Wildlife and Parks, P.O. Box 200701, Helena, MT 59620-0701. Any comments must be received no later than March 10, 1997.

5. If a person who is directly affected by the proposed amendment wishes to express his or her data, views and arguments orally or in writing at a public hearing, he or she must make written request for a hearing and submit this request along with any written comments he or she has to Jim Satterfield, Department of Fish, Wildlife and Parks, P.O. Box 200701, Helena, MT 59620-0701. A written request for hearing must be received no later than March 10, 1997.

6. If the agency receives requests for a public hearing on the proposed amendment from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed action; from the administrative code committee of the legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 20 persons based on the number of people who use ice fishing shelters at Clark Canyon Reservoir on an annual basis, which is estimated to be 200.

RULE REVIEWER

Robert N. Lane

FISH, WILDLIFE & PARKS COMMISSION

Patrick J. Graham, Secretary

Certified to the Secretary of State on January 27, 1997.

BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES OF THE
STATE OF MONTANA

In the matter of the amendment of 11.14.101 through 11.14.103, 11.14.105, 11.14.109, 11.14.110, 11.14.112, 11.14.201, 11.14.202, 11.14.205, 11.14.208, 11.14.211, 11.14.212, 11.14.218, 11.14.221, 11.14.222, 11.14.226, 11.14.228, 11.14.229, 11.14.301, 11.14.305 through 11.14.307, 11.14.310 through 11.14.312, 11.14.316, 11.14.318, 11.14.319, 11.14.324, 11.14.327, 11.14.340, 11.14.401, 11.14.403 through 11.14.405, 11.14.407, 11.14.412, 11.14.414, 11.14.418, 11.14.501, 11.14.502, 11.14.506, 11.14.507, 11.14.511 through 11.14.513, 11.14.515, 11.14.519, 11.14.601, 11.14.604, 11.14.609, 11.14.610, adoption of rules I through VI, and repeal of 11.14.516 pertaining to day care facilities and certification for day care benefits.	)	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT, ADOPTION AND REPEAL OF RULES

TO: All Interested Persons

1. On March 4, 1997, at 1:30 p.m, a public hearing will be held in the auditorium of the Department of Public Health and Human Services Building, 111 N. Sanders, Helena, Montana to consider the proposed amendment, adoption and repeal of rules pertaining to day care facilities and certification for day care benefits.

The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing. If you request an accommodation, contact the department no later than 5:00 p.m. on February 24, 1997, to advise us of the nature of the accommodation that you need. Please contact Dawn Sliva, P.O. Box 4210, Helena, MT 59604-4210; telephone (406)444-5622; FAX (406)444-1970.

2. The rules as proposed to be adopted provide as follows:

Rule I FAMILY DAY CARE HOMES STAFFING AND OTHER PROVIDER REQUIREMENTS (1) The provider shall keep a list of the name,

address and phone number of each child in care and his or her parents. The list shall be made available to the department upon request.

(2) The allowable staff to child ratio in family day care homes is:

(a) 1:3 for children birth to 30 months; and

(b) 1:6 for children 30 months and older.

AUTH: Sec. 52-4-503 and 52-2-704, MCA
IMP: Sec. 53-4-504 and 52-2-731, MCA

RULE II FAMILY DAY CARE HOMES, PARENT INVOLVEMENT (1) The following written information shall be made available to all parents:

(a) a typical daily schedule of activities;

(b) admission requirements, enrollment procedures and hours of operation;

(c) frequency and type of meals and snacks served;

(d) fees and payment plan;

(e) regulations concerning sick children, transportation and trip arrangements;

(f) discipline policies; and

(g) department day care registration requirements.

(2) Family day care homes will post a copy of the facility registration and the phone number of state and local department offices in a conspicuous place. Parents should be encouraged to contact the department if they have questions regarding the registration or the day care regulations.

(3) Parents or guardians must have unlimited, immediate access to the day care facility during day care hours.

(4) The provider shall provide opportunities for the parent(s) to participate in activity planning and individual meetings.

AUTH: Sec. 52-4-503 and 52-2-704, MCA
IMP: Sec. 53-4-504 and 52-2-731, MCA

RULE III FAMILY DAY CARE HOMES, NUTRITION (1) Family day care homes must follow the same requirements as group facilities detailed in ARM 11.14.319.

AUTH: Sec. 52-4-503 and 52-2-704, MCA
IMP: Sec. 53-4-504 and 52-2-731, MCA

RULE IV FAMILY DAY CARE HOMES, EQUIPMENT (1) Family day care homes must follow the same requirements as group day care facilities detailed in ARM 11.14.311. Play equipment and materials must be provided that are appropriate to the developmental needs, individual interests, and ages of the children. There must be a sufficient amount of play equipment

and materials so that there is not excessive competition and long waits.

(2) Play equipment and materials must include items from each of the following six categories: dramatic role playing, cognitive development, visual development, auditory development, tactile development and large-muscle development.

(3) High chairs, when used, must have a wide base and a safety strap. Portable high chairs that hook onto tables are not recommended.

(4) Each child, except school-age children who do not take naps, shall have clean, and age-appropriate rest equipment, such as a crib, cot, bed or mat. Seasonably appropriate top and bottom covering, such as sheets or blankets, must be provided. Crib mattresses and other rest equipment shall be waterproof and regularly sanitized.

(5) Trampolines are prohibited.

AUTH: Sec. 52-4-503 and 52-2-704, MCA
IMP: Sec. 53-4-504 and 52-2-731, MCA

RULE V FAMILY DAY CARE HOMES, NIGHT CARE (1) A family day care home offering night care must develop plans for program, staff, equipment and space which will provide appropriately for the personal safety and emotional and physical care of children away from their families at night.

(2) This requirement shall be deemed to have been met if:

(a) special attention is given by the caregiver and the parents to provide for a transition into this type of care appropriate to the child's emotional needs;

(b) a selection of toys for quiet activities which can be used with minimal adult supervision is provided for children prior to bedtime;

(c) bathing facilities, comfortable beds or cots, and complete bedding are provided;

(d) staff are available to assist children during eating and pre-bedtime hours and when dressing;

(e) during sleeping hours, staff are awake and in the immediate vicinity and on the same floor level of sleeping children in order to provide for the needs of children and respond to any emergency; and

(f) at appropriate times a nutritious dinner and/or breakfast is served to children and a bedtime snack is offered.

(3) An individual family day care provider may not provide care consecutively day and night without at least one additional caregiver. No caregiver may have responsibility for the care and supervision of children for more than 12 consecutive hours.

AUTH: Sec. 52-4-503 and 52-2-704, MCA
IMP: Sec. 53-4-504 and 52-2-731, MCA

3. The rules as proposed to be amended provide as follows. New language that is to be added is underlined.

Language that is being deleted is interlined.

11.14.101 CHILD DAY CARE SERVICES, PURPOSES AND LICENSING (1) ~~Generally, c~~Child day care is a supplemental form of care which provides parental care to a child up to the age of 13 years except as indicated hereunder by an adult other than a parent, guardian, person in loco parentis, or relative on a regular basis for daily periods of less than 24 hours. This rule sets out general provisions on day care facility licensing and registration, and day care benefit programs.

(2) and (3) remain the same.

(4) The evaluation and determination of the need and eligibility for day care benefits for a child and his family is the responsibility of the ~~social worker located at the county office of the department or the appropriate official determining eligibility for a day care program whether such program is administered inside or outside the department.~~ child care resource and referral agency, local department social worker, work readiness component (WorC) case manager and/or eligibility technician depending on the type of day care program.

(4)(a) remains the same.

(b) Unless a ~~shorter~~ longer period of time is specified in rules or case plans applying to particular day care services, day care services (appropriateness of plan/arrangement and the financial eligibility for day care services) shall be redetermined every ~~six(6)~~ months for child protective services (CPS) day care and every three months for other types of day care, or sooner whenever information indicates eligibility may have changed or the adequacy of the day care plan needs to be reevaluated.

(5) The final authority for approval of CPS day care benefits ~~in any particular case~~ remains the responsibility of the appropriate community social worker supervisor working under the supervision of the regional administrator. Authority for the approval of other types of child care rests with the appropriate department representative charged with this task. Ultimate responsibility for the day care program rests with the ~~protective services division~~ program management bureau.

(6) Child protective services ~~(CPS)~~ day care may be provided to a single or two parent family.

(a) Except as otherwise provided, payment for CPS day care requires ~~facts documenting~~ documentation in the case record that:

(i) the family is not able to pay for day care~~; and the situation is documented in the case record~~;

(ii) the child is in need of day care because of danger of neglect or abuse, or for physical or emotional reasons ~~that are documented~~; and

(iii) the parent(s) understands and agrees that CPS day care is limited:

(A) in duration;

(B) as to specific dates and times; and

(C) in accordance with the terms of a case plan developed by the social worker, and may be terminated based upon the success or failure of the parent(s) to alleviate the danger to the child(ren) which necessitated the provision of CPS day care, or based on other considerations relevant to provision of such benefits.

(b) ~~Foster parents generally are not eligible to receive CPS day care. If, however,~~ Foster parents may be eligible to receive CPS day care only:

(i) ~~the attendance of the foster parent(s) is~~ during the time necessary to attend required ~~at~~ training, counseling, or some similar event which is directly connected to the ability of the foster parent(s) to care for the child(ren); ~~or,~~ CPS day care may be provided for the time the foster parent(s) attends such event. In addition, CPS day care may be provided;

(ii) to enable the foster parent(s) to work if requested by the placing social worker, ~~and if~~ approved by the appropriate community social worker supervisor working under the supervision of the regional administrator. Prior to approving or disapproving work-enabling CPS day care benefits for the foster parent(s), the appropriate community social worker supervisor may consider all facts and circumstances bearing on the department's ability to provide the benefits, and the necessity of the benefits for procuring appropriate foster home care for the child(ren). ~~In addition, payment~~

(c) Payment for work-enabling CPS day care benefits for any foster parent requires documentation that:

(i) either no appropriate foster care placement willing to provide foster home care without CPS day care benefits exists, or the proposed placement would provide a particularly desirable placement for the child and the foster parent(s) is unable or unwilling to provide care without the CPS day care benefits; and

(ii) the foster parent(s) is ineligible for other appropriate day care program benefits.

~~(c)~~ (d) In addition to the other requirements in this rule, the regional administrator may condition eligibility for work-enabling CPS day care benefits for foster parents on the current availability of funds to pay for such care while meeting the demands of other department programs.

~~(d)~~(7) Payment for JOBS related day care benefits requires:

~~(i)~~ ~~The~~ that the family is registered for JOBS.

~~(ii)~~ If the certified registrant is placed in employment, but is no longer receiving an AFDC subsistence grant and meets the other day care eligibility requirements stated in this ~~section~~ subchapter, day care services will continue, if requested, for 30 days from the date of entry into employment.

~~(e) Payment for special-need-related or extra meal day care requires that:~~

~~(i) the extra meal is not part of the full day care or full night care services;~~

~~(ii) the parents' situation is such as to require the~~

~~provision of the extra meal (i.e., parent is employed from 7:00 a.m. to 5:30 p.m.). This must be documented in the case record;~~

~~(iii) the day care facility is in agreement to provide the extra service;~~

~~(iv) the child's needs and best interest are being met through the service provided; and~~

~~(v) the rate has been approved in writing by the appropriate community social worker supervisor upon receiving a written evaluation for the need from either the social worker or the appropriate resource and referral agency.~~

~~(f)~~ (8) Payment for special ~~child or exceptional child day care requires:~~ needs child day care requires that

~~(i) That~~ the child be between the ages of 0 ~~through 17~~ to 19 years of age and the case record contains written verification of the physical, ~~handicaps or retardation from the appropriate authority.~~ developmental, medical, or emotional disability from a qualified professional, such as a medical professional, licensed social worker, psychologist, psychiatrist or licensed rehabilitation counselor. If over 18 years of age, in addition to the requirements for documentation of the child's special needs, the child must be a full-time student expected to graduate by 19 years of age.

~~(ii)~~ (9) ~~That~~ For CPS special needs day care, in addition to the requirements of (8) above, there must be a written evaluation of the appropriateness of the day care being ~~given~~ provided the child ~~in the facility~~ which has been ~~submitted to and~~ approved by the appropriate community social worker supervisor. The evaluation shall include:

~~(A)~~ (a) the long range goal for the family, particularly the child and how day care is incorporated into this plan;

~~(B)~~ (b) the positives as well as the negatives of this placement;

(c) the steps that would be taken to ensure appropriate adjustments of the parent and child to the placement; and

~~(D)~~ (d) the plan for follow-up evaluations of the placement.

(10) For other state paid day care, resource and referral agencies (r&rs) responsible for approving the special needs rate. To approve the rate, r&rs must have appropriate documentation from a qualified professional attesting to the child's disability.

AUTH: Sec. 53-4-503 and 52-2-704, MCA
IMP: Sec. 53-4-502, 52-2-712 and 52-2-721, MCA

11.14.102 DEFINITIONS (1) "Day care facility" means a person, association or place, incorporated or unincorporated, that provides supplemental parental care on a regular basis. It includes a family day care home, a day care center, or a group day care home. It does not include:

(a) a person who limits care to children who are related to him by blood or marriage or under his legal guardianship, or any

group facility established chiefly for educational purposes that limits its services to children who are ~~three~~ 3 years of age or older~~;~~ or

(b) a person caring for the children of a single family; or

(c) a person, not receiving any type of state payment for child care, who is caring for children in the children's own home. In addition to the children being cared for in their own home, there may be no more than 2 children from another home being cared for by the same provider.

(2) remains the same.

(3) "Family day care home" means a place in which supplemental parental care is provided to ~~three~~ 3 to ~~six~~ 6 children from separate families on a regular basis, with no more than 3 children under ~~2 years~~ 30 months of age ~~unless care is provided for infants only. For places providing care only for infants, "family day care home" means a place in which supplemental parental care is provided for up to 4 infants. No other children shall be in attendance~~.

(4) remains the same.

(5) "Group day care home" means a place in which supplemental parental care is provided to 7 to 12 children from separate families on a regular basis ~~unless care is provided for infants only. For places providing care only for infants, "group day care home" means a place in which supplemental parental care is provided for up to 8 infants. No other children shall be in attendance. The staff:infant ratio of ARM 11.14.516 applies to group day care homes.~~

(6) remains the same.

(7) "Regular basis" means providing supplemental parental care to children of separate families for 3 or more consecutive weeks. The child must be in attendance four or more days a week for 6 hours a day or more.

(8) through (12) remain the same.

(13) "Department" means the department of ~~family~~ public health and human services.

(14) "Full day care" for state paid day care means care given to a child in a day care facility licensed or registered by the department which is provided for a continuous period of ~~not less than 6 hours per day~~ 6 to 10 hours per day.

(15) remains the same.

(16) "Overlap care" means care provided at a day care facility for school aged children for the times before and after school and approved by the department for a designated period of time ~~not to exceed two hours per day~~ not to exceed 3 hours when the number of children in care may exceed the number of children registered for care on the registration certificate.

(17) "Night care" means care provided for a child between the hours of 7 p.m. and 7 a.m. ~~in~~ during which the parent(s) desires a child to sleep.

(18) "Infant" means a child ~~under the age of 24 months of age.~~ birth to 18 months of age.

(19) "Toddler" means a child aged 18 months to 30 months. ~~"Preschooler" means a child between 24 months of age and the age the child will be when he or she initially enters the first grade of a public or private school system.~~

(20) "Preschooler" means a child between 3 years of age and the age when the child enters school. ~~"School-age child" means a child who attends school and who is between 5 and 19 years of age.~~

(21) "School-age child" means a child who attends school and who is between 5 and 13 years of age. ~~"Caregiver" means a licensee, registrant, employee, aid or volunteer who is responsible for the direct care and supervision of children in a day care facility."~~

(22) "Caregiver" means a licensee, registrant, employee, aid or volunteer who is responsible for the direct care and supervision of children in a day care facility.

(23) "Provider" means the applicant for license or registration, the licensee or registrant.

AUTH: Sec. 53-4-503 and 52-2-704, MCA
IMP: Sec. 53-4-501, 53-4-504, 52-2-702, 52-2-703 and 52-2-731, MCA

11.14.103 DAY CARE FACILITIES, REGISTRATION OR LICENSING APPLICATION (1) Any individual may apply for a registration certificate to operate a family day care home or group day care home. Any individual, agency or group may apply for a license to operate a day care center. However, an applicant who has had a previous day care application denied or who has had a day care license or registration certificate revoked or suspended may not reapply for licensure or registration within ~~six months~~ 1 year of the denial or revocation. If the suspension or revocation is contested and upheld after a fair hearing, the reapplication may not be made until ~~six months~~ 1 year after the date of the decision of the hearing officer. Applications may be obtained from any ~~district~~ local office of the department.

(2) remains the same.

(3) Before a regular license without provisions or restrictions may be granted, the following shall be submitted by the applicant at the time of application and annually thereafter:

(a) ~~a certificate of approval~~ an approved inspection report from the state fire marshal or his official designee indicating the fire safety rules have been met;

(b) ~~a certificate~~ an approved inspection report from public health authorities certifying the satisfactory completion of training or a certificate of approval following inspection by local health authorities in accordance with ARM 16.24.406 through ~~ARM~~ 16.24.418;

(c) proof of current fire and liability insurance coverage for the day care center;

(d) a schedule of daily activities;

(e) a sample weekly menu;

(f) a DFS 33 personal statement of health for licensure form for each caregiver, aide or volunteer who has direct contact with the children in care;

(g) a criminal background and child and adult protective services check on the provider and each caregiver prior to any services being provided by an individual covered by this requirement;

~~(g)~~(h) a list of current staff with ages, addresses and telephone numbers;

~~(h) names, addresses, and telephone numbers of three personal references not related to the applicant who have knowledge of the applicant's character, experience and ability; and~~

(i) a written fire and emergency evacuation plan. For license renewal there must also be documentation of 8 annual emergency evacuation practices, including when each drill took place and how long it took to evacuate everyone from the facility; ~~Such other information which may be requested by the department to determine compliance with the licensing requirements~~

(j) upon initial application only, the names, addresses and telephone numbers of 3 personal references not related to the applicant who have knowledge of the applicant's character, experience and ability; and

(k) other information which may be requested by the department to determine compliance with the licensing requirements.

(4) Before a registration certificate may be granted, the following shall be submitted by the applicant at the time of application and annually thereafter:

(a) A DFS 33 personal statement of health form for each caregiver;

~~(b) Names, addresses and telephone numbers of three personal references not related to the applicant(s) who have knowledge of the applicant's character, experience and ability;~~

(b) A criminal background and child and adult protective services check on the provider and each caregiver prior to any services being provided by an individual covered by this requirement;

(c) Proof of current fire and liability insurance coverage for the provision of day care in the home;

(d) A written fire and emergency evacuation plan with the initial application and additional documentation of eight annual emergency evacuation practices for registration renewal;

~~(d) Such other information which may be requested by the department to determine compliance with registration requirements.~~

(e) Upon initial application only, the names, addresses and telephone numbers of three personal references not related to the applicant(s) who have knowledge of the applicant's character, experience and ability; and

(f) Such other information which may be requested by the department to determine compliance with registration requirements.

(5) Applications for renewal shall be made by the provider ~~at least thirty (30)~~ within 30 days prior to expiration of the license or registration certificate.

(6) remains the same.

AUTH: Sec. 53-4-503 and 52-2-704, MCA
IMP: Sec. 53-4-504, 53-4-507, 52-2-702, 52-2-722 and 52-2-731, MCA

11.14.105 DAY CARE FACILITIES, REGISTRATION AND LICENSING PROCEDURES (1) remains the same.

(2) No registrant or licensee shall discriminate in child admissions or employment of staff on the basis of race, sex, religion, creed, color, ~~or~~ national origin~~.~~ or disability. Any determination of discrimination will be made by the Montana human rights commission.

(3) Within ~~thirty (30)~~ 30 days of receipt of the signed and completed application forms, the department will evaluate the application for registration or licensure based upon the requirements found in these rules.

(a) A prospective family day care home or group day care home that meets ~~these~~ all requirements as evidenced by the application shall be issued a registration certificate. The registration certificate may be either provisional, restricted or regular.

(3)(b) remains the same.

(4) A provisional registration certificate or license may be issued for a period of up to ~~three~~ 3 months when the day care facility does not meet all of the requirements if the ~~facility~~ provider is attempting to comply. A second ~~three~~ 3 month provisional certificate or license may be issued in special circumstances, at the discretion of the community social worker supervisor, the total length of time of issuance not to exceed ~~six~~ 6 months.

(4)(a) through (5) remain the same.

(6) The department, after written notice to the applicant, licensee or registrant, may deny, suspend, restrict, revoke or reduce to a provisional status a registration certificate or license upon finding that:

(a) the applicant has not met the requirements for licensure or registration set forth in these rules~~,~~; or

(b) the licensee or registrant has received 3 written warnings of non-compliance with the registration or licensing requirements. The requirement of 3 warnings does not apply to revocation, suspension or refusal of a provisional license, certificate or registration. Negative licensing action may be taken upon the receipt of the third warning whether contained in a single or several letters of notice.

~~(c) however, suspension~~

(7) Suspension or revocation may be immediate if:

~~(i)~~(a) upon referral of suspected child abuse or neglect regarding an operating day care facility, the initial investigation reveals that there are reasonable grounds to believe that a child in the facility may be in danger of harm, suspension or revocation will be immediate;

~~(ii)~~(b) the department requests and is denied access to the licensed or registered facility;

~~(iii)~~(c) the provider has made any misrepresentations to the department, either negligent or intentional, regarding any information requested on the application form or necessary for registration or licensing purposes; or

~~(iv)~~(d) the provider, a member of the provider's household or staff has been named as the perpetrator in a substantiated report of child abuse or neglect as defined in ARM 11.14.515.

(7) through (10) remain the same in text but are renumbered (8) through (11).

~~(11)~~(12) Separate registration certificates and licenses shall be required for programs maintained on separate premises even when operated ~~under the same auspices~~ by the same provider.

AUTH: Sec. 52-2-704, MCA
IMP: Sec. 53-4-504, 53-4-507, 52-2-702, 52-2-723 and 52-2-731, MCA

11.14.109 FAMILY DAY CARE HOME AND GROUP DAY CARE HOME REGISTRATION SERVICES PROVIDED (1) through (1)(a) remain the same.

(b) ~~counseling~~ referral services concerning children's problems; and

(1)(c) through (3) remain the same.

~~(4) Upon request of the department, the state department of health and environmental sciences or the state fire marshal or his designee shall inspect any family day care home or group day care home for which a registration certificate is applied for or is issued and shall report its findings to the department.~~

AUTH: Sec. 53-4-503 and 52-2-704, MCA
IMP: Sec. 53-4-504, 52-2-731 and 52-2-733, MCA

11.14.110 DAY CARE FACILITIES, JOINT PROGRAMS (1) and (2) remain the same.

(3) If multiple programs, including multiple day care programs or facilities in the same building, increase the number of people regularly in the building to more than 12 individuals, fire, safety and sanitation requirements which may be impacted must be complied with by the day care facility.

(4) Persons, corporations or organizations may be licensed or registered for more than one day care facility if facility sites, staff and space are completely separate from one another.

(a) If the day care facility is housed in a private single-family living structure, the structure can only obtain

one registration or license. An exception to this may be made by a Division of Child and Family Services regional administrator, if the facility meets the requirements of (1) through (4) above.

(b) If the day care facility is a non-residential structure, it will be licensed as a center and will be required to meet all center regulations.

(c) If the day care facility is contained in a multi-family structure, such as an apartment building, the structure will be allowed to house multiple day care facilities that meet the requirements of (1) through (4) above.

(d) If the facility is licensed or registered as a day care facility but also serves as a foster care home, the department regional administrator must approve the dual license or registration.

AUTH: Sec. 53-4-503 and 52-2-704, MCA
IMP: Sec. 53-4-504 and 52-2-731, MCA

11.14.112 DAY CARE FACILITIES, SMOKE FREE ENVIRONMENT ~~IN DAY CARE FACILITIES~~

(1) Children shall be afforded a smoke free environment in all day care facilities.

(2) The registrant or licensee shall ensure that no smoking occurs with the facility while children are in care.

(3) If smoking is permitted in an outdoor area, the registrant or provider shall ensure that the children are protected from secondhand smoke.

AUTH: Sec. 53-4-503 and 52-2-704, MCA
IMP: Sec. 53-4-504 and 52-2-731, MCA

11.14.201 DAY CARE CENTERS, LICENSING SERVICES PROVIDED

(1) The department will provide the following:

(a) assistance to the applicant to meet licensing requirements;

(b) ~~counseling~~ referral services concerning child problems;

(c) consultation to the day care center in providing enrichment experiences for the children, proper environment and nutrition; and

(d) technical assistance to day care centers for staff training~~;~~.

(2) The department or its authorized representative shall make periodic unannounced visits to all licensed day care centers to ensure continued compliance with licensing requirements.

(3) remains the same.

AUTH: Sec. 53-4-503 and 52-2-704, MCA
IMP: Sec. 53-4-504, 52-2-731 and 52-2-733, MCA

11.14.202 DAY CARE CENTERS, PROGRAM REQUIREMENTS (1) The program conducted in a day care center shall be written and shall provide experiences which are responsive to the individual child's pattern of chronological, physical, emotional, social and intellectual growth and well-being. Both active and passive learning experiences shall be conducted in consultation with parents.

(a) This requirement shall be deemed to have been satisfied if the licensing representative has been able to observe the daily program in operation, reviews the written daily program or lesson plans and approves the program based upon the criteria below:

(1)(a)(i) through (1)(a)(vi) remain the same.

AUTH: Sec. 53-4-503 and 52-2-704, MCA
IMP: Sec. 53-4-504, 52-2-723, 52-2-731 and 52-2-732, MCA

11.14.205 DAY CARE CENTERS, RECORDS (1) through (3) remain the same.

(4) Prior to a child being enrolled or entered into a day care center the following must be on file:

(a) written information on each child explaining any special needs of the child, including allergies;

(b) a release or authorization of persons allowed to pick up the child;

(c) necessary medical forms, including signed and updated immunization records and the names of emergency contact persons; and

(d) an emergency consent form, such as the DFS-113. This form must accompany staff when children are away from the child care site for activities.

AUTH: Sec. 52-4-503 and 52-2-704, MCA
IMP: Sec. 53-4-504, 53-4-508, 52-2-723, 52-2-731 and 52-2-732, MCA

11.14.208 DAY CARE CENTERS, DISCIPLINE (1) Caregivers shall use appropriate forms of discipline ~~but must not use spanking or other forms of corporal punishment or any other technique which is humiliating, shaming, frightening, or otherwise damaging to children~~. Physical punishment, including spanking or shaking and other forms of corporal punishment, is strictly prohibited in child care facilities.

(2) Any punishment or discipline which is humiliating, shaming, frightening or otherwise damaging is strictly prohibited.

(3) Parental or guardian permission does not allow for the use of any punishments or disciplines listed in (1) or (2) above.

~~(2)~~(4) The provider ~~shall require~~ is responsible for ensuring that each caregiver to participates in an in-service training session regarding discipline and guidance techniques

appropriate for children.

AUTH: Sec. 52-4-503 and 52-2-704, MCA
IMP: Sec. 53-4-504, 53-4-508, 52-2-723 and 52-2-731, MCA

11.14.211 DAY CARE CENTERS, SPACE (1) remains the same. (2) This requirement shall be deemed to have been satisfied if:

(a) the facility has a minimum of 35 square feet per child of indoor space, ~~exclusive of~~ excluding floor area devoted to fixed equipment or support functions such as kitchens, bathrooms, offices, etc. as well as 75 square feet per child of outdoor play space; and

(b) the equipment and furniture arrangement permits unobstructed floor area sufficient to allow vigorous play appropriate for each group of children in care, as well as arrangements of sleeping equipment which permit easy access to every child and unobstructed exits.

(3) Outdoor play areas at the facility must be surrounded by a fence that is at least 4 feet high and in good repair without any holes or spaces greater than 4 inches in diameter.

~~(3)~~(4) The center ~~can~~ may obtain ~~a variance~~ an exception from the department from the above requirements for the following reasons:

(a) limited outdoor space is offset by a greater amount of indoor space, such as a gym, permitting an equivalent activity program;

(b) limited indoor space is offset by sheltered outdoor space where climate permits reliance on outdoor space for activities normally conducted indoors; or

(c) ~~scheduling for the~~ limited outdoor or unfenced space is offset by the availability of use of an adjacent school playground, nearby parks, ~~cleared vacant safe lots, and/or a street blocked off by local authorities.~~ or other safe outdoor play area.

AUTH: Sec. 52-4-503 and 52-2-704, MCA
IMP: Sec. 53-4-504, 53-4-508, 52-2-723 and 52-2-731, MCA

11.14.212 DAY CARE CENTERS, SUPPORT SERVICES SPACE AND EQUIPMENT (1) remains the same.

~~(a)~~(2) This requirement shall be deemed to have been satisfied if:

~~(i)~~ ~~The~~ the center has appropriate storage and work areas adjacent to the area of use, to accommodate the following functions if these are conducted on the premises:

~~(A)~~(a) administrative office functions, record storage, meeting arrangements for staff or for parent conference offering privacy of conversation;

~~(B)~~(b) food preparation and serving~~;~~;

~~(C)~~(c) custodial services;

~~(D)~~(d) laundry;

~~(E)~~(e) rest area for staff relief periods; and

~~(F)~~(f) storage of program materials and manipulative toys to be used and rotated at different times during the year.

AUTH: Sec. 52-4-503 and 52-2-704, MCA
IMP: Sec. 53-4-504, 53-4-508, 52-2-723 and 52-2-731, MCA

11.14.217 DAY CARE CENTERS, TRANSPORTATION (1) through (6) remain the same.

(7) The requirements of 11.14.511 must also be met when transporting children.

AUTH: Sec. 52-4-503 and 52-2-704, MCA
IMP: Sec. 53-4-504 and 52-2-731, MCA

11.14.218 DAY CARE CENTERS, MATERIALS AND EQUIPMENT (1) and (2) remain the same.

(3) Toys and objects with a diameter of less than 1 inch (2.5 centimeters), objects with removable parts that have a diameter of less than 1 inch (2.5 centimeters), plastic bags, ~~and~~ styrofoam objects and balloons must not be accessible to children under 3 years of age ~~and those~~ or children who are still placing objects in their mouths.

(4) Outdoor equipment, such as climbing apparatus, slides, and swings, must be anchored firmly, and placed in a safe location according to manufacturer's instructions. Ground cover under these items should be either sand, small gravel or wood chips, with a depth of the ground cover being at least 6 inches. Trampolines are prohibited.

(5) Play equipment and materials must include items from each of the following ~~six~~ 6 categories: dramatic role playing, cognitive development, visual development, auditory development, tactile development and large-muscle development. Dramatic role playing materials shall be sanitized regularly.

(6) remains the same.

(7) Each child~~, except school-age children who do not take naps,~~ shall have clean, sanitized and age-appropriate rest equipment~~, such as a crib, cot, bed or mat~~. Seasonably appropriate covering, such as sheets or blankets, must be provided. Crib mattresses and other rest equipment shall be waterproof and regularly sanitized.

(8) and (9) remain the same.

(10) A first aid kit must be kept on-site and must include at least the following items:

(a) syrup of ipecac (one ounce bottle);

(b) sterile, absorbent bandages, such as the individually wrapped sterile pad bandages;

(c) a synthetic ice or gel pad;

(d) tape and a variety of Band-Aids;

(e) tweezers and scissors;

(f) the phone number for poison control (1-800-525-5042); and

(g) disposable latex gloves.

(11) For trips away from the child care facility, a portable first aid kit must accompany staff and must include at least the items listed in (10) above.

AUTH: Sec. 52-4-503 and 52-2-704, MCA
IMP: Sec. 53-4-504, 53-4-508, 52-2-723 and 52-2-731, MCA

11.14.221 DAY CARE CENTERS, AFTER SCHOOL CARE

(1) remains the same.

(2) This requirement shall be deemed to have been satisfied if the licensing representative has observed the program in operation and approved the program based on the criteria below:

(a) adult supervision is provided for individual and group pursuit in developmentally appropriate crafts, sewing, cooking, art, music, or other activities~~.~~;

(b) provision is made for children to participate in activities outside the center with appropriate adult supervision~~.~~;

(c) children have the opportunity appropriate to the child's age to participate in making rules and have opportunities to express objections to them;

(d) children have the opportunity to choose the activity in which they would like to participate and have ample opportunity to participate in child directed activities; and

~~(d)~~(e) parents have had the opportunity to participate ~~participated~~ in planning and approving the after-school activities and have participated in approving rules and agree on the handling of infractions of the rules.

AUTH: Sec. 52-4-503 and 52-2-704, MCA
IMP: Sec. 53-4-504, 53-4-508, 52-2-723 and 52-2-731, MCA

11.14.222 DAY CARE CENTERS, NIGHT CARE (1) remains the same.

(2)(a) through (d) remain the same.

(e) during sleeping hours, staff are awake, ~~and~~ in the immediate vicinity and on the same floor level of sleeping children in order to provide for the needs of children and respond to any emergency; and

(f) at appropriate times a nutritious dinner and/or breakfast ~~meal~~ is served to children and a bedtime snack is offered.

AUTH: Sec. 52-4-503 and 52-2-704, MCA
IMP: Sec. 53-4-504, 53-4-508, 52-2-723 and 52-2-731, MCA

11.14.226 DAY CARE CENTERS, STAFFING REQUIREMENTS

(1) The ~~child~~: child to staff ratio~~:~~ for day care centers is:

(a) 4:1 for ~~infants 0 to 24 months~~ children birth to 30

months old;

(b) ~~6~~:1 for children ~~2-4 years~~ 31 months up to 4 years old;

(c) 10:1 for children 4-6 years; and

(d) 15~~14~~:1 for over 6 years~~.~~.

~~(c)~~ (2) ~~only~~ Only the provider, primary caregiver(s) and aides may be counted as staff in determining the staff ratio.

~~(2) Qualifications of staff.~~

~~(a)~~ (3) The director shall have an ~~associate~~ bachelor's degree in a related field plus ~~one~~ 1 year experience in child care or child development associate certification (CDA), a certified child care professional accreditation or three years experience in child care. If the director also acts as a caregiver or conducts in-service training, ~~he~~ the director must meet the qualifications of a primary caregiver.

~~(b)~~ (4) A primary caregiver must be at least 18 years of age and shall meet all of the training qualifications of ~~an aide~~ (5)(d) plus the following:

~~(i)~~ (a) two years experience as a licensed or registered group or family day care home provider or day care center staff person or hold a bachelor of arts or an associates degree in education or a related field~~.~~;

~~(ii)~~ (b) be currently certified ~~trained~~ in cardio-pulmonary resuscitation ~~or multi-media first aid~~ including choking response. For caregivers who will be caring for infants, infant-child CPR is required. If the caregiver is only caring for children over the age of eight years, adult CPR will suffice; and

(c) be currently certified in standard first aid.

~~(3)~~ (5) An aide ~~is~~ must be directly supervised by a primary care giver, ~~and~~ shall be at least 16 years of age and meet the following qualifications:

(a) have sufficient language skills to communicate with children and adults;

(b) be in good mental and physical health;

(c) have at least ~~one~~ 1 day of on-the-job orientation;

(d) verify that they have received a minimum of at least ~~eight~~ 8 hours of ~~training within the first year,~~ continuing education annually, in at least ~~two~~ 2 separate sessions provided ~~either~~ or approved by the department, ~~or center, other trainer in the following areas:~~ including, at a minimum, the following:

(i) 4 hours ~~- to include~~ related to the emotional, cognitive, physical and social development of children and creative activities for children;

(ii) 1 hour - discussing appropriate discipline;

(iii) 1 hour - of first aid;

(iv) 1.5 hours - regarding nutrition ~~and~~ , sanitation; and universal precautions; and

(v) ~~.5 hours - fire safety~~ a half hour of fire safety.

~~(4)~~ (6) The provider must assure that each caregiver possesses good character and is physically, mentally and emotionally competent to care for children and free from

communicable disease.

(a) The provider shall maintain written records regarding each ~~employed~~ caregiver which include:

(i) a record of training and experience; and

(ii) three references from persons unrelated to the ~~employed~~ caregiver attesting to the ~~employee's~~ caregiver's character and suitability for the job.

(b) Each caregiver must have experience in the care and supervision of children. Aides and volunteers lacking the experience with children required by this rule may obtain such experience through provision of supervised care in the center.

(c) Unless an exception is granted by the regional administrator, no caregiver shall:

(i) have been convicted or adjudicated of a crime involving harm to children or physical or sexual violence against any person. A caregiver who is charged with a crime involving children or physical or sexual violence against any person and awaiting trial may not provide care or be present in the center pending the outcome of the trial.; ~~In excluding from the center any caregiver adjudicated of a crime involving harm to children or physical or sexual violence against any person, the department shall give due regard for the non-criminal nature of such adjudications under 41-5-106, MCA;~~

(ii) be currently diagnosed or receiving therapy or medication for a mental illness or emotional disturbance which might create a risk to children in care. Mental illness which might create a risk to children in care shall be determined by a licensed psychologist or psychiatrist. The department may request that a caregiver obtain a psychological or psychiatric evaluation at his or her own expense if there is reasonable cause to believe such a mental illness or emotional disturbance exists;

(iii) be chemically dependent upon drugs or alcohol. Chemical dependence on drugs or alcohol shall be determined by a licensed physician or certified chemical dependency counselor. The department may request the caregiver to obtain an evaluation at his or her own expense if there is reasonable cause to believe chemical dependence exists; or

(iv) have been named as a perpetrator in a substantiated report of child abuse or neglect, or been named as perpetrator in a report substantiating abuse or neglect of a person protected under the Montana Elder and Developmentally Disabled Abuse Prevention Act, or of a person protected by a similar law in another jurisdiction.

(d) The provider is responsible for assuring that the persons covered by this ~~subsection~~chapter have met these requirements before providing care or within a reasonable time from the date that the person begins providing care. ~~Aides and volunteers lacking the experience with children required by this rule may obtain such experience through provision of supervised care in the center.~~

~~(5)~~(7) No staff member, aide, volunteer or other person

having direct contact with the children in the center shall ~~conduct themselves in a manner which poses~~ pose any potential threat to the health, safety and well-being of the children in care.

~~(6)~~(8) The licensee shall submit a report to the appropriate ~~district~~ local office of the department within 24 hours after the occurrence of an accident causing injury to a child which resulted in the child being hospitalized, requiring ambulance transport or intervention, or any fire in the facility ~~when~~ in which the services of the fire department were required. A copy of the report shall be provided to the parent(s) of the child(ren) involved, and a copy retained on file at the day care facility.

~~(7)~~(9) The ~~provider~~ director, assistant director ~~and all~~ or any staff members of the day care center who suspects that a child may have been abused or neglected shall report their concerns immediately ~~any child suspected of being abused or neglected to the county welfare department or the child abuse hotline, 1-800-332-6100.~~ to the department.

~~(8)~~(10) The provider shall keep personal information about the child and ~~his~~ the child's family confidential.

AUTH: Sec. 52-4-503 and 52-2-704, MCA
IMP: Sec. 53-4-504, 53-4-506, 52-2-723, 52-2-731 and 52-2-735, MCA

11.14.228 DAY CARE CENTERS, PARENT INFORMATION (1) The following written information shall be made available to all parents:

(a) a typical daily schedule of activities~~;~~;

(b) admission requirements, enrollment procedures, hours of operation~~;~~;

(c) frequency and type of meals and snacks served~~;~~;

(d) fees and payment plan~~;~~;

(e) regulations concerning sick children~~;~~;

(f) transportation and trip arrangements~~;~~;

(g) discipline policies; and

(h) department day care licensing requirements.

(2) Day care centers shall post a copy of the facility license and the phone number of state and local division of child and family services offices in a conspicuous place. Parents should be encouraged to contact the division if they have questions regarding the license or the day care regulations.

(3) Unless prohibited by court order, parents or guardians must have unlimited access to the day care facility during day care hours.

AUTH: Sec. 52-4-503 and 52-2-704, MCA
IMP: Sec. 53-4-504, 53-4-506, 53-4-508, 52-2-723, 52-2-731 and 52-2-735, MCA

11.14.229 DAY CARE CENTERS, SAFETY REQUIREMENTS

(1) remains the same.

(2) All medications must be kept in their original containers and labeled with the original prescription label, in a place inaccessible to children. ~~, in their original containers, and labeled with the original prescription label~~.

(3) No extension cord shall be used as permanent wiring. ~~and all~~ All appliances, ~~and~~ lamp cords and exposed light sockets must be suitably protected to prevent ~~pulling or chewing by children~~ electrocution.

(4) The poison control number (1-800-524-5042) must be posted at all telephone locations at the day care facility.

(5) Use of waterbeds, water mattresses, gel pads or sheepskin covers for children's sleeping surface is prohibited.

(6) In an emergency, all occupants must be able to escape from the facility, whether a home or building, in a safe and timely manner. At least 2 exits must be available from all occupied floor levels. All bedrooms and sleeping rooms used for children attending the facility must also have 2 exits.

(a) First story main levels must have 2 accessible exit doors that are unlocked when children are in care and are easily operable from the inside with a single action. The 2 exit doors must be far enough apart from one another to avoid having them both blocked by fire and smoke. Aisle ways and corridors leading to exit doors must be kept clear of obstructions. Deadbolt locks that can be opened from the inside only with a key are prohibited.

(b) Basements used by children in the facility must have at least 2 exits. At least one of those exits must lead directly to the outside of the building so that children are able to exit without having to ascend stairs inside the building. The exits must be far enough apart from one another to avoid having them both blocked by smoke and fire.

(c) Children younger than 8 are not allowed on any floor above the ground/main floor level. The only exception to this rule is if an approved automatic fire sprinkler system is installed throughout the entire building and the upper level floor has 2 separate exits. If the day care is located in a multi-use building other than a family residence, the 2 exits from an upper level floor must be for the exclusive use of the day care. Any other occupants above the first floor must have their own exits. An approved exterior fire escape is acceptable as the second exit.

(d) Exit doors, windows, and their opening hardware must be maintained in good repair at all times.

AUTH: Sec. 52-4-503 and 52-2-704, MCA
IMP: Sec. 53-4-504, 52-2-723, 52-2-731 and 52-2-735, MCA

11.14.301 GROUP DAY CARE HOMES, PROVIDER RESPONSIBILITIES AND QUALIFICATIONS (1) The provider and all persons

responsible for children in the day care ~~home~~ must be at least 18 years of age and must be in good mental and physical health.

(2) The director or provider/owner, all caregivers, aides, volunteers, kitchen and custodial staff, and persons over age 18 residing in the day care facility must obtain a completed criminal background check and a completed child protective services check before providing direct care to the children attending the day care facility. The director or provider/owner of the facility is responsible for ensuring that copies of these reports are on file at the facility.

~~(2)~~(3) The provider shall be responsible for the direct care, protection, supervision, and guidance of the children, through active involvement or observation, within a group day care ~~home~~ facility.

~~(3)~~(4) ~~The providers~~ All caregivers shall have experience in the care and supervision of children.

~~(4)~~(5) The providers and all ~~persons responsible for children~~ caregivers in the group day care home shall possess good character, and be physically, mentally and emotionally competent to care for children and free from communicable disease. The provider and all caregivers shall comply with tuberculosis testing requirements set out in ARM 16.28.1005, and the immunization requirements of ARM 11.14.316.

~~(5)~~(6) Unless an exception is granted by the regional administrator, no ~~provider,~~ caregiver or other person present in the home while the children are in care shall:

(a) have been convicted or adjudicated of a crime involving harm to children or physical or sexual violence against any person. Any provider, caregiver or other person charged with a crime involving children or physical or sexual violence against any person and awaiting trial may not provide care or be present in the home pending the outcome of the trial. ~~; In excluding any individual adjudicated of a crime involving harm to children or physical or sexual violence against any person, the department shall give due regard for the non-criminal nature of such adjudications under 41-5-106, MCA;~~

(b) be currently diagnosed or receiving therapy or medication for a mental illness or emotional disturbance which might create a risk to children in care. Mental illness or emotional disturbance which might create a risk to children in care shall be determined by a licensed psychologist or psychiatrist. The department may ~~request a provider,~~ require that a caregiver or other person having contact with the children in the facility or residing in the facility ~~to~~ obtain a psychological or psychiatric evaluation at his or her own expense if there is reasonable cause to believe such a mental illness or emotional disturbance exists;

(c) be chemically dependent upon drugs or alcohol. Chemical dependence on drugs or alcohol shall be determined by a licensed physician or certified chemical dependency counselor. The department may ~~request the provider,~~ require that any caregiver or other person having contact with the children in

the facility or residing in the facility ~~to~~ obtain an evaluation at his or her own expense if there is reasonable cause to believe chemical dependence exists;

(d) remains the same in text except it is renumbered (6)(d).

~~(6)~~(7) The provider shall report immediately any child suspected of being abused or neglected to the county office of the department of ~~family~~ public health and human services.~~, or the child abuse hotline, 1-800-332-6100.~~

~~(7)~~(8) The provider shall cooperate with the department regarding all aspects of registration and shall allow department workers immediate access to their homes for on-site visits at all times the children are in care.

~~(8)~~(9) The provider shall submit a report to the appropriate district office of the department within 24 hours after the occurrence of an accident causing injury to a child which resulted in the child being hospitalized or required ambulance transport or intervention or any fire in the home when the services of the fire department were required. A copy of the report shall be provided to the parents of any child involved and a copy retained on file at the facility.

~~(9)~~(10) The provider shall keep personal information about the child and his family confidential.

~~(10)~~(11) The provider shall attend a basic day care orientation or its equivalent, provided or approved by the department, within the first ~~60~~ 90 days of certification. Additionally, the provider and all caregivers must verify that they have received a minimum of 8 hours of continuing education annually including, at a minimum, the following:

(a) four hours related to the emotional, cognitive, physical and social development of children and creative, developmentally appropriate activities for children;

(b) one hour discussing appropriate discipline of children;

(c) one hour of first aid;

(d) one and a half hours regarding nutrition, sanitation and universal precautions; and

(e) and a half hour of fire safety.

~~(11)~~(12) ~~It is strongly recommended that the~~The provider ~~have training~~ must be currently certified in cardio-pulmonary resuscitation including response to choking. If the caregiver is caring for children under the age of eight, it is also required that the provider have certification in infant-child CPR ~~or multi-media~~ and standard first aid ~~and be familiar with standard Red Cross first aid procedure~~.

AUTH: Sec. 52-4-503 and 52-2-704, MCA
IMP: Sec. 53-4-504, 52-2-702, 52-2-704, 52-2-731, 52-2-732 and 52-2-735, MCA

11.14.305 GROUP DAY CARE HOMES, BUILDING REQUIREMENTS

(1) The day care home must have a minimum of 35 square

feet ~~of usable space per child.~~per child of indoor space, excluding floor area devoted to fixed equipment or support functions such as kitchens, offices, bathrooms, etc., as well as 75 square feet per child of outdoor play space.

~~(2) All areas used for day care purposes must have at least one door for egress of not less than 34 inches wide and a minimum of one other means of egress of at least 24 inches high by 20 inches wide of full clear opening. All exits must be unobstructed at all times.~~

~~(3)~~(2) Basements, if in use, must be dry, well ventilated, warm and well lighted.

~~(4) All rooms used for napping by children must have at least one window which can be readily used for rescue and ventilation.~~

(5) through (9) remain the same in text but are renumbered (3) through (7).

~~(10)~~(8) ~~Maintenance: A maintenance program shall be provided to maintain the~~The home and grounds used by children must be maintained to ensure the following:

(a) that the building is in good repair;

(b) that the floors, walls, ceilings, furnishings, and other equipment are ~~easily cleanable~~ reasonably clean;

(c) that the building and grounds are reasonably free of ~~harborage for~~ insects, rodents and other vermin; and

(d) that the children attending the facility shall not be exposed to no paint containing lead in excess of .06% ~~shall be used~~.

AUTH: Sec. 52-4-503 and 52-2-704, MCA
IMP: Sec. 53-4-504 and 52-2-731, MCA

11.14.306 GROUP DAY CARE HOMES, FIRE SAFETY REQUIREMENTS

~~(1) If the sleeping room is on the second story, there must be a plan to rescue children if the stairway is blocked. A UL approved smoke detector, which is properly maintained and regularly tested, must be located on the second floor and basement, if they are being used for day care.~~

(1) In an emergency, all occupants of the day care facility must be able to escape from the home or building in a safe and timely manner. All occupied floor levels must have 2 exits. All bedrooms and sleeping rooms used by children attending the facility must also have 2 exits.

(a) The ground/main level must have 2 accessible exit doors easily opened from the inside with a single action. Deadbolt locks that can be opened from the inside only with a key are prohibited. The 2 exit doors must be far enough apart from one another to avoid having them both blocked by fire and smoke. Aisle ways and corridors leading to exit doors must be kept clear of obstructions.

(b) Basements used by children attending the facility must have at least 2 exits. One exit must lead directly to the outside of the building enabling children to exit without having

to ascend stairs inside the building. Basement exits must be far enough apart from one another to avoid having them both blocked by smoke or fire.

(c) Children younger than 8 years of age are not allowed on any floor above the ground/main floor level unless an approved automatic fire sprinkler system is installed throughout the entire building and 2 separate exits are provided from the upper floor. If the day care is located in a multi-use building other than a single family residence, those 2 exits must be for the exclusive use of the day care. Other occupants above the first floor must have their own exit systems. An approved exterior fire escape stairway would be acceptable as the second exit.

(d) Sleeping rooms and bedrooms used by children attending the facility must have a minimum of 2 exits.

(2) Exit doors, windows and their opening hardware must be maintained in good working order at all times.

~~(2)~~(3) ~~A portable fire extinguisher with a minimum rating of 2A10BC is required.~~ A fire extinguisher must be ~~readily accessible at all times~~ easily accessible on each floor level. Fire extinguishers must be permanently mounted on the wall or in labeled cabinets so that the top of the extinguisher is no higher than 5 feet from the floor. The minimum level of extinguisher classification is 2A10BC. It is recommended that fire extinguishers be located near outside exit doors. Extinguishers are required to be serviced annually.

~~(3) Mobile homes must meet all criteria plus:~~

~~(a) smoke detecting devices near all sleeping areas;~~

~~(b) exit doors which open by turning knob.~~

All day care facilities must have operating UL smoke detecting devices installed throughout the facility in accordance with the manufacturer's specifications. If individual battery operated smoke detectors are used, the following maintenance is required:

(a) smoke detectors must be tested at least once a month to ensure that they are operating correctly and have new operating batteries installed at least once each calendar year; and

(b) the placement and number of detectors in a home or building must be adequate to awaken all sleeping occupants.

(4) All wood burning stoves must ~~be properly installed and inspected by the local fire marshal.~~ meet building codes for the installation and use of such stoves. If used during the hours of care, the stove must be provided with a protective enclosure.

(5) No portable electric or unvented fuel-fired heating devices are allowed. All radiators, if too hot to touch, must be provided with protective enclosure.

(6) A minimum of 8 fire drills must be conducted annually, at least one month apart as weather permits. Records, including who conducted the drill, how many children and adults participated in the drill, when the drill took place, and how

long it took to evacuate everyone must be available for review.

AUTH: Sec. 52-4-503 and 52-2-704, MCA
IMP: Sec. 53-4-504 and 52-2-731, MCA

11.14.307 GROUP DAY CARE HOMES, SAFETY REQUIREMENTS

(1) remains the same.

(2) All medications must be kept in their original containers, labeled with the original prescription label in a place inaccessible to children~~, in their original containers, labeled with the original prescription label~~.

(3) No extension cord will be used as permanent wiring, ~~and a~~ All appliances, ~~and~~ lamp cords and exposed light sockets must be suitably protected to prevent ~~pulling or chewing by children~~ electrocution.

(4) Any pet or animal, present at the home, indoors or outdoors ~~with the provider's permission~~, must be in good health, show no evidence of carrying disease, and be a friendly companion of the children. The provider is responsible for maintaining the animal's vaccinations and vaccination records. These records must be made available to the department upon request. The provider must make reasonable efforts to keep stray animals off the premises.

(5) Guns and ammunition must be kept in locked storage ~~or out of the reach of children and with guns stored separate from ammunition~~.

(6) The home and outdoor play areas must be clean, reasonably neat, and free from accumulation of dirt, rubbish, or other health hazards.

(7) Any outdoor play area used regularly must be adjacent to the day care home with 75 square feet of play space per child. It must be maintained free from hazards such as wells, ~~and~~ machinery and animal waste. If any part of the play area is adjacent to a ~~highway~~ busy roadway, drainage or irrigation ditch, stream, large holes, or other hazardous areas, the play area must be enclosed with a fence ~~fencing~~ in good repair without any holes or spaces greater than 4 inches in diameter or natural barriers to restrict children from these areas.

(8) remains the same.

(9) Toys and objects with a diameter of less than 1 inch (2.5 centimeters), objects with removable parts that have a diameter of less than 1 inch (2.5 centimeters), plastic bags, ~~and~~ styrofoam objects, and balloons must not be accessible to children who are still placing objects in their mouths.

(10) Outdoor equipment, such as climbing apparatus, slides, and swings, must be anchored firmly, and placed in a safe location according to manufacturer's instructions. Recommended ground covers under these items include sand, fine gravel or woodchips with a depth of the ground cover being at least 6 inches.

(11) Trampolines are prohibited.

AUTH: Sec. 52-4-503 and 52-2-704, MCA
IMP: Sec. 53-4-504 and 52-2-731, MCA

11.14.310 GROUP DAY CARE HOMES, OTHER FACILITY REQUIREMENTS (1) Each home must have hot and cold running water with at least one toilet provided with toilet paper and ~~one~~ 1 sink provided with soap and paper towels.

(2) Each facility must have a telephone. Those facilities which have an unlisted number must make this number available to the parent(s), ~~and~~ emergency contact persons of the children in care, and the appropriate regional or ~~district~~ local offices of the department.

(3) and (4) remain the same.

AUTH: Sec. 52-4-503 and 52-2-704, MCA
IMP: Sec. 53-4-504 and 52-2-731, MCA

11.14.311 GROUP DAY CARE HOMES, EQUIPMENT (1) - (1)(b) remain the same.

(2) Physical equipment.

(a) High chairs, when used, must have a wide base and a safety strap. Portable high chairs that hook onto tables are not recommended.

(b) Each child~~, except school-age children who do not take naps,~~ shall have clean, and age-appropriate rest equipment~~, such as a crib, cot, bed or mat~~. Seasonably appropriate top and bottom covering, such as sheets or blankets, must be provided. Crib mattresses and other rest equipment shall be waterproof and regularly sanitized.

AUTH: Sec. 52-4-503 and 52-2-704, MCA
IMP: Sec. 53-4-504 and 52-2-731, MCA

11.14.312 GROUP DAY CARE HOMES, PROGRAM REQUIREMENTS

(1) remains the same.

(2) ~~The provider shall provide:~~

~~(a)~~ ~~daily~~There must be developmentally appropriate activities for the children which foster sound social, intellectual, emotional and physical growth, including~~:~~

~~(b)~~(a) opportunities for individual and small group activities;

~~(c)~~(b) time and opportunity for creative experiences for children through art, music, books and stories, and dramatic play; and

~~(d)~~(c) outdoor play each day except when precluded by severity of weather.

(3) ~~Supervision of children.~~

~~(a)~~ The provider or other caregiver who is at least 18 years of age shall be on the premises at all times children are in care.

~~(b)~~(4) Providers shall use appropriate forms of discipline~~, but must not use spanking or other forms of corporal~~

~~punishment or any other disciplinary technique which is humiliating, shaming, frightening or otherwise damaging to the children.~~

(a) Physical punishment including spanking or shaking and other forms of corporal punishment are strictly prohibited in day care facilities.

(b) Any punishment or discipline which is humiliating, frightening, or otherwise damaging, is prohibited.

(c) Parental or guardian permission does not allow the use of punishments or disciplines prohibited in (4)(a) and (b) above.

~~(c)~~(5) Television or movie watching during the hours children are in care shall not be excessive and be limited to child-appropriate programs.

AUTH: Sec. 52-4-503 and 52-2-704, MCA
IMP: Sec. 53-4-504 and 52-2-731, MCA

11.14.316 GROUP DAY CARE HOMES, HEALTH CARE REQUIREMENTS

(1) through (3) remain the same.

(4) If, while in care, a child becomes ill or is suspected of having a communicable disease reportable to the health department ~~while in care~~, the parent shall be notified by the provider. The parent is responsible for arranging to have the child taken home.

(5) remains the same.

(6) When a child is absent, the day care provider shall obtain the reasons so the interest of the other children may be properly protected. If a reportable communicable disease is suspected, the provider shall inform a health officer. No child shall be re-admitted after an absence until the reason for the absence is known and there is assurance that his return will not harm him or the other children. Disease charts that identify the reportable diseases are available from the department ~~of health and environmental sciences~~.

(7) and (8) remain the same.

(9) A first aid kit must be kept on site at all times and contain at least the following:

(a) syrup of ipecac (one ounce bottle);

(b) sterile, absorbent bandages;

(c) a synthetic ice or gel pack;

(d) tape and a variety of band-aids;

(e) tweezers and scissors;

(f) the poison control number (1-800-525-5042); and

(g) latex disposable single use gloves.

~~(9) Standard Red Cross first aid supplies shall be kept in the home.~~

(10) A portable first aid kit containing at least the items listed in (9) above must accompany staff and children on trips away from the facility.

(10) remains the same but is renumbered (11).

~~(11)~~(12) All new children of an appropriate age shall be

~~accompanied~~ taught to ~~the toilet, taught to~~ use ~~it~~ and flush ~~it~~ the toilet, and to wash hands after using the toilet, and before and after eating.

~~(12) Water supply.~~

~~(a)~~(13) When a municipal water supply system is not available, a private system may be developed and used as approved by the state or local health department. Testing must be conducted at least annually by a certified lab to ensure that the water supply remains safe.

~~(b)~~ Sanitary drinking facilities shall be provided by means of disposable single-use cups, fountains of approved design, or separate, labeled or colored glasses for each child.

~~(13)~~(14) ~~Sewage disposal:~~An adequate and safe sewerage system shall be provided.

~~(14) Garbage storage and disposal.~~

~~(a)~~(15) Garbage cans shall be provided in sufficient number and capacity to store all refuse between collections and shall be corrosion resistant, fly tight, watertight, and rodent proof with lids.

~~(b)~~ Kitchen garbage containers must have lids or be stored in an enclosed area.

~~(15)~~(16) Food services.

(a) All food shall be from an approved source and shall be transported, stored, covered, prepared and served in a sanitary manner to prevent contamination.

(b) Milk and other dairy products shall be pasteurized.

(c) Use of home canned foods other than jams, jellies and fruits is prohibited.

(d) Perishable foods shall be kept at temperatures above 140° F or below 45° F.

(e) No persons with boils, infected wounds, respiratory diseases or other communicable diseases shall handle food or food utensils.

(f) Hands shall be washed with warm, running water and soap and dried with paper towels or hand drier before handling ~~of~~ food.

(g) All food utensils shall be properly washed and rinsed after each usage. A domestic style dishwasher may be used if equipped with a heating element.

(h) Single service utensils may only be used once.

~~(16) Laundry.~~

~~(a)~~(17) Folding of clean laundry must not take place on the same work surface used for sorting dirty laundry.

~~(b)~~ Bedding shall be laundered when wet or soiled and must be sanitized weekly ~~necessary and aired out periodically to prevent mildew~~.

AUTH: Sec. 52-4-503 and 52-2-704, MCA
IMP: Sec. 53-4-504 and 52-2-731, MCA

11.14.318 GROUP DAY CARE HOMES, SWIMMING (1) Children may not be allowed to use a swimming pool, as defined in ARM

16.10.1201, unless it and the surrounding area are constructed and operated in accordance with ~~department of health and environmental sciences~~ ARM 16.10.1207.

(2) ~~Inflatable~~ Portable wading pools, if used, must be drained, cleaned, sanitized and refilled with fresh water at least daily.

(3) All in ground and above ground swimming pools located in the outdoor play space area or accessible to children must be fenced with a locked gate. When children are swimming, supervision must include at all times at least ~~1~~ one person certified in Red Cross advanced life saving or an equivalent certificate by a recognized ~~agency~~ organization.

AUTH: Sec. 52-4-503 and 52-2-704, MCA
IMP: Sec. 53-4-504, 52-2-731 and 52-2-735, MCA

11.14.319 GROUP DAY CARE HOMES, NUTRITION (1) Nutritious meals and snacks must be provided to children in such quality and quantity to meet the national research council or the USDA child and adult care food program recommended dietary allowances for children of each age. Minimum nutritional requirements, age appropriate, will be supplied to the provider by the state or county health department.

(2) through (7) remain the same.

(8) Fresh ~~D~~drinking water shall be available to children and offered at frequent intervals.

(9) Proper methods of handling, preparing, and serving food in a safe and sanitary manner shall be clearly understood and followed by the provider.

AUTH: Sec. 52-4-503 and 52-2-704, MCA
IMP: Sec. 53-4-504 and 52-2-731, MCA

11.14.320 GROUP DAY CARE HOMES, TRANSPORTATION

(1) through (6) remain the same.

(7) The requirements of ARM 11.14.511 must also be met when transporting children.

AUTH: Sec. 52-4-503 and 52-2-704, MCA
IMP: Sec. 52-4-504 and 52-2-731, MCA

11.14.324 GROUP DAY CARE HOMES, ~~SPECIAL PROGRAM REQUIREMENTS~~ NIGHT CARE AND OVERLAP CARE ~~(1) Night care. The following requirements apply only to group day care homes providing night care and are in addition to all other requirements contained in these rules.~~

~~(a) A nutritious meal shall be served to children and a bedtime snack shall be offered.~~

~~(b) Bedtime schedules must be established for children in consultation with the child's parent(s).~~

~~(c) Evening quiet time activity such as story-time, games, art and craft activities, and reading must be provided to each~~

~~child.~~

~~(d) Each child shall have individual, clean, comfortable sleeping garments.~~

~~(e) There must be at least 1 bathtub or shower. Bathtubs and showers must be equipped to prevent slipping.~~

~~(f) Children under 6 years of age will be supervised while in the bathtub or shower.~~

(1) A group day care home offering night care must develop plans for program, staff, equipment and space that will appropriately provide for the personal safety, and emotional and physical care of children who are away from their families at night. This requirement shall be deemed to have been met if:

(a) special attention is given by the caregiver and the parents to provide for a transition into this type of care appropriate to the child's emotional needs;

(b) a selection of toys, books and materials for quiet activities which can be used with minimal adult supervision is provided for children prior to bedtime;

(c) bathing facilities, comfortable beds or cots, and complete bedding, are provided;

(d) staff are available to assist children during eating and pre-bedtime hours and during the morning period when dressing;

(e) during sleeping hours, staff are awake and in the immediate vicinity and on the same floor level of sleeping children in order to provide for the needs of children and respond to any emergency;

(f) at appropriate times a nutritious dinner and/or breakfast is served to children and a bedtime snack is offered.

(2) ~~Overlap care.~~

~~(a)~~ Overlap care may be approved by the department in ~~There may be~~ situations, such as before and after school, when the number of children in care over ~~two (2) years of age~~ 4 years of age would exceed, for a short period of time, the ~~licensed or~~ registered capacity.

(a) Overlap of children under ~~two (2)~~ 4 years of age shall not be permitted.

(b) Overlap care shall not exceed ~~three (3)~~ hours total in any child-care day.

(c) ~~Group day care homes that are registered to care for nine (9) or fewer children may care for up to three (3) additional children during the approved overlap time. Group day care homes that are registered to care for ten (10) 10 or more children may care for up to four (4) additional children during the approved overlap time.~~ Group day care facilities may be approved to provide overlap care for up to 4 additional children during the approved overlap time if there are at least 2 caregivers providing direct care at any time there are more than 6 children being cared for at the facility.

(d) Day care facilities providing 2 shifts of 12-hour care may be granted ~~three (3)~~ hours of overlap care for each 12

~~twelve~~ hours of continuous care upon the written approval of the family resource specialist or other department licensing representative.

(e) There must be 35 square feet per child of indoor space including the additional children during approved overlap hours.

(2)(b) and (c) remain the same but are renumbered (2)(f) and (g).

(h) group day care homes which exceed 12 children during approved overlap are subject to inspection and required certification by the state fire prevention and investigation bureau and the state sanitarian.

AUTH: Sec. 52-4-503 and 52-2-704, MCA
IMP: Sec. 53-4-504 and 52-2-731, MCA

11.14.327 GROUP DAY CARE HOMES, PARENT INVOLVEMENT

~~(1) The parent shall be informed about the activities, hours of care, fees, policies, responsibilities for meals, clothing, health policies and supervision, transportation and pick up arrangements.~~

~~(2) Expectations of the parent.~~

~~(a) The parent shall be given the day care contract by the provider which shall be completed and returned to the provider prior to caring for the child.~~

~~(b) The parent shall be given a copy of the day care regulations by the provider.~~

~~(3) The provider shall provide opportunities for the parent(s) to participate in activity planning and individual meetings.~~

(1) The following written information shall be made available to all parents:

(a) a typical daily schedule of activities;

(b) admission requirements, enrollment procedures and hours of operation;

(c) frequency and type of meals and snacks served;

(d) fees and payment plan;

(e) regulations concerning sick children;

(f) transportation and trip arrangements;

(g) discipline policies; and

(h) department day care licensing requirements.

(2) Group day care homes shall post a copy of the facility registration and the phone number of state and local department offices in a conspicuous place. Parents should be encouraged to contact the department if they have questions regarding the license or the day care regulations.

(3) Parents or guardians must have unlimited, immediate access to the day care facility during day care hours.

(4) The provider shall provide opportunities for the parents to participate in activity planning and individual meetings.

AUTH: Sec. 52-4-503 and 52-2-704, MCA
IMP: Sec. 53-4-504 and 52-2-731, MCA

11.14.340 GROUP DAY CARE HOMES, STAFFING AND ADDITIONAL REQUIREMENTS ~~(1) There shall be at least two caregivers caring for the children at all times when there are more than six children present at the home.~~

~~(2) There shall be no more than six infants in a group day care home at any time, unless care is provided for infants only.~~

(1) The minimum staff to child ratio for group day care is:

(a) 1:4 for children birth to 30 months; and

(b) 1:6 for children 30 months and older.

(2) There shall be sufficient staff so that an adult is always present and supervising all children.

(3) ~~The~~ Except for approved overlap care, the provider may not provide care for a child if caring for that child would cause the provider to exceed the number of children the provider is registered to care for on the registration certificate.

(4) through (6) remain the same.

AUTH: Sec. 52-4-503 and 52-2-704, MCA
IMP: Sec. 53-4-504 and 52-2-731, MCA

11.14.401 FAMILY DAY CARE HOMES, PROVIDER RESPONSIBILITIES AND QUALIFICATIONS (1) The provider and all persons responsible for children in the day care home must be at least 18 years of age and must be in good mental and physical health. A caregiver under the age of 18 may assist in the day care if there are, at the same time, other adult caregivers present in the facility in numbers sufficient to comply with [Rule I].

(a) The provider, and all staff, including caregivers, aides, volunteers, kitchen and custodial staff, and persons residing in the day care facility must obtain a copy of a completed criminal background check and a completed child protective services check before providing services in the day care facility. The provider is responsible for ensuring that a copy of these required, dated reports are on file at the facility.

(2) The provider shall be responsible for the direct care, protection, supervision, and guidance of the children through active involvement or observation within a family day care home.

(3) and (4) remain the same.

(5) Unless an exception is granted by the regional administrator, no provider, caregiver or other person present in the home while the children are in care shall:

(a) have been convicted or adjudicated of a crime involving children or physical or sexual violence against any person. Any provider, caregiver or other person charged with a crime involving children or physical or sexual violence against any person and awaiting trial may not provide care or be present in the home pending the outcome of the trial~~.; In excluding from the home any individual adjudicated of a crime involving harm to children or physical or sexual violence against any person, the department shall give due regard for the non-criminal nature of~~

~~such adjudications under 41-5-106, MCA;~~

(b) be currently diagnosed or receiving therapy or medication for a mental illness or emotional disturbance which might create a risk to children in care. Mental illness or emotional disturbance which might create a risk to children in care shall be determined by a licensed psychologist or psychiatrist. ~~The~~ Prior to registration, the department may ~~request~~ require that a provider, caregiver or other person providing care or residing in the facility ~~to~~ obtain a psychological or psychiatric evaluation at his or her own expense if there is reasonable cause to believe such a mental illness or emotional disturbance exists;

(c) be chemically dependent upon drugs or alcohol. Chemical dependency on drugs or alcohol shall be determined by a licensed physician or certified chemical dependency counselor. ~~The~~ Prior to registration, the department may ~~request~~ require that the provider, caregiver or other person ~~to~~ obtain an evaluation at his or her own expense if there is reasonable cause to believe chemical dependency exists; or

(5)(d) remains the same.

(6) The provider shall report immediately any child suspected of being abused or neglected to their ~~county welfare department or the child abuse hot line, 1-800-332-6100.~~local child protection services office.

(7) The provider shall cooperate with the department regarding all aspects of registration and shall allow department workers immediate access to their homes for on-site visits while children are in care.

(8) The provider shall submit a report to the appropriate ~~district~~ local office of the department within 24 hours after the occurrence of an accident causing injury to a child which resulted in the child being hospitalized or required ambulance transport or intervention or any fire in the home when the services of the fire department were required. A copy of the report shall be given to the parents of any involved child and a copy shall be retained on site at the facility. The report shall be available to licensing staff upon request.

(9) remains the same.

(10) The provider shall attend a basic day care orientation or its equivalent, provided or approved by the department, within the first ~~60~~ 90 days of certification. The provider and all caregivers must document that they have received a minimum of eight hours of continuing education on an annual basis, including at least the following:

(a) four hours related to emotional, cognitive, physical and social development of children and creative activities for children;

(b) one hour discussing appropriate discipline children;

(c) one hour of first aid;

(d) one and a half hours related to nutrition, sanitation and universal precautions; and

(e) one half of an hour of fire safety.

(11) ~~It is strongly recommended that the~~ The provider ~~have~~ must be currently certified ~~training~~ in cardio-pulmonary resuscitation including response to choking. For caregivers caring for infants, infant-child CPR is required. ~~or multi-media~~ Providers must also be certified in standard first aid and be familiar with standard Red Cross first aid procedure.

(12) remains the same.

AUTH: Sec. 52-4-503 and 52-2-704, MCA
IMP: Sec. 53-4-504, 52-2-702, 52-2-704 and 52-2-731, MCA

11.14.403 FAMILY DAY CARE HOMES, BUILDING REQUIREMENTS

(1) ~~All areas used for day care purposes must have at least one door for egress of not less than 34 inches wide and a minimum of one other means of egress at least 24 inches high by 20 inches wide for full clear opening. All exits must be unobstructed at all times.~~ The day care home must have a minimum of 35 square feet per child of indoor space, excluding floor area devoted to fixed equipment or support functions such as kitchens, offices and bathrooms. There must be 75 square feet per child of outdoor space.

(2) Basements, if in use, must be dry, well ventilated, warm and well lighted.

~~(3) All rooms used for napping by children must have at least one window which can be readily used for rescue and ventilation.~~

~~(4)~~(3) Third stories in dwellings must not be used for day care purposes and must be barricaded or locked to prevent entry by children.

~~(5)~~(4) Doorways and stairs must be clear of any obstruction.

~~(6)~~(5) Every closet door must be such that children can open the door from the inside.

~~(7)~~(6) Every bathroom door must be designed to permit the opening of the locked door from the outside in an emergency and the opening device must be readily accessible to the provider.

~~(8)~~(7) Protective receptacle covers must be installed on electrical outlets in all areas occupied by children under five years of age.

~~(9)~~(8) ~~Maintenance: A maintenance program shall be provided to maintain the~~ The home and grounds used by children shall be maintained to ensure ~~the following~~ that:

(a) the building is in good repair;

(b) the floors, walls, ceilings, furnishings, and other equipment are ~~easily cleanable;~~ reasonably clean;

(c) the building and grounds are reasonably free of ~~harborage for~~ insects, rodents and other vermin;

(d) children in the facility shall not come into contact with no paint containing lead in excess of .06% ~~shall be used~~.

AUTH: Sec. 52-4-503 and 52-2-704, MCA
IMP: Sec. 53-4-504 and 52-2-731, MCA

11.14.404 FAMILY DAY CARE HOMES, FIRE SAFETY REQUIREMENTS (1) ~~If the sleeping room is on the second story, there must be a plan to rescue children if the stairway is blocked. A UL approved smoke detector, which is properly maintained and regularly tested, must be located on the second floor and basement, if they are being used for day care.~~ In an emergency, all occupants of the day care facility must be able to escape from the home or building in a safe and timely manner. All occupied floor levels must have 2 exits. All bedrooms and sleeping rooms used for children attending the facility must also have 2 exits.

(a) The ground/main level must have 2 accessible exit doors easily opened from the inside with a single action. Deadbolt locks that can only be opened from the inside with a key are prohibited. The 2 exit doors must be far enough apart from one another to avoid having them both blocked by fire and smoke. Aisle ways and corridors leading to exit doors must be kept clear of obstructions.

(b) Basements used by children attending the facility must have at least 2 exits. One exit must lead directly to the outside of the building enabling children to exit without having to ascend stairs inside the building. Basement exits must be far enough apart from one another to avoid having them both blocked by smoke or fire.

(c) Children below the third grade level are not allowed on any floor above the ground/main floor level unless an approved automatic fire sprinkler system is installed throughout the entire building and 2 separate exits are provided from the upper floor. If the day care is located in a multi-use building other than a single family residence, those 2 exits must be for the exclusive use of the day care. Other occupants above the first floor must have their own exit systems. An approved exterior fire escape stairway would be acceptable as the second exit.

(d) Sleeping rooms and bedrooms used by children attending the facility must have a minimum of 2 exits.

(2) Exit doors, windows and their opening hardware must be maintained in good working order at all times.

~~(2)~~(3) ~~A portable fire extinguisher with a minimum rating of 2A10BC is required.~~ A fire extinguisher ~~must be readily accessible at all times.~~ must be easily accessible on each floor level. Fire extinguishers must be permanently mounted on the wall or in labeled cabinets so that the top of the extinguisher is no higher than 5 feet from the floor. The minimum level of extinguisher classification is 2A10BC. It is recommended that fire extinguishers be located near outside exit doors. Extinguishers are required to be serviced annually.

~~(3) Mobile homes must meet all criteria plus:~~

~~(a) smoke detecting devices near all sleeping areas;~~

~~(b) exit doors which open by turning knob.~~

(a) all day care facilities must have operating UL smoke detecting devices installed throughout the facility in

accordance with the manufacturer's specifications. If individual battery operated smoke detectors are to be used, the following maintenance is required:

(b) smoke detectors must be tested at least once a month to ensure that they are operating correctly and have new operating batteries installed at least once each calendar year.

(c) the placement and number of detectors in a home or building must be adequate to awaken all sleeping occupants.

(4) All wood burning stoves must ~~be properly installed and inspected by the local fire marshal.~~ meet building codes for the installation and use of such stoves. If used during the hours of care, the stove must be provided with a protective enclosure.

(5) No portable electric or unvented fuel-fired heating devices are allowed. All radiators, if too hot to touch, must be provided with protective enclosure.

~~(6) No stoves or combustion heaters will be located as to block escape in case of malfunctioning of the stove or heater.~~

~~(7)~~(6) A minimum of 8 fire drills must be conducted annually, conducted at least 1 month apart as weather permits. Records, including who conducted the drill, how many children and adults participated in the drill, when the drill took place, and how long it took to evacuate everyone must be available for review.

AUTH: Sec. 52-4-503 and 52-2-704, MCA
IMP: Sec. 53-4-504 and 52-2-731, MCA

11.14.405 FAMILY DAY CARE HOMES, SAFETY REQUIREMENTS

(1) remains the same.

(2) All medications must be kept in their original containers, labeled with the original prescription label in a place inaccessible to children~~, in their original containers, labeled with the original prescription label~~.

(3) No extension cord will be used as permanent wiring~~, and a~~All appliances~~, and~~ lamp cords and exposed light sockets must be suitably protected to prevent ~~pulling or chewing by children~~ electrocution.

(4) Any pet or animal, present at the home, indoors or outdoors ~~with the provider's permission~~, must be in good health, show no evidence of carrying disease, and be a friendly companion of the children. The provider must make reasonable efforts to keep stray animals off the premises. The provider is responsible for maintaining the animal's vaccinations and vaccination records. These records must be available to the department upon request.

(5) Guns and ammunition must be kept in locked storage~~, or out of the reach of children and with guns stored separate from ammunition.~~

(6) The home and outdoor play areas must be clean and free from accumulation of dirt, rubbish, or other health hazards.

(7) Any outdoor play area must be maintained free from

hazards such as wells, ~~and~~ machinery and animal waste. If any part of the play area is adjacent to a ~~highway~~ busy roadway, drainage or irrigation ditch, stream, large holes, or other hazardous areas, the play area must be enclosed with a fence ~~fencing~~ that is in good repair without any holes or spaces greater that 4 inches in diameter or natural barriers to restrict children from these areas.

(8) Toys and objects with a diameter of less than 1 inch (2.5 centimeters), objects with removable parts that have a diameter of less than 1 inch (2.5 centimeters), plastic bags, ~~and~~ styrofoam objects and balloons must not be accessible to children who are still placing objects in their mouths.

(9) Outdoor equipment, such as climbing apparatus, slides, and swings, must be anchored firmly, and placed in a safe location according to manufacturer's instructions. Appropriate ground cover under these items include sand, small gravel or woodchips with a depth of the ground cover being at least 6 inches.

AUTH: Sec. 52-4-503 and 52-2-704, MCA
IMP: Sec. 53-4-504 and 52-2-731, MCA

11.14.407 FAMILY DAY CARE HOMES, TELEPHONE AND OTHER FACILITY REQUIREMENTS (1) Each home must have hot and cold running water with at least one toilet provided with toilet paper and one sink provided with soap and paper towels.

(2) and (3) remain the same.

AUTH: Sec. 52-4-503 and 52-2-704, MCA
IMP: Sec. 53-4-504 and 52-2-731, MCA

11.14.412 FAMILY DAY CARE HOMES, PROGRAM REQUIREMENTS ~~(1) The provider or other person at least 18 years of age shall be on the premises at all times children are in care.~~

~~(2) Providers shall use appropriate forms of discipline and must not use spanking or other forms of corporal punishment or any other disciplinary technique which is humiliating, shaming, frightening or otherwise damaging to the children.~~(1) A written plan of daily activities and routines, in addition to free play, must be developed and available for review. The plan must be flexible to accommodate the ages and needs of individual children and the group as a whole. It must be designed with intervals of stimulation and relaxation, and a balance between periods of active play and quiet play or rest.

(2) There shall be daily developmentally appropriate activities for the children which foster sound social, intellectual, emotional and physical growth, including:

(a) opportunities for individual and small group activities;

(b) time and opportunity for creative experiences for children through art, music, books and stories, and dramatic play; and

(c) outdoor play each day except when precluded by severity of weather.

(3) The provider or other caregiver at least 18 years of age shall be on the premises at all times children are in care.

(4) Providers shall use appropriate forms of discipline.

(a) Physical punishment including spanking or shaking and other forms of corporal punishment are strictly prohibited in day care facilities.

(b) Any punishment or discipline which is humiliating, frightening, or otherwise damaging, is prohibited.

(c) Parental or guardian permission does not allow the use of punishments or disciplines prohibited in (4)(a) and (b) above.

~~(3) The provider shall keep a list of the name, address and phone number of each child in care and his or her parents. The list shall be made available to the department upon request.~~

~~(4) The provider may not provide care for a child if caring for that child would cause the provider to exceed the number of children the provider is registered to care for on the registration certificate.~~

(5) Television or movie watching during the hours children are in care shall not be excessive and shall be limited to child-appropriate programs.

AUTH: Sec. 52-4-503 and 52-2-704, MCA
IMP: Sec. 53-4-504 and 52-2-731, MCA

11.14.414 FAMILY DAY CARE HOMES, HEALTH CARE REQUIREMENTS (1) through (4) remain the same.

(5) ~~Any~~ No adult at the home shall ~~not~~ be in contact with the children in care if the adult has any reportable communicable disease or contagious illness.

(6) ~~Standard Red Cross first aid supplies shall be kept in the home.~~ Each provider shall develop policies for first aid. These policies must include directions for calling parents or someone else designated as responsible for the child when a child is sick or injured.

(7) A first aid kit must be kept on site at all times. The kit must include at least the following:

(a) syrup of ipecac (one ounce bottle);

(b) sterile, absorbent bandages;

(c) a synthetic ice or gel pack;

(d) tape and a variety of Band-Aids;

(e) tweezers and scissors;

(f) the poison control number (1-800-525-5042); and

(g) latex disposable single use gloves.

(8) A portable first aid kit containing at least the items listed in (7) must accompany staff and children on trips away from the facility.

(9) A notation of all injuries must be made on the child's medical record including the date, time of day, nature of the injury, treatment, and whether the parent was notified.

(10) All children of an appropriate age and developmental level shall be taught to use and flush the toilet, and to wash hands after using the toilet, and before and after eating.

(11) When a municipal water supply system is not available, a private system may be used as approved by the state or local health department. Testing must be conducted at least annually by a certified lab to ensure that the water supply remains safe. Sanitary drinking facilities shall be provided by means of disposable single-use cups, fountains of approved design, or separate, labeled or colored glasses for each child.

~~(7)~~(12) ~~Sewage disposal:~~ An adequate and safe ~~sewerage~~ sewage system shall be provided.

~~(8) Garbage storage and disposal.~~

~~(a)~~(13) Garbage cans shall be provided in sufficient number and capacity to store all refuse between collections and shall be corrosion resistant, fly tight, watertight, and rodent proof with lids.

~~(b)~~ Kitchen garbage containers must have lids or be stored in an enclosed area.

~~(9)~~(14) Food services.

(a) All food shall be transported, stored, covered, prepared and served in a sanitary manner to prevent contamination.

(b) Milk and other dairy products shall be pasteurized.

(c) Use of home canned foods, other than jams, jellies, and fruits is prohibited.

(d) Perishable foods shall be kept at temperatures above 140° F or below 45° F.

(e) No persons with boils, infected wounds, respiratory diseases or other communicable diseases shall handle food or food utensils.

(f) Hands shall be washed with warm running water and soap and dried with paper towels or a hand drier before handling ~~of~~ food.

(g) All food utensils shall be properly washed and rinsed after each usage. A domestic style dishwasher may be used if equipped with a heating element.

(h) Single service utensils may only be used once.

(15) Folding of clean laundry must not take place on the same work surface used for sorting dirty laundry. Bedding shall be laundered when wet or soiled and must be sanitized weekly.

AUTH: Sec. 52-4-503 and 52-2-704, MCA
IMP: Sec. 53-4-504 and 52-2-731, MCA

11.14.418 FAMILY DAY CARE HOMES, OVERLAP CARE

(1) Overlap care may be approved by the department in ~~there may be~~ situations, such as before and after school, when the number of children in care over ~~two (2)~~ 4 years of age would exceed, for a short period of time, the registered capacity.

(a) Overlap of children under ~~two (2)~~ 4 years of age shall not be permitted.

(b) Overlap care shall not exceed ~~three (3)~~ hours total in any child-care day.

(c) Family day care homes may care for ~~two (2)~~ additional children during the approved overlap time.

~~(d) Day care facilities providing two shifts of 12-hour care may be granted three (3) hours of overlap for each twelve continuous hours of care upon the written approval of the family resource specialist or other department licensing representative.~~

(2) and (3) remain the same.

(4) There must be 35 square feet of indoor space per child pursuant to ARM 11.14.403, including any additional children during approved overlap hours.

AUTH: Sec. 52-4-503 and 52-2-704, MCA
IMP: Sec. 53-4-504 and 52-2-731, MCA

11.14.501 ~~FAMILY AND GROUP DAY CARE HOMES CARING FOR INFANTS AND TODDLERS.~~ DOCUMENTATION OF ~~THE~~ ABSENCE OF UNUSUAL HEALTH RISKS (1) ~~A~~ Prior to residence or enrollment in a day care facility of a child with special health needs requiring special considerations or restrictions, the parent or guardian must obtain a written statement by a physician or county health nurse concerning any such special needs ~~of each infant~~ and documenting that the ~~infant's~~ child's presence in a day care facility poses no unusual health risk to the ~~infant~~ child or to other children in the facility. ~~must be obtained and~~ This documentation must be kept on file by the provider ~~prior to residence or enrollment of the infant in the day care facility~~.

AUTH: Sec. 52-4-503 and 52-2-704, MCA
IMP: Sec. 53-4-504 and 52-2-731, MCA

11.14.502 ~~DAY CARE FACILITIES CARING FOR INFANT~~ DIAPERING AND TOILET TRAINING (1) A sufficient supply of clean, dry diapers shall be available and diapers shall be changed as frequently as needed. Disposable diapers, a commercial diaper service, or reusable diapers supplied by the ~~infant's~~ child's family may be used. If non-disposable diapers are used, the facility may launder the diapers using a germicidal process approved by the state or local health department. In the absence of such a process, the facility may not launder non-disposable diapers of enrolled children.

(2) and (3) remain the same.

(4) Soft, absorbent, disposable towels or clean reusable towels which have been laundered between each use shall be used for cleaning the ~~infant~~ child.

(5) Safety pins shall be kept out of reach of infants and toddlers. ~~Infants~~ Children shall not be left unattended on a surface from which they might fall.

(6) All toilet articles shall be identified and separated as to each ~~infant~~ child using diapers and kept in a sanitary

condition.

(7) remains the same.

(8) Toilet training shall be initiated when ~~readiness is indicated for~~ the child is ready and in consultation with the child's parent(s) or placement agency. There shall be no routine attempt to toilet train ~~infants~~ children under the age of 18 months.

AUTH: Sec. 52-4-503 and 52-2-704, MCA
IMP: Sec. 53-4-504 and 52-2-731, MCA

11.14.503 ~~DAY CARE FACILITIES CARING FOR INFANTS,~~ CHILDREN'S WET OR SOILED CLOTHING (1) remains the same.

(2) If an older, toilet trained child has an accident causing wet or soiled clothing, the child shall be changed promptly.

AUTH: Sec. 52-4-503 and 52-2-704, MCA
IMP: Sec. 53-4-504 and 52-2-731, MCA

11.14.506 DAY CARE FACILITIES CARING FOR INFANTS, FEEDING (1) remains the same.

(2) A day's supply of formula or breast milk in nursing bottles or formula requiring no more preparation than dilution with water shall be provided by the parent(s) ~~.~~, unless an alternative agreement is reached between the parents and provider ensuring that the infant's nutritional needs are sufficiently met. Bottles of formula or breast milk shall be clearly labeled with each infant's name and date and immediately refrigerated. After use bottles shall be thoroughly rinsed before returning to the parent at the end of the day. Special dietary foods required by ~~the~~ an infant or toddler shall be prepared by the parent(s).

(3) Bottles shall not be propped. Infants too young to sit in high chairs shall be held in a semi-sitting position for all bottle feedings. Children who use a bottle should not be allowed to lie on their backs when drinking from the bottle. Older infants and toddlers shall be fed in safe high chairs or at baby feeding tables. Infants ~~six~~ 6 months of age or over who show a preference for holding their own bottles may do so provided an adult remains in the room and within observation of the infant. Bottles shall be taken from ~~the infant~~ a child when ~~he/she~~ the child finishes feeding, when the bottle is empty and while the ~~infant~~ child is sleeping.

(4) through (6) remain the same.

AUTH: Sec. 52-4-503 and 52-2-704, MCA
IMP: Sec. 53-4-504 and 52-2-731, MCA

11.14.507 ~~DAY CARE FACILITIES CARING FOR INFANTS,~~ BATHING (1) Bathing children shall not be done routinely by the facility, but if required:

(a) No child shall be left unattended in the bathing area~~.~~;

(b) Bathing materials shall be sanitized after bathing ~~the infant.~~a child;

(c) Nonallergic soap shall be used~~.~~;

(d) Arrangements shall be made so ~~a~~ no child can ~~not~~ turn on hot water while being bathed. Water supply to bathing area will not be over 120° F.~~;~~ and

(e) The bathing area shall be out of drafts and provisions should be made so the child may be completely dried after a bath.

AUTH: Sec. 52-4-503 and 52-2-704, MCA
IMP: Sec. 53-4-504 and 52-2-731, MCA

11.14.511 ~~DAY CARE FACILITIES CARING FOR INFANTS,~~ TRANSPORTATION (1) Facilities providing transportation for ~~infants~~ children under 4 years of age or 40 pounds shall comply with the following requirements:

(a) All vehicles shall be equipped with ~~car beds and/or~~ children's car seats that meet federal department of transportation standards for the age and weight of the child being transported.

~~(b) Car beds shall be anchored securely to the floor of the vehicle. Infants shall be strapped in the car bed.~~

~~(c)~~(b) Car seats shall be fastened securely to the seat or to the floor of the vehicle. Children shall be secured with safety belts anchored to the floor.

~~(i) Any infant who has developed skill to sit alone safely shall use a car seat, not a car bed.~~

~~(ii)~~(c) There shall be no more than ~~one~~ 1 ~~infant~~ child in each ~~car bed or~~ car seat.

(d) There shall be one adult in addition to the driver for each ~~four (4)~~ 3 infants/toddlers being transported. ~~When transporting more than two infants, there will be a minimum of two adults.~~ No child shall be left unattended in a vehicle. An adult shall accompany each child to and from the vehicle to the child's home or the home authorized by the parent(s) to receive the child.

AUTH: Sec. 52-4-503 and 52-2-704, MCA
IMP: Sec. 53-4-504 and 52-2-731, MCA

11.14.512 DAY CARE FACILITIES CARING FOR INFANTS AND TODDLERS, ACTIVITIES (1) All infants and toddlers shall have ample opportunity during each day for freedom of movement, such as creeping or crawling or rolling in a safe, clean, open, uncluttered area.

(2) An infant or toddler who is awake shall not spend more than ~~one hour~~ 30 minutes of consecutive time confined in a crib, playpen, jump chair, ~~or~~ walker or highchair.

(3) Each infant or toddler shall have individual personal contact and attention by the same adult on a regular daily basis

at least once each hour during nonsleeping hours. Examples of personal contact and attention include being held, rocked, taken on walks inside and outside the center, talked to and played with.

(4) and (5) remain the same.

AUTH: Sec. 52-4-503 and 52-2-704, MCA
IMP: Sec. 53-4-504 and 52-2-731, MCA

11.14.513 ~~DAY CARE FACILITIES CARING FOR INFANTS, BUILDING AND SPACE~~ OUTDOOR ACTIVITIES (1) ~~Infants~~ Children shall be protected from draft and prolonged exposure to direct sunlight. With the parent's permission, sunscreen shall be applied to children over 6 months old when outdoor conditions dictate such.

(2) The outdoor activity area shall be adjacent to the facility, fenced and free of hazards which are dangerous to the health and life of ~~infants~~ the children. ~~The outdoor area shall be designed so that all parts are always visible to and easily supervised by staff~~ Every time a child is outdoors, the child must be supervised by a caregiver.

(3) remains the same.

(4) Provision shall be made for both sunny and shady activity areas.

AUTH: Sec. 52-4-503 and 52-2-704, MCA
IMP: Sec. 53-4-504 and 52-2-731, MCA

11.14.515 DAY CARE FACILITIES CARING FOR INFANTS AND TODDLERS, EQUIPMENT (1) remains the same.

(2) The facility shall provide, ~~in~~ adequate ~~numbers~~ and safe equipment such as walkers, swings, playpens, jump chairs and adult rocking chairs. The equipment must meet current federal safety regulations.

AUTH: Sec. 52-4-503 and 52-2-704, MCA
IMP: Sec. 53-4-504 and 52-2-731, MCA

11.14.519 DAY CARE FACILITIES CARING FOR INFANTS, SPECIAL REQUIREMENTS FOR DAY CARE CENTERS (1) Day care centers shall post each infant's ~~the~~ diet and schedule in an area clearly visible to the center's infant care staff.

(2) Individual storage space that is labeled for the infant's clothing and other personal items shall be provided.

~~(3) Clothing worn to and from work by the day care center staff members shall be covered by or replaced with clean comfortable non-irritating washable smock or similar clothing.~~

(3) Each infant shall be assigned a primary caregiver. There shall be sufficient staff so that an adult is always present and directly supervising infants.

(4) remains the same.

AUTH: Sec. 52-4-503 and 52-2-704, MCA

IMP: Sec. 53-4-504 and 52-2-731, MCA

4. The rule 11.14.516 as proposed to be repealed is on page 11-713 of the Administrative Rules of Montana.

AUTH: Sec. 52-4-503 and 52-2-704, MCA
IMP: Sec. 53-4-504 and 52-2-731, MCA

5. The proposed changes were recommended following a complete review of all of the department's child care regulations as required to receive funds under the Federal Child Care and Development Block Grant. 45 C.F.R. § 98.15(m) (1995). In addition, the department has proposed changes to update office and employee position references.

Rationales for adopting Rules I through VI may be found below in connection with amendments having the same rationale.

ARM 11.14.101(4) and 11.14.102(13) are changed by substituting the Department of Public Health and Human Services for the Department of Family Services. Effective July 1, 1995, the Legislature transferred responsibility for day care rules to the Department of Public Health and Human Services.

ARM 11.14.101(4)(b) is changed to substitute "longer" for "shorter." The change is necessary because in practice, the span of services is for longer periods than the original rule required. In addition, CPS day care is generally certified for periods up to six months, but other day care programs require redetermination every three months.

The changes to ARM 11.14.101(5) through (10) are necessary to update references to agency positions, offices, recipients, and contractors. The changes are also necessary for improving the use of proper grammar within the rule. In addition, a proposed change to ARM 11.14.101(6)(e) strikes language allowing for payment for extra meals. The department's current rate is designed to include the cost of extra meals.

The proposed changes to ARM 11.14.102(3) and Rule I extends the child to staff ratio in family day care homes of one provider to three children under two years of age to three children under 30 months. The change is necessary to prohibit a single provider from caring for six children who are two and a half years old and younger. The less restrictive child-staff ratio for older children as provided in the current definition of "Family Day Care Home" is not justified until a child is over the age of two and one half years of age. The developmental stage of children two and one half years of age and younger requires the lower ratio.

Three definition changes/additions are proposed in regard to classifying non-school age children in ARM 11.14.101(18), (19), and (20). The change to the definition of "infant," and the additions of definitions for "toddlers" and "preschoolers," is necessary to allow for improved categorization of requirements that differ by the definitions.

The language of the old definition for "school age child" is

retained with minor grammatical changes and is moved to (21). The section defining "caregiver" is retained but is moved to (22). The new (23) defining "provider" is necessary to clearly identify the persons covered by the term in the rules that follow.

The changes to ARM 11.14.103 are necessary to improve the grammar of the language in the rule. In addition, the proposed changes are necessary to implement existing prohibitions in ARM 11.14.226, 11.14.301 and 11.14.401, in regard to provision of care by persons with a history of violent criminal behavior, crimes involving harm to children, or child abuse or neglect. The additional language specifies the procedure for making the background checks. Identical requirements are proposed to be inserted for the same reason into ARM 11.14.301, the group day care home rule on staff qualifications, and 11.14.401, the family day care home rule on staff qualifications. A specific procedure under these rules for obtaining the information is necessary to make the checks more reliable and to ensure consistent treatment among applicants. Proposed changes to ARM 11.14.103 also address necessary additions concerning personal references (improved clarity in regard to what is required for provider references), and require specific fire plans for improved fire safety.

Similarly, the proposed changes to ARM 11.14.105 are necessary to improve the grammar of the language in the rule, clarify existing requirements and to update references.

The proposed deletion of ARM 11.14.109(4) is necessary because it is unduly repetitive of Section 52-2-733, MCA. Necessary language is added to ARM 11.14.110 to set out new requirements for joint programs. The new subsections address safety concerns and administration of joint programs.

The proposed change to 11.14.112 provides necessary clarification on smoking outside of facilities. Under the amendment, necessary protection from second hand smoke is provided for children where smoking is allowed out of doors on the facility grounds.

Both areas need to be clarified by rule. Language proposed to be added to ARM 11.14.201 is needed to explain agency services for child problems (staff will provide referrals for counseling on child problems rather than the counseling itself), and to direct that visits be "unannounced" as required by Section 52-2-733, MCA. The current language on counseling is too broad to properly implement agency authority in this area. The rule should be changed to require that worker be responsible for assisting in obtaining the counseling, rather than providing the counseling. As to the provision proposed to be added making the visits "unannounced," a proper implementation of the statute requires specifying this aspect of the required visits.

A necessary amendment to ARM 11.14.202 adds a requirement for departmental review of the facility's written daily program or lesson plans. The addition is necessary to allow for establishing a procedure for review of the program or plans.

Similarly, a new (4) is proposed to be added to ARM 11.14.205 to provide specific requirements on record keeping and authorization forms. Record keeping and authorization forms in the areas addressed by the new language should be part of this chapter's minimum requirements.

The proposed deletions and additions to ARM 11.14.208 are necessary to improve the rule's discipline requirements. The existing version fails to prohibit shaming, humiliating, frightening or otherwise damaging types of discipline. The provision prohibiting corporal punishment is maintained but is clarified, and a prohibition against shaking a child is specifically added. Similarly, the additions to the rule clarify that parental permission does not excuse non-compliance with the rule. Other proposed changes to the rule are grammatical. The changes are necessary to ensure that children are protected from inappropriate types of discipline. The same rationale supports the proposed changes to the discipline standards covering group day care homes in ARM 11.14.312, and discipline in family day care homes as required under ARM 11.14.412.

The necessary changes to ARM 11.14.211 provide detail on space requirements. The existing provisions fail to identify all areas that should be excluded from calculating square footage available for each child. The existing requirements also fail to clearly specify that substituted outdoor space must be safe. The lack of clarity makes even-handed enforcement more difficult.

In addition, the proposed amendments to ARM 11.14.211 add a requirement that the outdoor space be fenced. The rule's provision on allowing for a variance would apply to the requirement of a fence. The requirement of a fence for outdoor play areas (absent a valid variance), should be part of the minimum safety requirements for centers to prevent children from leaving the safety of the playground. The above rationale for changes to ARM 11.14.211 also supports the proposed changes to the rule covering space requirements in group day care homes in ARM 11.14.305 of this notice, and the proposed changes to ARM 11.14.403, covering space requirements in family day care homes, which also appear in this notice. Changes to ARM 11.14.212 are grammatical and designed to improve the rule's formatting.

The changes to ARM 11.14.218 are proposed to make necessary improvements to minimum safety standards on materials and equipment. Many young children swallow and choke on balloons. Therefore, the rule should be changed to prohibit facilities from allowing children who are still mouthing objects from having balloons. The rule should also require that the surfaces beneath play equipment provide some cushion through use of sand, small gravel or wood chips. An adequate cushion under play equipment helps to prevent injuries. Similar necessary additions to ARM 11.14.218 clarify that sanitary rest equipment be available to all children. The proposed changes also specify that cribs must be waterproof and regularly sanitized, and

provide detail on the minimum contents of first aid kits. An amendment to 11.14.218, 11.14.307 and a provision proposed to be adopted in Rule IV prohibit trampolines in the three types of day care facilities. The prohibition is necessary because trampolines have proved to be dangerous to children in day care settings, and therefore the amendment and adoption would impose a minimum safety requirement. The rationale for prohibiting balloons, and for cushioning play equipment, also supports the changes proposed to be made to ARM 11.14.307 (safety in group day care homes), and 11.14.405 (safety in family day care homes).

The changes to ARM 11.14.221 are necessary to clarify requirements on activities and parental involvement in planning for activities. Additions to ARM 11.14.222 are designed to implement adequate safeguards for proper care of children during the night. The need for night care among Montana families has grown, and more providers have begun to offer night care to meet the demand. Parents and licensing workers have complained that there is a lack of adequate standards given the numbers of children who attend day care facilities at night. The same rationale also supports the proposed changes to ARM 11.14.324 and the proposed adoption of Rule V, also appearing in this notice.

Additions to ARM 11.14.226 are necessary to update and improve minimum standards for child care staff in day care centers. The changes address minimum staff to child ratios, minimum staff training requirements, and minimum requirements on staff qualifications. The current standards are too low to adequately guarantee proper supervision and safety. The same rationale supports the changes to ARM 11.14.340 in regard to group day care home staff/child ratios, and the adoption of Rule I, on staff/child ratios in family day care homes, also appearing in this notice. Amendments to the infant/staff ratio of 11.14.516 are also proposed in this notice to apply the new standard to this rule which sets out infant care-staff ratios applying to all three types of facilities. The changes also clarify reporting requirements on children's injuries and suspected abuse or neglect. The current provisions are too ambiguous. A similar ambiguity is proposed to be eliminated by deletion of language providing for consideration of the non-criminal nature of an adjudication for a sex offense of a delinquent youth. Provisions excluding sex offenders are intended to protect children. Consideration of the non-criminal nature of the act when the offender is a juvenile should not be required. The same rationale supports similar amendments to ARM 11.14.301 and 11.14.401.

Changes to ARM 11.14.228 are proposed to improve provision of written information to parents, to require posting of the facility license, and to guarantee parental access to children. These changes should be added to guarantee that parents have adequate information about the facility and unconditional access to their children. The same rationale applies to the proposed

changes on parental involvement set out in ARM 11.14.327 applying to group day care homes, and Rule II applying to family day care homes, also appearing in this notice. Proposed changes to the safety requirements of ARM 11.14.229 are necessary to update minimum standards on electrical safety, safety in storage and labeling of prescription drugs, and procedures and practices for making emergency exits. The same rationale supports the similar changes proposed in amendments to ARM 11.14.307, applying to group day care homes, and 11.14.405, applying to family day care homes, also appearing in this notice. The changes to ARM 11.14.307 and 11.4.405 also include necessary minimum safety changes in regard to household pets. Household pets in group and family day care homes have caused safety and sanitary problems for children in care in Montana. More specific requirements are needed to address the problems.

Additions to ARM 11.14.301 are grammatical and also provide necessary updates and improvements on minimum standards for providers, child care staff and other persons present in group day care homes. The changes on child care staff qualifications address criminal records checks (see rationale for changes to ARM 11.14.103), training requirements, supervision requirements, and requirements for department access to the home while children are in care. The new training requirements are necessary because the current standards fail to adequately ensure that caregivers receive needed training. Training improves the quality of care, and specific, annual training requirements will assist in assuring that beneficial care is provided. The additional language on supervision will help to resolve problems that have arisen in regard to the intent of the rule. Providers have questioned the extent that the rule requires that their active participation in providing care. The amendment clarifies that their involvement must include direct provision of care. Similar clarifications are necessary to resolve issues arising on reporting injuries to children. The rule should be clarified to state that any injury that results in ambulance transport of the child must be reported. The proposed additions on department access to the facility are necessary to better implement the mandate of 52-2-733, MCA allowing inspection of any facility by the department.

Changes proposed to ARM 11.14.306 are necessary to update fire safety requirements for group day care homes. Identical changes are proposed for ARM 11.14.404, to insure adequate fire safety in family day care homes. Existing fire safety requirements are out-of-date. Similarly, the changes proposed to ARM 11.14.307 and 11.14.405 on storage and labeling of prescription drug containers are necessary to improve and update minimum requirements for group and family day care homes. The mandatory use of paper towels, as proposed in amendments to ARM 11.14.310 and 11.14.407, will aid in minimizing germs in family and group day care homes. The proposed changes to ARM 11.14.311 regulating group day care homes, and the proposed adoption of Rule IV, applying to family day care homes, are necessary to

cover equipment requirements for these facilities. High chairs that attach to tables are "not recommended" as proposed in the rules because they are not as safe as regular high chairs. The rules will also specify that play materials must be appropriate for the ages of the children in attendance, and set out the requirements for sanitary rest equipment. Under the current rule on play equipment, a provider may claim compliance even though children enrolled in the facility lack equipment appropriate for their developmental level. To avoid this possibility, the rule should specify that play materials be provided for all levels in attendance. The additional language on sanitary rest equipment should be added as a minimum health requirement.

Amendments proposed for ARM 11.14.316, and 11.14.414, are necessary to update and improve health care requirements for group and family day care homes. The proposed changes include requirements on the specific contents of first-aid kits that must be kept on site at the facilities, and be carried on outings away from the facility. Access to a suitably supplied first aid kit should be part of the minimum safety requirements for these facilities. The changes also clarify the specific requirements on clean drinking water, sewage systems, dishwashers, and laundry practices. The department proposes these additional amendments because these practices or equipment requirements should be included as minimum safety or sanitary standards.

Changes proposed for ARM 11.14.318 are grammatical and update terminology in regard to use of portable and non-portable swimming pools. The proposed amendments to group and family day care homes and nutrition requirements are found in the proposed changes to ARM 11.14.319 and Rule III. The changes to ARM 11.14.319 are grammatical or are intended to update terminology. Rule III is proposed to adopt the nutrition standards for meals and snacks in group day care homes for family day care homes. There exists no valid reason for not enforcing nutrition standards in the smaller facilities. Rule V, amendments to ARM 11.14.418, and amendments to 11.14.324, address provision of "overlap" care and night care. Current standards allow for an increase in the number of children during a facility's "overlap" period. The overlap period is intended to allow for after-school care of school age children. Generally, no additional staff are required. The current rules provide that children over the age of two may be cared for during the overlap period. The rules should be changed to prohibit supervision of younger children under the relaxed standards in place for overlap care. A more appropriate age for allowing a child to be cared for during periods of overlap is fours years, as proposed in this notice.

Sub-chapter 5's title will be changed from "infant care" to reflect that these rules apply to infant and toddler care as well as other supplemental rules for the care of all children.

The proposed change to ARM 11.14.501 is intended to relax

the current requirement that parents must obtain a written note from their physician stating that day care is permissible for each infant. Under the proposal, only those children already identified as having special needs need obtain written confirmation that day care is permissible. The amended version of the rule represents a minimum standard that is sufficient to ensure safety for children.

Where the statement is required, it should contain "restrictions" or "considerations" instructing the provider on the child's special health needs. The additions requiring the information will help ensure that providers properly address the special health needs of infants.

The proposed changes to ARM 11.14.502 and 11.14.507 are grammatical. The proposed change to ARM 11.14.503 adds a requirement to ensure that older children in need of a change after an "accident" receive the change promptly. No child should be forced to wear soiled or wet clothing for any substantial length of time. The proposed changes to ARM 11.14.506 clarify that the parents and the provider may agree to alternatives to bottles of formula or breast milk in feeding infants, and that the requirement on special dietary needs applies to both infants and toddlers. Amendments are proposed to ARM 11.14.511, 11.14.512, 11.14.513 and 11.14.515 to update terminology on equipment, clarify application of requirements as to toddlers, and to set out specific care requirements on use of sun-screen, confinement in high chairs, use of car seats, swings, and walkers. The changes to ARM 11.14.513 also clarify that out-of-doors supervision of toddlers and infants is required. The changes to these rules are necessary to update and improve minimum standards for safety and to guarantee adequate conditions of care for toddlers and infants.

4. Interested parties may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to Laura Harden, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 202951, Helena, MT 59620-2951, no later than March 10, 1997.

5. The Office of Legal Affairs, Department of Public Health and Human Services has been designated to preside over and conduct the hearing.

Rule Reviewer

Director, Public Health and Human Services

Certified to the Secretary of State January 27, 1997.

BEFORE THE DEPARTMENT
OF PUBLIC SERVICE REGULATION
OF THE STATE OF MONTANA

In the Matter of Proposed Adoption of Rules Pertaining to IntraLATA equal access Presubscription.	)))))))	NOTICE OF PROPOSED ADOPTION OF RULES PERTAINING TO INTRALATA EQUAL ACCESS PRESUBSCRIPTION NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons

1. On March 12, 1997 the Department of Public Service Regulation proposes to adopt new rules pertaining to the above description.

2. The proposed rules do not replace or modify any section currently found in the Administrative Rules of Montana.

3. The rules proposed to be adopted provide as follows:

RULE I. DEFINITIONS (1) "Bona fide request" is a written request submitted by a telecommunications company, other than the primary toll carrier, for intraLATA equal access presubscription service in an exchange or exchanges.

(2) "Equal access presubscription" or "dialing parity" means that a person that is not an affiliate of a local exchange carrier is able to provide telecommunications services in such a manner that customers have the ability to route automatically without the use of any access code, their telecommunications to the telecommunications services provider of the customer's designation from among two or more telecommunications services providers (including such local exchange carrier). From a customer perspective, this means that the local exchange company shall provide all telecommunications companies operating in an equal access presubscription office with dialing arrangements and other service characteristics that are equivalent in type and quality to that provided to the primary toll carrier in its provision of toll service.

(3) "Presubscription" is customer preselection of the carrier to handle 1+/0+ toll calls without having to dial an access code (i.e. 10XXX or 101XXXX).

(4) "Primary (or presubscribed) interexchange carrier" or "PIC" means the telecommunications company with whom a customer may presubscribe to provide 1+/0+ toll service without the use of access codes, following equal access presubscription implementation.

(5) "2-PIC" is the equal access presubscription option that affords customers the opportunity to select one telecommunications company for all interLATA 1+/0+ toll calls, and at the customers' options, to select another telecommunications company for all intraLATA 1+/0+ toll calls. AUTH: Sec. 69-3-103, MCA; IMP, Secs. 69-3-102 and 69-3-201, MCA

RULE II. EQUAL ACCESS PRESUBSCRIPTION IMPLEMENTATION (1) US West Communications, Inc. is not required to implement intraLATA equal access presubscription (dialing parity) in its territory before it has been granted authority to provide in-region interLATA services pursuant to the federal Telecommunications Act of 1996, 47 USC 271, or before February 8, 1999, whichever is earlier.

(2) Each local exchange company shall, either in response to a bona fide request or on its own initiative, provide intraLATA dialing parity where technically and economically feasible using the 2-PIC method.

(3) Upon receipt of a bona fide request, each local exchange company shall complete implementation of intraLATA dialing parity within six months of receipt of such request.

(4) Each local exchange company may negotiate implementation schedules that differ from the requirements in this section with the agreement of all interexchange carriers that make bona fide requests within 90 days of the first bona fide request.

(5) A local exchange company may petition the commission for a waiver of the requirement to provide intraLATA dialing parity consistent with (2) above on the grounds that no bona fide request has been received or that compliance is not technically and/or economically feasible. The commission, after notice and opportunity for hearing, may grant a waiver upon such a showing.

(6) A local exchange company may petition for an extension of the timing requirements of (3) above on the grounds that equal access presubscription implementation cannot reasonably be provided within the given exchange(s) within the required time frame. Any petition for extension may not request an extension in excess of an additional six months. The commission, after notice and opportunity for hearing, may grant such extension(s) upon such a showing. AUTH: Sec. 69-3-103, MCA; IMP, Secs. 69-3-102 and 69-3-201, MCA

RULE III. CUSTOMER EDUCATION AND PRESUBSCRIPTION PROCEDURES (1) In exchanges with existing interLATA dialing parity, the local exchange company shall provide written information to customers, at least 30 days prior to its scheduled implementation, describing intraLATA dialing parity and explaining presubscription procedures. Any customer commencing service after that mailing, but before implementation of equal access presubscription, shall also receive a copy of the written information from the local exchange company providing service.

(2) In exchanges without interLATA equal access presubscription, the local exchange company shall furnish customers with information at least 60 days prior to implementation of dialing parity. The information must provide clear directions and forms to allow customers to presubscribe to their selected primary intraLATA company.

(3) Customers who commence service after the initial intraLATA equal access presubscription implementation is completed in their end office shall be informed of their carrier selection options at the time that service is requested and shall be required to select both their primary interLATA and intraLATA companies.

(4) Informational materials, forms and scripts developed for use in compliance with this section shall be complete, clear, and unbiased. The local exchange companies or primary toll carriers shall cooperate with the telecommunications companies to develop these informational materials, forms, and scripts, and shall file these materials, forms, and scripts with the commission not more than 60 days after receipt of a bona fide request for intraLATA equal access presubscription. Copies shall also be serviced on each telecommunications company that has indicated intent to be included in such materials. The commission shall have 30 days after receipt of such materials, forms, or scripts to consider comments from interested parties and to advise the company of any necessary changes. The company shall promptly make those changes before using the materials, forms or scripts. AUTH: Sec. 69-3-103, MCA; IMP, Secs. 69-3-102 and 69-3-201, MCA

RULE IV. NOTICE AND IMPLEMENTATION (1) Not more than 15 days after receipt of a bona fide request for implementation of intraLATA dialing parity, the local exchange company or primary toll carrier shall provide notice of such request to all interexchange companies offering service in the affected exchange(s). The notice shall include information concerning the scheduled implementation dates as well as the ordering procedures, terms and conditions for an interexchange company to participate.

(2) Not more than 45 days after receipt of a bona fide request for intraLATA equal access presubscription, the local exchange company or primary toll carrier shall make available to any interexchange company that intends to subscribe to intraLATA equal access presubscription a complete list of the primary toll carrier's customers by name, telephone number and address. The primary toll carrier shall also update the list upon request. Any charges for such lists shall be cost-based and non-discriminatory. The interexchange company shall use such lists only for purposes of presubscription solicitation and no longer than 180 days after implementation of dialing parity. AUTH: Sec. 69-3-103, MCA; IMP, Secs. 69-3-102 and 69-3-201, MCA

RULE V. BALLOTING (1) In exchanges with existing interLATA dialing parity, balloting will not be used to determine each customer's primary intraLATA company.

(2) In exchanges where interLATA dialing parity is not in place prior to receipt of a bona fide request for intraLATA equal access presubscription, balloting for both interLATA and intraLATA equal access presubscription shall be conducted concurrently. The balloting shall be carried out in accordance with the requirements for interLATA equal access presubscription established by the federal communications commission in CC docket 83-1145, phase I.

(3) Interexchange companies intending to be included in all informational materials of ballots furnished to customers in advance of initial implementation of intraLATA equal access presubscription in any exchange shall advise the local exchange company or primary toll carrier in writing at least 90 days prior to the scheduled implementation date. The local exchange company or primary toll carrier shall then include the interexchange company in all materials and forms listing providers. AUTH: Sec. 69-3-103, MCA; IMP, Secs. 69-3-102 and 69-3-201, MCA

RULE VI. CHARGES (1) No charge shall be imposed for a customer's initial selection of a primary intraLATA company. Each local exchange company shall allow customers to change their selection of a primary intraLATA company, at no charge, within six months following implementation of intraLATA dialing parity in an exchange. Any charges for subsequent changes shall be the same as those imposed for changing interLATA companies.

(2) In cases in which customers change both their intraLATA PIC and their interLATA PIC at the same time, a single PIC change charge shall apply.

(3) No PIC change order shall be submitted to a local exchange company unless and until the order has been confirmed in accordance with the procedures set forth by the federal communications commission. AUTH: Sec. 69-3-103, MCA; IMP, Secs. 69-3-102 and 69-3-201, MCA

RULE VII. SCOPE OF INTRALATA EQUAL ACCESS PRESUBSCRIPTION (1) 0-, N11 type calls (e.g. 411, 611 and 911), and 976 calling will continue to be processed by the local exchange company following the implementation of intraLATA equal access presubscription in any exchange. IntraLATA 0+ and 1+ calls will be routed to the customer's primary intraLATA company. Calls using dialing protocols such as 500, 700, 800 or 900 to route them to the appropriate carrier are not subject to intraLATA presubscription.

(2) Customers' intraLATA calling shall continue to be provided by the primary toll carrier until the customer selects a different primary intraLATA company. AUTH: Sec. 69-3-103, MCA; IMP, Secs. 69-3-102 and 69-3-201, MCA

RULE VIII. EQUAL ACCESS PRESUBSCRIPTION COST RECOVERY (1) Each local exchange company may recover through its switched access rates the additional costs it incurs to provide intraLATA equal access presubscription. Such costs include only initial incremental expenditures for hardware and software related to the provision of equal access presubscription that would not be required to upgrade the switching capabilities of the office absent the provision of equal access presubscription. Those costs also include administrative costs incurred in the approved customer education and presubscription efforts.

(2) The costs of intraLATA equal access presubscription implementation shall be recovered over an eight year period.

(3) The costs of equal access presubscription implementation shall be recovered from all providers of intraLATA toll service in the exchange(s) through a charge applicable to all switched intraLATA minutes of use originating in the exchange(s). AUTH: Sec. 69-3-103, MCA; IMP, Secs. 69-3-102 and 69-3-201, MCA

RULE IX. SAFEGUARDS (1) In order to insure that the development of intraLATA competition will not be impeded following intraLATA equal access presubscription the following practices shall be observed by the incumbent LEC toll service provider:

(a) Customers who initiate service in an exchange following the implementation of presubscription should be provided with information concerning their carrier selection options at the time they sign up for service. The material and procedures employed in this process must be competitively neutral and approved by the commission prior to their use.

(b) When handling customer-initiated contacts regarding local service matters such as a change in service, LEC business office personnel may not engage in promotional efforts for the LEC's toll service offerings.

(c) When a customer contacts a LEC business office to change their PIC from the LEC to a competitor, the transaction must be handled in a neutral manner (i.e., in the same manner as a PIC change from one competitor to another).

(d) Bills rendered to the customer shall identify the customer's presubscribed carrier(s) in a neutral manner.

(e) Letters of authorization (LOAs) submitted by a competitor prior to intraLATA presubscription implementation shall be accepted at any time. In case of multiple submission of LOAs, the last dated LOA shall be processed.

(f) The LEC shall not assume that customers who have an interLATA PIC freeze on their account prior to implementation of intraLATA presubscription wish to have the freeze extend to intraLATA toll service following intraLATA presubscription implementation. AUTH: Sec. 69-3-103, MCA; IMP, Secs. 69-3-102 and 69-3-201, MCA

4. Rationale: AT&T Communications of the Mountain States, Inc. proposed on April 21, 1995, rules that would

require intraLATA equal access in Montana. The Montana Public Service Commission did not act to implement the request due to pending legislation at the federal level which could impact state implementation of equal access in intraLATA toll markets.

Following the adoption of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (February 8, 1996), the Montana Public Service Commission voted to proceed with the request that it adopt rules for intraLATA equal access (dialing parity) in order to have the appropriate rules in place when federal law permits U S WEST Communications, Inc. (a Regional Bell Operating Company (RBOC) under the 1996 Act) to enter its in-region interLATA toll market.

On November 16, 1996 AT&T updated its request for intra-LATA equal access rules to accommodate the changes required from the 1996 federal Act and requested further that its new proposal be formally submitted for rulemaking.

5. Interested parties may submit their data, views or arguments concerning the proposed adoption in writing (original and 10 copies) to Karen Hammel, Public Service Commission, 1701 Prospect Avenue, P.O. Box 202601, Helena, Montana 59620-2601 no later than March 12, 1997.

6. If a person who is directly affected by the proposed adoption wishes to express his data, views and arguments orally or in writing at a public hearing, he must make written request for a public hearing and submit this request along with any written comments he has (original and 10 copies) to Karen Hammel, Public Service Commission, 1701 Prospect Avenue, P.O. Box 202601, Helena, Montana 59620-2601, no later than March 12, 1997.

7. If the agency receives requests for a public hearing on the proposed adoption from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed adoption; from the Administrative Code Committee of the legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 25 based upon the number of consumers in the state of Montana.

8. The Montana Consumer Counsel, 34 West Sixth Avenue, P.O. Box 201703, Helena, Montana 59620-1703, (406) 444-2771, is available and may be contacted to represent consumer interests in this matter.

Dave Fisher
DAVE FISHER, Chairman

Robin A. McHugh
Reviewed by Robin A. McHugh

CERTIFIED TO THE SECRETARY OF STATE JANUARY 27, 1997.

BEFORE THE BOARD OF OPTOMETRY
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the amendment, repeal and adoption of rules pertaining to the general practice requirements, unprofessional conduct, fees, disciplinary actions and continuing education concerning the practice of optometry	NOTICE OF AMENDMENT, REPEAL AND ADOPTION OF RULES PERTAINING TO THE PRACTICE OF OPTOMETRY

TO: All Interested Persons:

1. On August 22, 1996, the Board of Optometry published a notice of proposed amendment, repeal and adoption of rules pertaining to the practice of optometry, at page 2238, 1996 Montana Administrative Register, issue number 16. The Board received a sufficient number of requests for a public hearing, therefore a notice of public hearing was published on page 2654, 1996 Montana Administrative Register, issue number 20. The hearing was held on November 21, 1996 in Helena, Montana.

2. The Board has amended ARM 8.36.406, 8.36.409, 8.36.412 and 8.36.602; repealed ARM 8.36.405, 8.36.408, 8.36.410 and 8.36.411 and adopted new rules II (8.36.418) and III (8.36.419) exactly as proposed. The Board has amended ARM 8.36.601 and adopted new rule I (8.36.417) as proposed, but with the following changes:

8.36.601 REQUIREMENTS (1) Each licensed optometrist shall be required to attend not less than ~~18 hours annually~~ 36 hours biannually of scientific clinics, forums~~,~~ or optometric educational studies as may be provided or approved by the board of optometrists as a prerequisite for his/her license renewal. Continuing education will be reported every two years on the renewal form commencing with the 1999 renewal form.

(1)(a) through (5) will remain the same as proposed.

I (8.36.417) LICENSURE OF OUT-OF-STATE APPLICANTS (1) through (1)(b) will remain the same as proposed, but ending commas of (a) and (b) will be changed to semi-colons.

(c) the candidate shall supply proof of successful completion of all parts of the national examination offered by the national board of examiners in optometry (NBEO) with a passing score ~~of 70 percent of higher~~. Candidate scores on the examination must be forwarded by the exam agency directly to the board~~,~~;

(d) through (f) will remain the same, but the ending commas of (d) and (e) will be changed to semi-colons.

3. The Board accepted written comment through November 21, 1996. The Board has thoroughly considered all comments received. Those comments, and the Board's responses thereto, are as follows:

COMMENT NO. 1: One comment was received stating new rule I(c) stating a score of 70 percent or higher must be achieved by each candidate on the NBEO is in conflict with ARM 8.36.404, which states all parts must be passed, but makes no reference to 70 percent.

RESPONSE: The Board concurs with the comment and will delete the reference to 70 percent, and state "with a passing score," according to NBEO standards, as shown above.

COMMENT NO. 2: Seven comments were received stating ARM 8.36.601 should not increase the number of continuing education (CE) hours to 18, as the current number of 12 is sufficient when viewed as a minimum, and licensees could always obtain more CE hours if they desire this. Additionally, 18 hours is not possible at one meeting, and may force licensees to travel out-of-state to obtain CE, which would not benefit the people of Montana.

RESPONSE: The Board did not agree, and stated that it is possible to obtain 18 CE hours at many meetings. Additionally, in-state CE sponsors can now adjust to the new rule accordingly, and offer three-day meetings with sufficient credits. Out-of-state meetings are already offering this. The requirement of 18 CE hours will enhance all licensees' professional knowledge for the protection of the public, and the Board will therefore enforce this new requirement for the reasons stated above. This new requirement will be effective for the 1999 reporting period.

COMMENT NO. 3: Six comments were received stating the Board should require 36 hours of CE credit every two years, or 54 per three-year cycle. This would allow flexibility for the licensee's schedule in taking advantage of educational opportunities, and reflect the national trend of a 2-3 year requirement.

RESPONSE: The Board noted that a three-year cycle would be too long, as it would allow a licensee to procrastinate and not have sufficient CE hours at the end of the cycle. The Board concurs with the two-year cycle, however. No carry-over will be allowed from one cycle to the next. The new two-year cycle will begin on July 1, 1997. All licensees will report as usual in June of 1997, but the next report of 36 hours will not be due until the June 1999 renewal. This system will allow more flexibility with scheduling, and will allow a more gradual transition to the 36-hour biannual requirement.

COMMENT NO. 4: Four comments were received in support of expanding the CE hour requirement, as the practice of optometry has changed so much in the past few years, that the Board should raise the education requirement to ensure all licensees are keeping up with the times.

RESPONSE: The Board acknowledged receipt of the comment in support.

COMMENT NO. 5: Two comments were received stating ARM 8.36.406(1)(b) through (d) should not be deleted, as it was originally written to clarify for companies that an optometrist must be on or near the premises. The separate entrance requirement was written so the optometrist could function free and clear of influence. Section 37-10-311, MCA, allows this separation of optometrist and company store owner, and is necessary because a location in a company store can give the perception that the optometrist is an employee of the store. The current rule is adequate, and allows independence by an optometrist and hasn't discouraged companies from entering this state.

RESPONSE: The Board noted that 37-10-311, MCA, had been repealed by the 1995 Legislature, and cannot therefore be relied upon as authority for this rule. The Board has changed the rule to comply with new statutory language.

COMMENT NO. 6: Two comments were received stating ARM 8.36.412 on Unprofessional Conduct should not delete all language now found in statute, as the rule spells out the details more clearly, and the statute may not contain enough detail.

RESPONSE: The Board did not agree, and felt the statutory language is sufficient to inform licensees and the public as to what constitutes unprofessional conduct. Licensees will be provided both statutes and rules, and can easily find reference to prohibited conduct. It is also not necessary to repeat statutory language in a rule.

COMMENT NO. 7: One comment was received stating the Board should consider requiring six or more of the 18 CE hours be transcript quality CE, as many other states require this and it helps to further ensure the public's health.

RESPONSE: The Board did not agree, as this requirement would make CE more difficult to obtain. The majority of CE meetings are not offered as transcript quality, and this would make it harder to obtain CE hours. The Board is not ready to make this change at this time.

COMMENT NO. 8: One comment was received in support of the rule change from reciprocity to licensure by endorsement (new rule I).

RESPONSE: The Board acknowledged receipt of the comment in support.

BOARD OF OPTOMETRY
CYNTHIA JOHNSON, OD, CHAIRMAN

ANNIE M. BARTOS
RULE REVIEWER

BY: ANNIE M. BARTOS, CHIEF COUNSEL
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, January 27, 1997.

BEFORE THE BOARD OF REAL ESTATE APPRAISERS
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the amendment, adoption and repeal of rules pertaining to real estate appraisers	)))	NOTICE OF AMENDMENT, ADOPTION AND REPEAL OF RULES PERTAINING TO REAL ESTATE APPRAISERS

TO: All Interested Persons:

1. On October 24, 1996, the Board of Real Estate Appraisers published a notice of proposed amendment, repeal and adoption of rules pertaining to real estate appraisers at page 2665, 1996 Montana Administrative Register, issue number 20.

2. The Board has amended ARM 8.57.403, 8.57.404, 8.57.405, 8.57.406, 8.57.407, 8.57.408, 8.57.409 and 8.57.412; repealed ARM 8.57.401, 8.57.402, 8.57.414, 8.57.415, and 8.57.416; and adopted new rules II (8.57.419) and III (8.57.420) exactly as proposed. The Board has amended ARM 8.57.411 and 8.57.417 and adopted new rule I (8.57.418) as proposed, but with the following changes: (authority and implementing sections remain the same as proposed)

8.57.411 CONTINUING EDUCATION (1) through (4) will remain the same as proposed.

~~(5) Instructors of the Uniform Standards of Professional Appraisal Practice must provide proof to the board of attending the update course offered by the appraisal standards board of the appraisal foundation.~~

8.57.417 AD VALOREM TAX APPRAISAL EXPERIENCE (1) Experience credit may be awarded to ad valorem tax appraisers who demonstrate that they use techniques to value properties ~~similar to those used by appraisers~~ in compliance with USPAP, and effectively use the appraisal process.

(2) through (3)(a) will remain the same as proposed.

(b) The supervising tax appraiser or other appropriate official signing the affidavit must indicate their understanding that experience credit shall only be awarded to applicants who demonstrate they use techniques to value properties ~~as those used by licensed or certified real estate appraisers~~ in compliance with USPAP.

(4) through (7) will remain the same as proposed.

I (8.57.418) QUALIFYING EXPERIENCE (1) through (6) will remain the same as proposed.

(7) Timber and mineral appraisal does not qualify as real estate appraisal experience, unless performed in conjunction with a real estate appraisal involving real property.

(8) through (9) will remain the same as proposed.

3. The Board has thoroughly considered all comments and testimony received. Those comments and the Board's responses thereto are as follows:

COMMENT NO. 1: One comment was received stating that the passing score referred to in ARM 8.57.403(2)(c) should be set at 80% rather than 79%.

RESPONSE: The Board rejects the comment as the 79% passing score is set by the testing entity hired by the Board of Real Estate Appraisers, and the Board is unable to recommend a passing score different than that set by the testing entity.

COMMENT NO. 2: One commentor states that the submission of a photograph, required in ARM 8.57.404(4), does not appear to fulfill any purpose. The commentor feels the examination score, experience and education of an applicant should be the only criteria for granting a license or certification. Commentor recommends deleting this requirement.

RESPONSE: The Board rejects this comment, stating that the purpose of the photograph is for security purposes and for the possibility of providing a visual identification of a person submitting an application to become a licensed or certified real estate appraiser.

COMMENT NO. 3: One comment was received suggesting that the word "continuously" be removed from the phrase "obtained continuously" set forth in ARM 8.57.405(2) and (3). Commentor states that the use of the phrase is confusing and appears to be contrary to the remainder of the verbiage contained in those subsections. Commentor suggests the use of the word "obtain" only.

RESPONSE: The Board rejects the comment and will allow the proposed rule to be adopted as proposed. The reason for the rule is to prohibit those applicants from submitting their evidence of experience obtained at some past date and combining it with experience obtained recently.

COMMENT NO. 4: The Board received another comment with respect to ARM 8.57.405 stating that the general certification experience requirements are simply too lenient. Commentor believes there is an extreme difference, in both quality expected and knowledge required, to prepare a commercial type and complex property type appraisal as opposed to residential appraisal. He suggests that the experience standards be double the 2,000 hours currently required.

RESPONSE: The Board considered this comment and has determined that the rule as proposed corresponds to the standards set forth in the Appraiser Qualification Board's requirements and other states that license or certify appraisers. Therefore, the Board rejects the comment and adopts the rule as proposed.

COMMENT NO. 5: One comment was received with respect to ARM 8.57.409 advocating increasing the amount of study required for the study of the Uniform Standards of Professional Appraisal Practice above the 1500 hour requirement that is already stated in that rule. In lieu of increasing that 1500 hour requirement, commentor believes the rule, as proposed,

should be amended to provide for some classroom study in the 60-hour classroom study requirement for non-residential work.

RESPONSE: The Board rejects this comment noting that it has not determined that a need exists for more hours of instruction in USPAP and therefore will adopt the rule as proposed.

COMMENT NO. 6: The Board received four comments relative to the proposed amendment to ARM 8.57.411(5). Commentors state, in essence, that the instructors of the Uniform Standards of Professional Appraisal Practice are required to attend an Appraisal Standards Board course before being approved to teach the USPAP in Montana. Currently, the Appraisal Standards Board offers its instruction course at two sites per year within the state of Montana. The Appraisal Foundation expressed concern that requiring attendance at the Appraisal Standards Board update courses makes a difficulty for USPAP instructors within the state of Montana. Commentors recommended removing the proposed amendment in (5) to alleviate the difficulty that this rule would create for USPAP instructors within the state.

RESPONSE: The Board concurs with the commentors and will not adopt proposed (5) of ARM 8.57.411.

COMMENT NO. 7: One comment was received stating that the language in ARM 8.57.417(1)(a), "... similar to those used by appraisers ...," does not appear to be consistent with the language in (b). Commentor states that, in both cases, the language used implies that individuals appraising for ad valorem purposes are in reality not appraisers. Commentor notes that the experience requirements for both ad valorem appraisers and licensed or certified real estate appraisers are essentially the same and are often times learned through ad valorem experience. Application of different techniques would vary based on the requirements of the appraisal assignment, applicable laws, availability of data, education, attitude and the scope of the appraiser. Commentor recommends addition of the language in (1) similar to "... techniques to value properties in compliance with USPAP and effectively use the appraisal process."

RESPONSE: The Board agrees with commentor and will drop the verbiage "properties similar to those used by appraisers" in lieu of the language stating "in compliance with USPAP".

COMMENT NO. 8: Commentor requested the addition of a category in ARM 8.57.417 for complex agriculture including, but not limited to, processing plants, packing plants, dairies and swine operations. Commentor would allow the hours to be at the discretion of the Board; however, commentor expected it would take longer than 60 hours for complex agriculture-type projects.

RESPONSE: The Board rejects the comment as the proposed amendments do not contemplate the addition of this type of new category. Therefore, the Board will treat this as a request

for rulemaking from one of the licensees and will proceed with the rulemaking process at a later date with the addition of a complex agricultural appraiser category under this section.

COMMENT NO. 9: Four comments were received relative to new rule I(7), stating that, as proposed, timber and mineral appraisals do not qualify as real estate appraisal experience. Commentors state that the appraisal of timber and mineral properties or water rights can be considered a specialized area of natural resource valuation. The appraisal process is applied the same as if an appraiser was to appraise any other type of property. Therefore, the commentors believe the appraisal should qualify so long as the appraiser employs the similar techniques used to value other properties used by licensed or certified real estate appraisers.

RESPONSE: The Board agrees with commentors to some extent in that the Board believes that, if timber valuations and mineral valuations are done in conjunction with a real estate appraisal, it will count toward experience requirements. However, should the timber or mineral contained on or within a property be the subject of the appraisal, the Board will not consider that as part of qualifying experience for licensure and the subsection will be amended accordingly.

COMMENT NO. 10: One Commentor disagrees with the hours assigned to rural agricultural and residential appraisals set forth in new rule I(8)(f). Commentor states that a 160 acre agricultural assignment, which is worth only 20 credit hours under the rule as proposed, is not reflective of the actual number of hours spent on such type of appraisal which can easily require more than 100 hours on a complex 160 acre agricultural appraisal.

RESPONSE: The Board rejects the comment presented. The board believes that the rule is to be used as a guide and, in those instances where a license applicant has expended more than the hours provided in this subsection, they may ask the Board for a variance from the rule and will be expected to demonstrate evidence that more hours should be assigned as a result of the types of difficulties encountered with the appraisal.

BOARD OF REAL ESTATE APPRAISERS
A. FARRELL ROSE, CHAIRMAN

BY: Annie M. Bartos
ANNIE M. BARTOS, CHIEF COUNSEL
DEPARTMENT OF COMMERCE

Annie M. Bartos
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, January 27, 1997.

BEFORE THE BOARD OF PUBLIC EDUCATION
OF THE STATE OF MONTANA

In the matter of the amendment of Teacher Certification	)	NOTICE OF AMENDMENT TO ARM 10.57.107 EMERGENCY AUTHORIZATION OF EMPLOYMENT

To: All Interested Persons

1. On November 7, 1996, the Board of Public Education published a notice of proposed amendments concerning ARM 10.57.107 Emergency Authorization of Employment on page 2961 of the 1996 Montana Administrative Register, Issue No. 21.

2. The Board has amended ARM 10.57.107 as proposed.

3. No comments were received.

Wayne Buchanan, Executive Secretary
Board of Public Education

Certified to the Secretary of State on January 16, 1997.

BEFORE THE BOARD OF PUBLIC EDUCATION
OF THE STATE OF MONTANA

In the matter of the amendment of Teacher Education Programs	)))	NOTICE OF AMENDMENT TO ARM 10.58.505 BUSINESS EDUCATION

To: All Interested Persons

1. On November 7, 1996, the Board of Public Education published a notice of proposed amendments concerning ARM 10.58.505 Business Education on page 2962 of the 1996 Montana Administrative Register, Issue No. 21.

2. The Board has amended ARM 10.58.505 as proposed.

3. No comments were received.

Wayne Buchanan, Executive Secretary
Board of Public Education

Certified to the Secretary of State on January 16, 1997.

BEFORE THE BOARD OF MILK CONTROL
OF THE STATE OF MONTANA

In the matter of amendments of rules 32.24.501, 32.24.504, 32.25.505 and 32.24.506 as they relate to quota.	))))	CORRECTED NOTICE OF AMENDMENT DOCKET #4-96

TO: ALL INTERESTED PERSONS:

1. On October 24, 1996, the Montana board of milk control published notice of the proposed amendments to quota rules. Notice was published at page 2718 of the 1996 Montana Administrative Register, issue no. 20, as MAR Notice 32-3-135. Notice of adoption was published at page 3215, issue no. 24, on December 19, 1996.

2. Rule 32.24.505(1)(a)(v) amendment should have been amended in the proposed notice and the amendment notice to reflect an internal reference to the cite as follows. In addition, small editorial changes are being made to make the rule read more clearly.

"32.24.505 READJUSTMENT OF QUOTA

(1)-(1)(a)(iv) Remains the same as shown in the amendment notice.

(v) combine the pounds determined pursuant to ~~sections~~ (1)~~(d)~~(a)(iii)~~,~~ and (iv) hereof with any pounds carried over from the previous year;

(vi)-(c) Remains the same as shown in the amendment notice.

AUTH: 81-23-104, MCA
IMP: 81-23-103, MCA

The replacement pages for this rule were submitted for the December 31, 1996, filing date.

DEPARTMENT OF LIVESTOCK

By: _____
A. Laurence Petersen, Exec. Officer, Board of Livestock
Department of Livestock

By: _____
Lon Mitchell, Rule Reviewer
Livestock Chief Legal Counsel

Certified to the Secretary of State January 27, 1997.

BEFORE THE MONTANA BOARD OF LAND COMMISSIONERS
AND THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

In the matter of the proposed amendment of Rules 36.25.146 and 36.25.167 pertaining to state land leasing	NOTICE OF AMENDMENT OF RULES

TO: All Interested Persons.

1. On December 5, 1996, the board and the department published notice of the proposed amendment of Rules 36.25.146 and 36.25.167 pertaining to state land leasing, at page 3110 of the 1996 Montana Administrative Register, Issue No. 23.

2. The board and the department have amended the rules as proposed.

AUTH: 77-1-106, 77-1-209, 77-1-802, and 77-1-804, MCA
IMP: 77-1-106, 77-1-801, 77-1-802, 77-1-804, and 77-6-210, MCA

3. No comments were received.

BOARD OF LAND COMMISSIONERS
MARC RACICOT, CHAIR

BY: _____
MARC RACICOT, CHAIR

BY: _____
Bud Clinch, Director
Department of Natural Resources
and Conservation

_____
Donald D. MacIntyre, Rule Reviewer

Certified to the Secretary of State on January 27, 1997.

BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES OF THE
STATE OF MONTANA

In the matter of the amendment of rule 11.7.901 pertaining to the interstate compact on the placement of children	))))	NOTICE OF THE AMENDMENT OF RULE

TO: All Interested Persons

1. On December 19, 1996, the Department of Public Health and Human Services published notice of the proposed amendment of rule 11.7.901 pertaining to the interstate compact on the placement of children at page 3205 of the 1996 Montana Administrative Register, issue number 24.

2. The Department has amended rule 11.7.901 as proposed.

3. No comments or testimony were received.

Rule Reviewer

Director, Public Health and Human Services

Certified to the Secretary of State January 27, 1997.

BEFORE THE DEPARTMENT
OF PUBLIC SERVICE REGULATION
OF THE STATE OF MONTANA

In the Matter of Adoption, Amendment, Repeal and Transfer of Rules Pertaining to Electric Safety Codes, Electric Service Standards, and Pipeline Safety (including Drug and Alcohol Testing).	)))))))	NOTICE OF ADOPTION OF NEW RULE I, AMENDMENT OF RULES 38.5.1010, 38.5.2102, 38.5.2201, 38.5.2202, 38.5.2204 & 38.5.2301, REPEAL OF RULES 38.5.2220 & 38.5.2303 through 38.5.2325 AND AMENDMENT AND TRANSFER OF RULE 38.5.2327

TO: All Interested Persons

1. On October 24, 1996, the Department of Public Service Regulation published notice of the proposed adoption, amendment, repeal, and transfer of rules pertaining to electric safety standards, electric service standards, and pipeline safety at pages 2777 through 2782, issue number 20 of the 1996 Montana Administrative Register.

2. The Department has amended 38.5.1010, 38.5.2102, 38.5.2201, 38.5.2202, 38.5.2204 and 38.5.2301 as proposed.

3. The Department has repealed 38.5.2220, 38.5.2303, 38.5.2305, 38.5.2307, 38.5.2309, 38.5.2311, 38.5.2313, 38.5.2315, 38.5.2317, 38.5.2319, 38.5.2321, 38.5.2323 and 38.5.2325 as proposed.

4. The Department has amended 38.5.2327 and also transferred it to 38.5.2302 as proposed.

5. The Department has adopted new Rule I (38.5.2304) as proposed.

6. COMMENTS: Montana-Dakota Utilities Co. (MDU) is the only person submitting comments. MDU also requests a hearing. The PSC appreciates MDU's concerns and efforts in this matter.

In regard to amendment of ARM 38.5.2204, inspections, investigations and reporting, MDU argues that 69-3-107, MCA's, reporting requirement of "within the next 2 business days" controls and, therefore, the PSC cannot establish the "two hour" reporting requirement proposed in the rule. MDU comments that this is not trivial because of the failure-to-report penalty (up to $1,000) in 69-3-206, MCA. MDU's objection is overruled. The terms in 69-3-107, MCA, are general and do not preclude establishment of different specific requirements where the PSC is given specific authority, e.g., pipeline safety. The "two hour" requirement is similar to its federal counterpart, 49 CFR 191.5, requiring notice "at the earliest practical moment following discovery," which has been interpreted as meaning the "report can and should be made within one to two hours after discovery." DOT "Alert Notice" (April 15, 1991). MDU should note that the penalty provision in 69-3-206, MCA, cannot be invoked unless the failure to report extends for a period of 30 days.

In regard to Rule I(2), testing, MDU argues the rule is contrary to the federal definition of "incident" at 49 CFR 191.3. MDU's objection is overruled. The substance of the rule already exists at ARM 38.5.2311(1)(c) and is surfacing here only as a result of rule "reformatting" (to reduce the number of rules). The rule recognizes a requirement at 39-2-304(1)(c)(ii), MCA, a Montana labor statute, which, in relevant part (post-accident), precludes testing as a condition of continued employment except when "the employer has reason to believe that an employee may have contributed to a work-related accident that causes ... property damage in excess of $1,500." To not include the provision in rules would create a rule conflict with Montana statute.

In regard to Rule I(3), testing, MDU argues that it is contrary to 49 CFR 199.11, requiring pre-employment, post-accident, random, and reasonable cause drug testing. MDU argues that the PSC is prohibited from changing the federal law on this point. MDU's objection is overruled. The rule recognizes the requirements in 39-2-304, MCA, a labor statute stating Montana's position on drug and alcohol testing of employees. The statute is applicable to employees in the industries affected by the PSC pipeline safety rules. It specifically notes that certain drug testing is prohibited. A PSC rule to the contrary would be in conflict with this state statute.

In regard to Rule I(6), testing, providing that employees who are alcohol or drug tested must be given the opportunity, at the expense of the operator, to obtain a retest by a laboratory selected by the employee, MDU argues that it is contrary to 49 CFR 199.17. MDU's objection is overruled. The substance of the rule already exists at ARM 38.5.2317 and is surfacing here only as a result of rule "reformatting." The substance of the rule is also in the above-referenced state labor statute, 39-2-304(3), MCA. A PSC rule to the contrary would be in conflict with that statute.

MDU also requests a public hearing. MDU's request is denied. MDU is not entitled of right to a hearing under MAPA and the circumstances do not demand that a hearing be held. MDU's written comments clearly convey its position. The substance of much of what MDU objects to already exists in the PSC rules (surfacing now because of reformatting) and has been debated in previous rulemakings.

DAVE FISHER, Chairman

Robin McHugh, Rule Reviewer

CERTIFIED TO THE SECRETARY OF STATE JANUARY 27, 1997.

BEFORE THE DEPARTMENT
OF PUBLIC SERVICE REGULATION
OF THE STATE OF MONTANA

In the Matter of Adoption of Rules Pertaining to Local Exchange Competition and Dispute Resolution in Negotiations between Telecommunications Providers for Interconnection, Services and Network Elements.	)))))))	NOTICE OF ADOPTION OF TELECOMMUNICATIONS RULES

TO: All Interested Persons

1. On October 3, 1996, the Montana Public Service Commission (Commission) published a Notice of Public Hearing on the proposed adoption of telecommunications rules pertaining to local exchange competition and dispute resolution between telecommunications providers for interconnection, services and network elements, at page 2528, issue number 19 of the 1996 Montana Administrative Register. The Commission received written comments and heard oral comments at a public hearing held on November 7, 1996.

After publication, the U.S. Court of Appeals for the Eighth Circuit (8th Circuit) stayed certain provisions of the Federal Communications Commission's (FCC's) First Report and Order in the matter of Implementation of the Local Competition Provisions in The Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-325, 61 Fed. Reg. 45,476 (1996) (hereinafter FCC Order), which had provided a basis for many of the proposed rules. The Commission proceeded with proposed rules consistent with the FCC Order.

The Court's partial stay issued on October 15, 1996, indicated its opinion that the petitioners will likely prevail on the jurisdictional argument, at least to the extent that FCC rules improperly preempt states' jurisdiction over pricing regulations for intrastate telecommunications services. On October 25, 1996 this Commission sent a memo to interested persons soliciting further comments from them as to the consequences of the stay on the Commission's proposed rules and the arbitration process, and requesting recommendations for alternatives available to the Commission in light of the stay.

The Commission received written comments from the Telecommunications Resellers' Association (TRA) (a national organization representing nearly 500 telecommunications service providers and their suppliers, who offer a variety of competitive telecommunications services throughout the United States), Montana Independent Telecommunications Systems (MITS), Montana Telephone Association (MTA), AT&T Communications of the Mountain States, Inc. (AT&T), and U S WEST Communications, Inc. (USWC). MITS, MTA, AT&T and USWC also provided oral comments at the hearing. The Administrative Code

Committee staff also supplied comments. Comments ranged from unqualified support of the rules (TRA) to advocating a minimalist approach.

General Comments:

COMMENT: Many of the comments relate to the general scope and purpose of the proposed rules, and to the Commission's authority to adopt rules, with the incumbent local exchange carriers (LECs) arguing for minimal or no rules. MITS states that rules, if needed at all, should address only those procedures necessary to supplement the 1996 Act where it provides incomplete guidance. USWC requests that the Commission adopt only those rules actually necessary to perform the mediation and arbitration functions, and the review of completed interconnection agreements for compliance with the 1996 Act. MTA urges a cautious approach, suggesting that the Commission hold informal conferences to develop rules, and prefers that the Commission delay rulemaking until resolution of the 8th Circuit appeals. Some of the comments seem to indicate that the Commission ought to simply refuse to recognize the FCC rules, to promulgate Montana rules based on the state jurisdiction argument, and to make its own decisions on implementation of the Act rather than follow the FCC's rules.

MTA, USWC and MITS all contend that the Commission has no jurisdiction to adopt substantive rules, and MTA further asserts that the procedural rules for arbitrations incorrectly presume Commission jurisdiction to arbitrate, which is not granted by statute in Montana and which cannot be granted to the Commission by Congress. MTA also recommends that the proposed rules should adopt the Governor's Blue Ribbon Task Force on Telecommunications (BRTF) policy recommendations for future Montana legislation. MITS and MTA argue that the Commission's rules should anticipate this legislation that will "undoubtedly" be promulgated in the 1997 Montana Legislative Session.

RESPONSE: The Commission proposed rules to address its duties in resolving interconnection disputes according to the 1996 Act. The comments made by incumbent LECs--MITS, MTA and USWC--argue that the Commission has no authority to adopt substantive rules. The Commission disagrees. The Montana Administrative Procedure Act (MAPA) specifically refers to substantive rules in 2-4-102(11) and 2-4-305(5), MCA. To be effective, rules must be within the scope of authority delegated to the Commission by the Montana Legislature. Although MAPA does not grant substantive rulemaking authority, if the authority is otherwise granted to an agency, MAPA governs proceedings, adjudicative and otherwise, that come before the Commission involving substantive matters, including substantive rulemaking. Substantive rulemaking authority is granted to the Commission in 69-3-103, MCA. Further grants of unqualified rulemaking authority are found in 69-3-310, MCA, and in 69-3-822, MCA. As pointed out by AT&T at the hearing, the

Commission has used its rulemaking authority in the past for adopting substantive rules.

The Commission considered the comments of the LECs urging it to look to the BRTF proposed legislation which has been introduced as Senate Bill 89. While some of the proposed rules may conflict with SB 89, state agencies, the Commission included, must operate according to existing law, not speculative outcomes for proposed legislation. Many of the BRTF's recommendations for legislation were hotly contested, prevailing on very narrow vote margins. They will likely be contested again during the present assembly, as will other proposed telecommunications legislation which the Commission has not yet seen. The Commission will make changes in its rules as necessary following adoption of legislation which affects them.

Many of the FCC's rules are not affected by the 8th Circuit's stay and most of this commission's proposed rules that mimicked the FCC's rules and are affected by the stay have been withdrawn. The Federal Act, however, envisions a joint FCC and state commission approach and specifically directs the FCC to adopt rules to implement the 1996 Act. As an example of this joint division of duties, 47 U.S.C. § 252(c) sets forth standards for state commissions to use in resolving open issues by arbitration and imposing conditions upon parties to arbitration agreements, and requires that the state commissions ensure that such resolutions and conditions meet the requirements of 47 U.S.C. § 251, including the regulations prescribed by the FCC pursuant to § 251. The federal law includes numerous examples of Congress's vision for administrative guidelines, both federal and state, and also includes many references to the responsibilities of the FCC and the state commissions in implementing the 1996 Act. The federal law is not sufficient in and of itself to provide guidelines, as Congress recognized and expressly stated. The Commission's rules as adopted reflect this cooperative approach.

2. The Department has adopted the following rules as proposed:

RULE VIII. 38.5.4013 OPPORTUNITY TO RESPOND TO PETITION
COMMENT: No comments received.

RULE IX. 38.5.4016 COMMISSION RESPONSIBILITY
COMMENT: (See Rule X below.)

RULE X. 38.5.4017 APPOINTMENT OF ARBITRATOR
COMMENT: Comments to Rules IX and X relate to the appointment of an arbitrator. MTA argues that the 1996 Act mandates that the Commission itself, acting as a whole, must conduct arbitration of open interconnection issues and, therefore, the reference to appointed arbitrators should be deleted. MTA further states that the only option available to the Commission is to use a hearings examiner as provided in

the BRTF draft legislation. In addition, at a minimum, MTA argues that the parties must be allowed to object to the appointment of a hearings examiner within a specified time, that the hearings examiner should also have the requisite expertise to conduct an arbitration, and that any Commissioner conducting mediation under the rule should be excluded from the arbitration process.

USWC states that the Commission may appoint a hearings examiner, as long as the hearings examiner is confined to issuing a proposed decision for the consideration of the Commission acting in a quorum. AT&T's comments generally suggest changes in Rule X to give the parties the right to select an independent arbitrator and not the Commission, stating that this would be consistent with the normal selection process of an independent arbitrator, where it is customary for the parties to have control over such selections. If the Commission does not amend the rule accordingly, AT&T states that Rule X should be amended to permit the parties five days to provide a mutually acceptable list of candidates from which the Commission may select an arbitrator.

RESPONSE: The federal Act does not clearly mandate that state commissions, acting as a whole, must be the arbitrators and MTA's argument that the 1996 Act places such a requirement on the Commission itself is contrary to its position on pages 6-8 of its comments which refers to the effect of federal directives on state commission authority.

Present law requires the Commission to operate under MAPA. MAPA covers the specific concerns expressed by MTA. Section 2-4-611, MCA, provides for objections from parties relating to the appointment of a hearings examiner and the expertise of the hearings examiner to conduct the arbitration. Further, Rule VI(1)(b) prohibits a commissioner acting as a mediator from participating in the arbitration and approval agreement, unless consented to by the parties.

The Commission emphasizes that the arbitrations contemplated by the 1996 Act are not the ordinary sort of arbitration proceedings which may be subject to the Federal Arbitration Act or the Montana Arbitration Act. Although the negotiation and arbitration generally takes place between two parties, when the Commission has issued an arbitration order and the agreement is subsequently submitted for approval, the Commission must use the standards for approval in § 252(e) of the 1996 Act. Arbitrated terms must meet the requirements of § 251 of the 1996 Act and the FCC regulations prescribed pursuant to that section, or the standards set forth in subsection (d). Negotiated terms must not discriminate against a carrier not a party to the agreement and must be consistent with the public interest, convenience, and necessity. Nothing in the proposed rules prohibits parties from submitting suggestions about the appointment of an arbitrator at the time of filing a petition or response. That would be the appropriate time for such suggestions considering the limited time for Commission decision in arbitration proceedings. Congress

could have required the sort of arbitration suggested by AT&T, but chose to place this duty with state commissions or, if a state commission fails to act, with the FCC, indicating a reasonable inference that regulatory bodies should make these decisions rather than the industry. Because the parties will have been negotiating for at least 135 days by the time an arbitration is requested, a request for suggestions of mutually acceptable arbitrators at the time of filing the petition or response is reasonable and should not present any barriers to the parties. Rules IX and X are adopted as proposed.

RULE XI. 38.5.4018 AUTHORITY OF ARBITRATOR

COMMENT: MTA comments that Rule XI(1) should be consistent with its previous suggestions that the Commission be the ultimate arbitrator and that MAPA references be deleted. MITS and USWC have a general position against MAPA as well.

RESPONSE: These comments have been addressed above in response to comments on Rules IX and X.

RULE XII. 38.5.4019 PREHEARING CONFERENCES

COMMENT: No comments were received.

RULE XV. 38.5.4033 PROPRIETARY INFORMATION

COMMENT: MTA comments that Rule XV should be expanded to allow for a party to apply for a protective order at any time concurrent with or subsequent to a request for interconnection negotiations.

RESPONSE: Rule XV expressly states that trade secret and proprietary information will be treated as provided for in the Commission's rules of practice and procedure and states that "the arbitrator or hearings officer may, at any time during the proceeding, enter a protective order to govern the treatment of information of a trade secret nature." The final sentence encourages parties to request a protective order at the earliest time and specifically states that they may do so concurrently with a request for arbitration. Rule XV on its face permits what MTA would like to see expanded and was intended to permit flexibility for making such requests. The Commission declines to amend this rule.

RULE XIX. 38.5.4042 MOTIONS

COMMENT: The only specific comment on Rule XIX is by USWC, which comments that the rule seems appropriate. There is no opposition to this rule.

RESPONSE: Rule XIX is adopted as proposed.

3. The Department has amended and adopted the following rules:

RULE I. 38.5.4001 SCOPE AND PURPOSE OF RULES (1)(a), (b) remain as proposed.

(c) Proceedings referred to in the Federal Telecommunications Act of 1996 (1996 Act) will be governed by this sub

chapter. The commission may waive, suspend or modify these rules for good cause to expedite a decision, prevent manifest prejudice to a party, assure a fair hearing, afford substantial justice, or ~~deviate from the provisions of this subchapter as it deems necessary to~~ fulfill its obligations under the 1996 Act.

(d) and (2) remain as proposed. AUTH: Sec. 69-3-103, MCA; IMP, Secs. 69-3-102 and 69-3-201, MCA

COMMENT: MITS suggests that Rule I(1) should recognize the narrow scope of proceedings which relate to agreements between carriers and should specify the types of agreements that are to be governed by this subchapter.

RESPONSE: Rule I(1) specifically states that the rules apply only to those proceedings which are before the Commission that relate to agreements between carriers seeking to provide competitive local exchange services; it does not apply to voluntarily negotiated agreements until they are submitted for approval. MITS has not identified the sort of agreements it is concerned about. The Commission does not adopt this suggestion.

COMMENT: According to MTA, Rule I(1)(c) purports to give the Commission authority to deviate from its own rules "as it deems necessary" to fulfill its obligations under the 1996 Act. According to MTA, administrative rules can only be amended by subsequent rulemaking in conformance with MAPA and the Commission's grant of authority. USWC also states that no authority suggests an administrative agency has power to adopt rules and then decide whether it wants to be bound by them, thus, this would violate due process rights of interested parties. MITS comments that the purposes of administrative rules--the promotion of uniformity and predictability in agency decision-making processes--are defeated if the agency is free to deviate from its own rules on a case-by-case basis. AT&T expressed concern that parties receive notice and opportunity to comment on how a proposed change may affect the public and the new entrants' business. The Administrative Code Committee staff also questioned the last sentence of Rule I(1)(c).

RESPONSE: Rule I(1)(c) is intended to provide flexibility which may be required to implement the 1996 Act, but is not intended to permit the Commission to arbitrarily deviate from its rules. The Commission's existing Rule ARM 38.2.305(1) already permits waiver of any of its rules for good cause and as justice may require, except where precluded by statute. In addition, at the time notice was published in this rulemaking, it was by no means certain that the 8th Circuit would grant a stay of any parts of the FCC Order. With a stay or an order preventing the FCC's rules from going into effect, particularly the pricing rules, this Commission could have "deemed it appropriate" to refuse to apply the pricing rules in Montana, despite their inclusion in this subchapter. Without a stay of the FCC's Order or portions thereof, the Commission would have been obligated to follow FCC rules until

a final decision had been rendered and all appeals had been exhausted. Although many of these concerns remain, the Commission agrees that the concern for due process must be addressed and amends Rule I to clarify this point.

COMMENT: USWC suggests a change in terminology in Rule I(1)(d) to refer to "interconnection, services or network elements" as "interconnection, unbundling and resale" to better reflect terminology used by the industry in order to avoid confusion.

RESPONSE: USWC's suggested change in Rule I(1)(d) is not incorporated into these rules. The same argument could be made, and perhaps more strongly, if the Commission's rules used different terms than Congress used in the 1996 Act. The Commission finds the terminology from the 1996 Act is less likely to cause confusion, particularly where, as here, new rules are being adopted to implement procedures that pertain to the 1996 Act.

RULE II. 38.5.4002 TERMS AND DEFINITIONS Terms used in this subchapter have the following meanings:

(1) through (7) remain as proposed.

(8) "Interconnection" is the physical linking of two networks for the mutual exchange of traffic. This term does not include the transport and termination of traffic.

(9) "Local exchange carrier (LEC)" is any person or entity that is engaged in the provision of telephone exchange service or exchange access, but does not include CMRS providers ~~until or unless the FCC so includes them~~.

(10) through (16) remain as proposed.

(17) "Open issues" means any unresolved difference(s) arising in the negotiations.

(18) through (21) remain as proposed.

(22) "Telecommunications carrier" is any provider of telecommunications services, except that such term does not include aggregators of telecommunications services, which are persons that, in the ordinary course of operations, make telephones available to the public or to transient users of their premises, for interstate telephone calls using a provider of operator services.

(23) and (24) remain as proposed. AUTH: Sec. 69-3-103, MCA; IMP, Secs. 69-3-102 and 69-3-201, MCA

COMMENT: USWC, MITS AND MTA all object to Rule II(2), the definition of "arbitration" which states that arbitration is an "investigatory contested case" proceeding under MAPA. MITS claims that MAPA creates a forum for extensive fact-finding and broad public involvement which is not appropriate for arbitrations and that the specific set of rules formulated by the BRTF should guide the arbitration process. USWC states it is inappropriate for the Commission to treat arbitration of open issues in the negotiation of an interconnection agreement as a contested case proceeding under MAPA. If MAPA is applied, according to USWC, the Commission would not be strictly

bound by the issues brought to it by the negotiating parties, which is directly contrary to § 252(b)(3)(A) of the 1996 Act. USWC also argues that if arbitration is a MAPA proceeding, the Commission could allow participation by parties other than those initiating the proceeding. USWC also comments that a MAPA proceeding is subject to judicial review in state court whereas arbitration decisions under the 1996 Act are subject to review in federal court. The LECs all emphasize the voluntary nature of private negotiations between parties which they believe is not consistent with MAPA.

MTA states, "The Commission, through Commission staff, is not a party to the arbitration, and has no authority to, for instance, participate in the discovery process." USWC comments that "if an arbitration was a MAPA proceeding, the Commission would be able to allow its staff to participate in the arbitration through the preparation of staff memoranda."

The commenters objected to MAPA not only in Rule II, but also in their comments to other rules. All objections to MAPA are addressed in the following response.

RESPONSE: Although negotiations under the 1996 Act contemplate voluntary agreements between parties, the Act also recognizes that such voluntary negotiations may not always succeed. Dispute resolution under the 1996 Act comes about when voluntary negotiations have not succeeded. Upon the timely request of a party, negotiating takes another form which is adjudicative in nature. Voluntary negotiations do not stop because such a request has been made; rather, the negotiations may proceed pursuant to two separate courses.

The Commission recognizes that arbitration of open issues under the 1996 Act is different from its traditional role as regulator of rates and service. However, as previously noted, the Commission must operate under MAPA unless and until the legislature chooses otherwise. MAPA is extremely flexible and, in fact, was specifically designed to permit flexibility because few state agencies operate alike. Rate and service regulation has traditionally been the role of the Commission, but other agencies that have completely different functions also operate under MAPA. Family services operates under MAPA in social services roles involving private, individual rights. Other agencies use MAPA in revoking professional licensing, dealing with criminal and civil violations of state law, dealing with wide and varied functions involving individual rights, and much more. MAPA is the general rule. Exceptions to the general rule can create more problems than they solve. If there is a problem with certain sections of MAPA, it is the Commission's belief that these particular problems should be addressed rather than designing a new statute that attempts to take many provisions from MAPA that are desirable and restate them in another section of the code. The Commission is familiar with MAPA and feels comfortable using it and adapting it to the particular nuances of arbitration proceedings.

The Commission's proposed rules recognize the uniqueness of arbitration proceedings. The Commission has already com-

pleted one arbitration using MAPA and is in the process of another arbitration proceeding using MAPA. MAPA does not require broad public participation in arbitration hearings. MAPA permits the Commission to limit the participation of parties other than those initiating the proceeding. *See* 2-4-102(7), MCA. Using MAPA, the Commission has limited intervention in these two arbitration proceedings to the Montana Consumer Counsel (MCC) and limited the role of other persons. These rules go even further by disallowing any participation by other persons.

The commenters also stated that MAPA allows the Commission to go beyond the issues identified by the parties. In fact, MAPA does not permit the Commission to expand on the issues presented by the negotiating parties when other law prohibits this. Even if MAPA did permit this, § 252(b)(4)(A) of the 1996 Act does not permit a state commission to expand the issues. State laws or regulations, including provisions in MAPA, that are inconsistent with the 1996 Act are preempted by the Act.

Another expressed concern is that MAPA requires an appeal to state district courts and the 1996 Act requires that arbitration decisions be taken to federal district courts. MAPA does not require an appeal to state court when other law provides for appeal in another forum. *See* 2-4-702, MCA.

MAPA deals mainly with major principles, not with details, because procedures vary from agency to agency. Thus, the agency is left to work out the details for the type of proceedings it conducts. This is what the Commission has done in the arbitration proceedings before it and in this rulemaking. The Administrative Procedures Subcommittee of the Montana Legislative Council quoted the following from an introduction by the Uniform Law Commissioners: "[E]ach agency must work out these details for itself according to the necessities of the situation. However, there are certain basic principles of common sense, justice, and fairness that can and should prevail universally. The proposed act incorporates these principles, with only enough elaboration of detail to support the essential major principles." *Subcommittee Comments* from Chapter Compiler's Comments, Annotations to the Montana Administrative Procedures Act, 2-4-101, MCA, *et seq.*

USWC and MTA commented that proceeding under MAPA creates problems because it permits staff involvement in MAPA proceedings. This concern about the Commission's staff participation in arbitration proceedings is puzzling. In some states, the staff is a party in contested cases. In Montana, Commission staff does not act as a party in any contested case proceedings. Neither is the Commission a party, but in its quasi-judicial role as a decision-maker, the Commission must have adequate information from which to decide the unresolved issues. Staff assistance is contemplated by MAPA and it is reasonable to further contemplate staff involvement in arbitration proceedings. The Commission relies on its technical and legal staff to assist it in various ways, one of which is the

preparation of staff memoranda for assistance in making decisions. In this regard, the Commission staff's function is not unlike that performed by judicial law clerks or by the Legislative Council's staff.

The Commission employs and relies on staff to assist it as directed by the Commission. Staff, with its experience, technical competence, and specialized knowledge, assists the Commission in understanding matters before it and in evaluating evidence. The advisory nature of staff involvement helps to guarantee the rights of the parties and to lessen the chance of arbitrary or capricious decision-making. The Commission's staff advises the Commission, but it is the Commission which makes decisions. The Commission contemplates no other role for its staff other than this advisory role. It is the opinion of the Commission that the technical advice of staff furthers not only the public interest, but also the interests of the private parties involved.

Arbitration as contemplated by the 1996 Act fits easily into the flexible framework provided by MAPA for contested case proceedings. The definition of "contested case" in 2-4-102, MCA, specifically includes ratemaking and price setting which the Commission is likely going to do with most arbitration proceedings. Certainly the Commission will be determining legal rights, duties, or privileges of a party which are required by law to be made after an opportunity for hearing. Inclusion of the word "investigatory" to describe the nature of the proceedings does not change anything. The Commission may require the parties to provide information in order to make a decision and may review such information during the course of the arbitration. Under the generally accepted use of the word, contested case proceedings before the Commission are investigatory. Further, the 1996 Act at § 252(b)(4)(B) limits the information that may be required by state commissions to "such information as may be necessary for the State commission to reach a decision on the unresolved issues." The Commission has no intention to go beyond that which is needed to address unresolved issues. Given the volume of material needed, the parties have no need to fear a "fishing expedition" to further complicate the task of weeding through the immense volumes of data submitted by the parties to the Commission. The Commission declines to amend Rule II(2).

COMMENT: MTA comments that the definition of "interconnection," Rule II(8), should specifically exclude carrier access as contemplated in subsequent rules and by the federal Act.

RESPONSE: The definition of "interconnection" in Rule II(8) is taken from the FCC's Order, specifically, the discussion of interconnection at ¶¶ 172-76. The FCC stated that to include transport and termination in the definition would create unintended results, noting in ¶ 176 that, "because interconnection refers to the physical linking of two networks, and not the transport and termination of traffic, access charges are not affected by our rules." It is appropriate to include

the word "physical" in the definition, however, and Rule II(8) is amended as shown above.

COMMENT: The Administrative Code Committee staff suggested that the last phrase in Rule II(9) is inappropriate because the ability to change a Montana rule cannot be delegated to the FCC.

RESPONSE: The Commission agrees and amends Rule II(9) accordingly.

COMMENT: USWC suggests including the word "unreasonable" prior to the word "impairment" in Rule II(16), the definition of number portability.

RESPONSE: The definition of "number portability" in proposed Rule II(16) is taken word-for-word from the 1996 Act. Because these rules are intended for use in implementing the 1996 Act, it is appropriate to use the same definition. Rule II(16) is adopted as proposed.

COMMENT: USWC and MITS both commented on the Rule II(17) definition of "open issues." USWC suggests adding "that has not been resolved" at the end of the sentence for clarity purposes. MITS suggests defining the term as "the issues set forth in the petition and response."

RESPONSE: As noted by MITS, § 252(b)(4)(A) of the 1996 Act limits Commission arbitration to the issues set forth in the petition and response thereto. The change suggested would be redundant. The Commission will, however, clarify the definition of Rule II(17) as requested by USWC.

COMMENT: USWC suggests that Rule II(18) be amended to change the word "premises" to "local tandem and end offices" or "central offices" in subsections (a) and (d).

RESPONSE: The definition of "premises" in discussed at ¶¶ 570-75 of the FCC's Order. The Commission has also included a definition of "premises" in Rule II(19), which is consistent with the FCC's definition that includes buildings and structures that house an incumbent LEC's network facilities and its facilities on public rights-of-way, including but not limited to vaults containing loop concentrators or similar structures. The FCC's discussion of premises shows that it rejected these changes and clearly intended to include structures other than central offices, and local tandem and end offices. The Commission declines to change the definition of "physical collocation."

COMMENT: MTA suggests the Commission clarify the term "aggregators" as used in the Rule II(22) definition of "telecommunications carrier" so that the exclusion of aggregators includes the federal definition of aggregators.

RESPONSE: Because we are following the federal Act and developing rules for its implementation, the Commission agrees that it is appropriate to include the federal definition as suggested by MTA. Rule II(22) is amended as indicated above.

RULE V. 38.5.4006 NEGOTIATION (1) The commission encourages the voluntary negotiation of agreements for interconnection, services or network elements. In order to facilitate

the streamlined processes mandated by the 1996 Act, negotiating parties should resolve as many terms and conditions in their agreements as possible prior to making a request for the commission to mediate or arbitrate unresolved terms. Parties should continue negotiating unresolved terms after petitioning the commission to arbitrate open issues and shall notify the arbitrator ~~immediately~~ expeditiously when any open issue is resolved voluntarily. AUTH: Sec. 69-3-103, MCA; IMP, Secs. 69-3-102 and 69-3-201, MCA

COMMENT: USWC comments that Rule V should be changed by deleting the word "immediately" and inserting "on a timely basis" to allow for agreements that are made at times when commission offices may be closed for business. USWC also states that "resolved voluntarily" should be clarified to allow for time to have the understanding reduced to writing and receive the appropriate approvals within the negotiating companies.

RESPONSE: The Commission does not intend that the parties' resolution of an open issue must be reduced to writing, but rather that such resolution should be treated like other contract terms which have not been identified as open issues for commission arbitration. Presumably, there will be one agreement incorporating negotiated and arbitrated terms which is presented in final written form for Commission approval. The Commission agrees that "immediately" may be inappropriate because this will depend on the stage in the arbitration process and amends Rule V as indicated above.

RULE VI. 38.5.4009 MEDIATION (1) remains as proposed.

(2) If a party requests mediation by the commission, the commission will consider the type of mediation requested by the parties and will use one of the following processes:

(2)(a) through (6) remain as proposed. AUTH: Sec. 69-3-103, MCA; IMP, Secs. 69-3-102 and 69-3-201, MCA

COMMENT: USWC comments that the Commission may not be able to successfully delegate its mediation functions to a third party as provided by Rule VI(2)(c). In addition, USWC and MTA both state that the Commission does not have the power to impose a fee upon the negotiating parties to pay for hiring a third-party mediator. Referring to Rule VI(2)(f), MTA further states that the Commission should insure that confidentiality is maintained through the issuance of a protective order or the opportunity for a party to request a protective order. MTA also asserts that Rule VI(6) should include a definition of "good cause" for Commission refusal to mediate negotiations between parties.

RESPONSE: Mediation is a choice made by parties to interconnection negotiations. If the likelihood of agreement is remote, Rule VI(4) provides that the mediator may terminate the negotiations. Rule VI(5) gives parties the opportunity to indicate their mediation preferences and is amended to add that the Commission will try to honor such requests. The Commission does not contemplate imposing fees for mediation by a

third party mediator. Rule VI(2)(c) allows the parties to choose a mediator who is acceptable to them and to share the costs equally. USWC and MTA have provided no authority for their argument that the Commission has no authority to require sharing of mediation costs in this manner. If any of the other mediation options set forth in Rule VI are chosen, the Commission has no authority to require payment for mediation.

Rule VI(2)(f) includes language which addresses the concern for confidentiality expressed by MTA without providing greater detail than necessary. The phrase "confidential to the extent permitted by law" in Rule VI(2)(f) is designed to include protective orders and any other protection of privacy which may be applicable in the mediation process. The Commission's intent is to permit greater protection than what may be permitted by a Commission-issued protective order. Protective orders provide, *inter alia*, an opportunity for others to challenge the proprietary claim. The Commission foresees no reason to permit such challenges in a mediation proceeding. No docket number will be assigned to mediations. Rule VI(2)(f) remains unchanged.

The Commission declines to define "good cause" for Commission refusal to mediate. It is not possible to foresee what sort of circumstances would result in a finding of "good cause." Each case must be decided on its unique facts. Rule VI is amended as above.

RULE VII. 38.5.4012 PETITION FOR ARBITRATION OF OPEN ISSUES (1) through (2)(c) remain as proposed.

(d) the general negotiation history~~, including meeting times and locations~~;

(e) through (3) remain as proposed. AUTH: Sec. 69-3-103, MCA; IMP, Secs. 69-3-102 and 69-3-201, MCA

COMMENT: USWC suggests a change in Rule VII(2)(d) to modify the requirement to provide an exhaustive history of the negotiations. USWC also states that Rule VII(2)(f) should be deleted or clarified to state that the test for "relevancy" is to help the Commission determine whether the negotiated portions of the agreement meet the relevant statutory test. MTA asserts that additional intervenors, other than the MCC, should be expressly prohibited.

RESPONSE: The Commission concurs with USWC's statement that an exhaustive history of the negotiations is unnecessary at this phase of the arbitration process. This information can be requested later in the proceeding if it becomes necessary. The Commission declines to adopt USWC's suggestion to delete or clarify Rule VII(2)(f) as the requirement for relevant nonproprietary information is necessary and sufficiently clear. This rule does not include any reference to intervenors and, therefore, it is also inappropriate to make that change in Rule VII which deals only with the petition to arbitrate open issues. Rule VII(2)(d) is amended as above.

RULE XIII. 38.5.4020 OTHER RESPONSIBILITIES OF THE ARBITRATOR (1) through (3)(a) remain as proposed.

(b) establish any rates for interconnection, services or network elements according to the pricing standards in ~~(Rule XXXIII)~~ section 252(d) of the 1996 Act as enacted on February 8, 1996; and

(c) remains as proposed.

(4) The arbitrator may decide whether any written statements shall be required from the parties or whether any written statements, pleadings or motions other than the petition and response shall be required from the parties or may be presented by them and shall fix the period of time for submission of such statements, pleadings or motions.

(5) remains as proposed. AUTH: Sec. 69-3-103, MCA; IMP, Secs. 69-3-102 and 69-3-201, MCA

COMMENT: MTA argues that the words "from whatever source derived" in the final sentence of Rule XIII(2) should be deleted. MTA assumes that the Commission is trying to supplement the administrative record by rule with materials not properly introduced according to the rules of evidence, which would raise grave due process concerns, and virtually guarantee appeals and reversals.

USWC objects to the inclusion of Rule XIII(3)(b), which requires the arbitrator to establish rates according to the pricing standards in Rule XXXIII. USWC further states that "this is part of the Commission's effort to implement the highly prescriptive FCC model." MTA suggests that the reference to the pricing standards rule in Rule XIII(3)(b) should be completely eliminated.

USWC states that it does not understand what the Commission is trying to accomplish in Rule XIII(4).

RESPONSE: The 1996 Act permits the arbitrator to proceed in the manner set forth in this rule. Rule XIII(2) is taken from § 252(b)(4)(B) of the 1996 Act, which states, "If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived." (Emphasis supplied.)

Rule XIII(3)(b) is affected by the Court's stay of the FCC's pricing rules and the Commission is not presently required to follow them. The Commission agrees that it is appropriate to amend the rule to delete this pricing reference. The Commission agrees that Rule XIII(4) can be clarified and amends the rule accordingly. Rule XIII is amended as above.

RULE XIV. 38.5.4030 INTERVENTION AND PARTICIPATION BY INTERESTED PARTIES (1) remains as proposed.

~~(2) Other interested persons will be permitted to take part in arbitration as nonparty participants. Participants, upon request, shall have access to all written information submitted and developed in the arbitration subject to the same requirements as the parties with respect to confidential or~~

~~proprietary data. In addition to observing arbitration proceedings and receiving documents sent to all persons on the arbitration service list, participants may file comments prior to the arbitration hearing and exceptions to the arbitration decision. Nonparty participants may comment only on the open issues as identified pursuant to (Rule XII).~~ AUTH: Sec. 69-3-103, MCA; IMP, Secs. 69-3-102 and 69-3-201, MCA.

COMMENT: MTA states that Rule XIV providing for intervention and participation by interested parties should be eliminated entirely because there is no practical or legal reason to allow intervention by any other parties. Although Montana's open meetings laws probably would allow observation of the arbitration procedure by the general public, this right does not extend to active participation in the arbitration process and the Commission must ensure that appropriate confidentiality is maintained during the arbitration process for the protection of trade secrets.

MITS argues that MAPA's provisions for broad public awareness and involvement, coupled with extensive fact-finding in a quasi-judicial process, is in direct contrast to Congress's intent that arbitration proceedings are merely extensions of private negotiations between mostly private parties. If these were fora for extensive fact-finding and broad public involvement, according to MITS, the Act would not expressly limit them to the unresolved issues contained in the petition and response prepared by the parties. In addition, MITS states that for companies seeking interconnection for the purposes of providing unregulated services such as data transmission, there is no more reason to allow non-party involvement than there would be in the arbitration of a contractual term between an automobile manufacturer and its steel supplier.

USWC also objects to Rule XIV(2), stating that it is inappropriate and that the 30-day period during the approval review process is sufficient for non-party review.

RESPONSE: Rule XIV is structured to limit active participation by any person or entity other than the negotiating parties and the Montana Consumer Counsel (MCC). MAPA specifically allows the Commission the discretion to do this. Section 2-4-102(7), MCA, defines "party" and permits the Commission to define the scope of intervention for limited purposes. This is what Rule XIV contemplates--intervention only by the MCC as required by law and only to participate to the extent necessary pursuant to the open issues as identified in the petition and response by the negotiating parties. Section 69-2-204, MCA, provides that the MCC's participation must be in accordance with MAPA. In the case of arbitration proceedings, the Commission is limiting the active participation by allowing MCC intervention for limited purposes only. In addition, 69-2-202, MCA, permits MCC to appear at the Commission's public hearings as a representative of the consuming public on all matters which in any way affect the consuming public, with all the rights and powers of any party in interest. The Com-

mission's rule recognizes that MCC must be allowed to intervene.

The Commission agrees that a broad involvement by the public is not necessary in arbitration proceedings. Although the Commission's existing rules at ARM 38.2.2401 through 38.2.2406 allow fairly broad intervention in Commission proceedings, intervention or the filing of comments by other persons will not be allowed in arbitration proceedings before the Commission. The Commission agrees with MITS' comments that Congress intended to limit the involvement of non-parties, that Commission arbitration is limited to the issues set forth in the petition and response, and with the statement that parties may elect to have a private arbitration or to continue negotiations without requesting Commission arbitration. Rule XIV is amended to strike (2) which would have permitted other persons to file comments.

RULE XVI. 38.5.4036 CONSOLIDATION OF ARBITRATION PROCEEDINGS (1) The commission may, to the extent practical, consolidate multiple ~~arbitration~~ proceedings for rural telephone company exemptions, eligible telecommunications carrier designations, arbitrations, and removal of barriers to entry in order to reduce administrative burdens on telecommunications carriers, other parties and the commission in carrying out its responsibilities under the 1996 Act. The commission may only consolidate multiple arbitration proceedings with consent of all the parties. AUTH: Sec. 69-3-103, MCA; IMP, Secs. 69-3-102 and 69-3-201, MCA

COMMENT: All the LECs comment that consolidation of arbitration proceedings as provided for in Rule XVI is inappropriate and not consistent with the 1996 Act. USWC additionally comments that consolidation of review proceedings could be appropriate and would be consistent with the 1996 Act. MTA comments further that this process has been rejected by the BRTF and that the Commission should only be allowed to consolidate proceedings if every party to the arbitrations involved agrees to the consolidation. MITS comments further that consolidation is likely to increase administrative burdens and that consolidation defeats the process of ongoing negotiations and agreement on unresolved issues before arbitration. MITS states that full compromise is unlikely to occur within the tight time frames of arbitration, so a complex decision will need to be rendered to address all the common issues as well as individual issues. In addition, according to MITS, the likelihood of challenges to the decision in the approval process and the likelihood of appeal correspondingly increase.

In contrast, AT&T recognizes the similarity between the language in Rule XVI and § 252(g) of the 1996 Act, and points out that the Act contains language omitted by the Commission rule which states that the Commission may consolidate arbitration proceedings "to the extent practical," to reduce administrative burdens. AT&T recommends including the omitted language in Rule XVI.

RESPONSE: The concerns specifically voiced by MITS caution against consolidating arbitration proceedings without considering such things as the similarity of proceedings, the time within which arbitrations must be completed and other factors that do not take into account the needs and characteristics of each separate proceeding. Section 252(g) of the 1996 Act provides, "Where not inconsistent with the requirements of the Act, a State commission may, to the extent practical, consolidate proceedings under §§ 214(e), 251(f), 253, and [252] in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under the Act." In setting forth the sections of the 1996 Act that may be consolidated, Congress did not specifically limit consolidations in § 252 of the 1996 Act like it did for §§ 214(e) and 251(f). Because it limited the latter sections, if Congress wanted to limit consolidations under § 252, it would have expressly done so. Congress did not do this and the Commission interprets this as allowing consolidation in arbitration proceedings. As a practical matter, however, the tight schedules for arbitration proceedings commencing at different times will preclude consolidation in many instances. Consolidation should not be done if it threatens to delay or impede the efficient resolution of the underlying disputes. The Commission must ensure that the procedures used and the outcomes of arbitration proceedings are not unfair or discriminatory. The Commission will accommodate the concerns for consolidation by adopting MTA's suggestion that all parties must consent before the Commission may consolidate multiple arbitration proceedings. The Commission also agrees with AT&T that the rule should be consistent with the 1996 Act, and amends the rule accordingly.

RULE XVII. 38.5.4039 ARBITRATION HEARING (1) remains as proposed.

~~(2) The arbitrator may limit the number of days permitted for hearing and may limit the number of witnesses permitted to testify at the hearing. Such limitations must consider the complexity and number of issues to be resolved.~~ AUTH: Sec. 69-3-103, MCA; IMP, Secs. 69-3-102 and 69-3-201, MCA.

COMMENT: USWC comments on Rule XVII(1) that closing briefs should be required in all arbitration proceedings due to the complexity of the issues that will be presented. MTA comments that Rule XVII(2) should be amended to permit the Commission to consult with the parties and obtain their consent prior to limiting the number of days permitted for hearing and the number of witnesses permitted to testify at the hearing. Both MTA and USWC express concern for the due process rights of the parties.

RESPONSE: The Commission disagrees that closing briefs should be required in all cases and declines to amend (1). While some arbitrations will be extremely complex with numerous issues, others may be fairly simple requiring little or

nothing in briefing. The Commission will consider the requests of the parties for briefing. The Commission is mindful of the requirements of due process in all proceedings before it, and amends the rule to strike (2). The arbitrator and the parties will make these decisions mutually prior to the hearing.

RULE XXI. 38.5.4048 ARBITRATOR'S DECISION (1) and (2) remain as proposed.

(3) Parties ~~and nonparty participants~~ may file exceptions to the recommended decision and request oral argument with the commission no later than 10 days after the arbitrator issues the recommended decision.

(4) ~~The 1996 Act gives the commission broad latitude to apply state standards directed toward protecting the public interest.~~ The issues presented shall be resolved~~, consistent with the public interest,~~ to ensure compliance with the requirements of sections 251 and 252(d) of the 1996 Act, applicable FCC regulations, relevant state law and applicable rules or orders of the commission. AUTH: Sec. 69-3-103, MCA; IMP, Secs. 69-3-102 and 69-3-201, MCA

COMMENT: Rule XXI provides for the handling of a recommended arbitration decision when the Commission does not act as the arbitrator. MTA comments that the rule should be made consistent with the "the requirement that the Commission act as the ultimate arbitrator." Further, MTA suggests that the rule be changed to reflect the BRTF recommended legislation which permits a hearings examiner to arbitrate, to delete the reference to non-party participants in (3), and to require the arbitration decision to fall inside the parameters of the parties' positions. USWC also recommends removing the reference to non-party participants. Both MTA and USWC state that subsection (4) is inappropriate. MTA contends that (4) takes great liberty with the language of the 1996 Act in determining that the Act gives the Commission "broad latitude to apply state standards directed toward protecting the public interest." MTA is concerned that this might be interpreted to allow the arbitration decision to fall outside the positions taken by the two parties and should specifically require the decision to fall inside those parameters. USWC states that the rule should be rewritten to reflect that if the Commission is the arbitrator, only the negotiating parties and MCC will be parties to the proceeding, and to eliminate the inference in (4) that the Commission can depart from its role as arbitrator in favor of a role as a regulator of rates and service. AT&T comments that § 252(c) of the 1996 Act does not contain a "public interest" standard and this should be deleted to make the rule consistent with the federal Act.

RESPONSE: The proposed rule is consistent with current Montana law as to the treatment of a decision by a hearings examiner. The process MTA argues for in terms of an "ultimate arbitrator" is provided for in MAPA, which permits the use of the a hearings examiner and requires the hearings examiner to

submit a proposed decision for final approval by the Commission. The provisions of MAPA apply to Commission proceedings and, therefore, a similar procedure need not be adopted for Commission arbitration proceedings. MTA's other concerns have been addressed in other rules. Although the recommendations of the BRTF are not law at this time and the Commission must conform its rulemaking to existing law, this rule is consistent with the BRTF's recommended legislation providing for a hearings examiner to arbitrate and to issue a recommended decision.

USWC does not state what the inference is in (4) that it believes permits the Commission to depart from its role as arbitrator in favor of a role as a regulator of rates and service. The arbitration decision, as specifically stated in (4), requires compliance with §§ 251 and 252(d) of the 1996 Act, applicable FCC regulations, relevant state law and applicable rules or orders of the Commission. In addition, the 1996 Act limits the Commission's discretion in resolving open issues. The Commission assumes that USWC refers to the phrase "consistent with the public interest," to which AT&T has objected. The 1996 Act, by requiring that the local exchange be opened to competition, is intended to facilitate competition in the telecommunications industry in order to benefit not only the carriers competing, but also the consuming public in the form of lower rates and the benefits of technological advances in the industry. An agreement that is negotiated voluntarily is subject to scrutiny in the approval process and the time for approval is longer than for an arbitrated agreement. The logical inference to be taken from the difference in the approval time permitted is that the public interest concerns have been looked at during the arbitration process and, therefore, less time is required for approval of an arbitrated agreement. The Montana Legislature also recognized the importance of this representation by the MCC and consideration of the public interest by the Commission. The Montana Telecommunications Act, 69-3-801, MCA, *et seq.*, emphasizes the importance of the benefits of competition, and also the importance of keeping basic telecommunications service affordable and available. The consuming public is represented by the MCC in proceedings before the Commission. The public interest is always a factor and the Montana Constitution requires a consumer representative to represent that interest. Nonetheless, the Commission will amend the rule to remove this phrase, as the reference to relevant state law includes this consideration. In addition, the first sentence of subsection (4) is not necessary to include in the rule as it is a conclusory statement not necessary to fulfill the purpose for adopting the rule. Rule XXI(3) is amended to be consistent with changes to Rule XIV, and with Rule XXI(4), is amended as above.

RULE XXII. 38.5.4051 OTHER DUTIES OF INCUMBENT LOCAL EXCHANGE CARRIERS (1) Within 10 days after receiving a peti-

tion for arbitration, the incumbent LEC shall ~~serve a copy of the petition on~~ provide notification of the filing in writing to all other telecommunications carriers requesting interconnection, services or network elements from it and with whom it has not negotiated a binding agreement.

(2) Upon filing a petition for approval of a negotiated or arbitrated agreement, the incumbent LEC shall ~~serve copies of the agreement on~~ provide notification of the filing in writing to all other telecommunications carriers requesting interconnection, services or network elements from it pursuant to section 252 of the 1996 Act. ~~The petitioning parties shall also serve copies of the agreement or a comprehensive summary of its contents on all persons on the commission's arbitration service list.~~ AUTH: Sec. 69-3-103, MCA; IMP, Secs. 69-3-102 and 69-3-201, MCA

COMMENT: USWC, MTA and AT&T commented that the notification requirements of Rule XXII are unreasonable. USWC comments that the rule is inappropriate and that there is no reason why the non-petitioning party should serve copies of someone else's petition upon a list of entities specified by the Commission. MTA claims this rule would violate many of the confidentiality concerns it has expressed, would lead to a burgeoning of the negotiation process and ultimately doom it. Again it stresses the private nature of the negotiations between the two parties. MTA also comments that the rule would increase the costs associated with the process and should be deleted. It notes that the arbitration service list could be very large with many national entities tracking agreements for purposes of negotiations in other states and this would cause unnecessary costs to all carriers. AT&T comments that the last sentence in subsection (2) is not consistent with the 1996 Act and should be deleted.

RESPONSE: The notification requirements of this rule are intended to inform persons that have requested negotiations with the incumbent LEC of other similar proceedings which could affect their continuing negotiations. That concern can be addressed by requiring the incumbent LEC to notify others with which it is negotiating that similar issues are being arbitrated. The incumbent LEC is the party most knowledgeable about the other agreements being negotiated. Requiring the incumbent LEC to notify other carriers is consistent with the 1996 Act as it will facilitate the entrance of competitive LECs. The notification does not have to be a copy of the petition and will reduce costs for the incumbent LEC if simple notification in the form of a letter is required. A copy of the letter should also be filed with the Commission. Similarly, the filing of a petition for approval of a negotiated or arbitrated agreement should require, at most, the same type of notification.

The concerns expressed about the costs of serving copies of the agreement or a comprehensive summary of its contents on all persons on the Commission's arbitration service list present reasonable objections. The Commission agrees with the

commenters that the final sentence of (4) should be deleted and amends the rule accordingly.

It is appropriate to address the continuing reference by some commenters to the private nature of the arbitration proceedings here. The negotiations between the parties begin as private proceedings. The 1996 Act encourages the voluntary resolution of as many issues as possible. A wholly negotiated agreement is not subject to the same standards for approval as an arbitrated agreement. When negotiations fail, either of the parties may request mediation, which can still result in a completely negotiated agreement. The parties may ask the Commission to mediate or they may retain a mediator of their choice. They may continue to mediate after they have requested the Commission to arbitrate. There is a specific time period within which the parties may request Commission arbitration. The parties may hire a private arbitrator if they desire and any agreement resulting will be approved as if it is a negotiated agreement.

However, if any party to the negotiation petitions the Commission to arbitrate, their agreement is not merely a private agreement between two parties. The standards for Commission arbitration apply and under Montana law the MCC may intervene in the arbitration to represent the consumer interest. Even an agreement that is completely negotiated by the parties is not comparable to a private arbitration agreement. It must conform to the 1996 Act and must be approved by the Commission as required by the Federal Act and state law. Public utilities have characteristics that put them in a category separate from other privately-owned businesses. They receive special treatment under both State and Federal laws which require them to perform certain functions not imposed on non-regulated businesses. For example, states have granted them the ability to use public rights of way through the power of eminent domain.

Public utilities have not been subject to the same risk factors as purely private businesses. They have been allowed to recoup their investment in plant and equipment through the rates they charge subscribers. Under rate-of-return regulation, they have been guaranteed the opportunity to earn a return on their investment--also through the rates they charge subscribers. Utilities perform functions that are critical to societal functions. In short, their operations are very different from unregulated private businesses. For these stated reasons, among others, public utilities' agreements cannot be treated like purely private agreements between unregulated private businesses. The Commission amends Rule XXII as indicated above.

RULE XXIV. 38.5.4054 APPROVAL OF NEGOTIATED AND ARBITRATED AGREEMENTS; PREEXISTING AGREEMENTS (1) An interconnection agreement shall be submitted to the commission for approval under section 252(e) of the 1996 Act ~~within 15 days~~ after the issuance of the final arbitration order by the com-

mission. The time for submitting the agreement shall be determined by the arbitrator on a case-by-case basis. ~~In the case of arbitrated agreements or, in the case of negotiated agreements, within 15 days after the execution of the agreement. The commission may extend the 15 day deadline for good cause.~~ The nine month time line for arbitration under section 252(b)(4)(C) and ARM 38.5.4020 is not applicable to the approval process.

(2) Petitions for approval of agreements and all relevant accompanying documents shall be filed with the commission in the manner provided for in ARM 38.5.4012. ~~A copy of the petition and accompanying documents shall be served on the commission's telecommunications mailing list no later than the day the petition is filed.~~ Along with the petition for approval of an arbitrated agreement, the parties shall file a proposed notice of the application and opportunity to comment for the commission to serve on its general telecommunications mailing list. Any party to the agreement may submit a petition for approval. Unless filed jointly by all parties, the petition for approval and any accompanying materials should be served on the other signatories by delivery on the day of filing. Any filing not containing the required materials will be rejected and must be refiled when complete. The statutory time lines shall be deemed not to begin until the petition for approval has been properly filed.

(3) through (4)(b) remain as proposed.

(c) agreements containing both arbitrated and negotiated terms must be approved within ~~90~~ 30 days after filing the executed agreement.

(5) remains the same.

(a) Upon the filing by one or more parties of an agreement adopted under the arbitration process, the parties involved in the arbitration ~~and any other interested persons~~ may file written comments supporting or opposing the proposed agreement within 10 days. Responses to the comments may be filed within five days following the filing of the comments.

(i) and (ii) remain the same.

(b) Upon the filing of an agreement resulting from voluntary negotiations, including mediation, ~~of a combination of voluntary negotiations and arbitration,~~ interested persons may file written comments supporting or opposing the proposed interconnection agreement within 21 days following notice by the commission. Responses to the comments may be filed within 10 days following the filing of comments.

(i) The commission will review agreements resulting from voluntary negotiations ~~or a combination of voluntary negotiations and arbitration~~ and will approve or reject an agreement by issuing an order with written findings as to any deficiencies within 90 days after filing of the agreement. If the commission has not issued such order within 90 days, the agreement shall be deemed approved on the 91st day.

(ii) The commission may reject the agreement if it finds that the agreement or any portion of the agreement, discrimi-

nates against a telecommunications carrier not a party to the agreement; or if it finds the implementation of the agreement or portion is not consistent with the public interest, convenience, and necessity. ~~The commission will only apply this standard when reviewing negotiated portions of an agreement resulting from both negotiation and arbitration or when reviewing such an agreement as a whole.~~

(6) The commission may review requests for approval and comments submitted pursuant to those requests at a public meeting and may schedule oral arguments to be presented at a public meeting. The commission does not interpret the approval process required by the 1996 Act as requiring an contested case type hearing. However, if reasonable or necessary, the commission may hold a hearing under the contested case procedures outlined in the Montana Administrative Procedure Act.

(7) remains as proposed.

(8) The commission may approve a negotiated interconnection agreement even if the terms of the agreement do not comply with the requirements of this subchapter as long as the agreement fully complies with section 252(c) of the 1996 Act.

(9) and (10) remain as proposed.

(a) If the commission approves a preexisting agreement, it shall be made available to other parties upon request.

(b) The commission may reject a preexisting agreement on the grounds that it is inconsistent with the public interest or for other reasons set forth in section 252(e)(2) of the 1996 Act. AUTH: Sec. 69-3-103, MCA; IMP, Secs. 69-3-102 and 69-3-201, MCA

COMMENT: Several subsections of Rule XXIV are objected to by various commenters. AT&T, USWC and MTA all question the interpretation of the Act in Rule XXIV(5)(b) relating to time limits for approval of combination arbitrated and negotiated agreements. The rule proposes to treat such agreements in such a way that arbitrated sections must be approved within 30 days and negotiated sections will be approved in 90 days, the same as an entirely negotiated agreement. MTA further contends that the approval process must be completed within the nine-month period prescribed for negotiation and arbitration under the Federal Act. With the exception of subsection (10) which was addressed in comment and response on Rule XXIII, USWC commented that the proposed rule seems to fairly capture the requirements of the Act.

RESPONSE: The interpretation of the 1996 Act included in Rule XXIV is being used in a few states which have already adopted rules for arbitration pursuant to the 1996 Act. It seems patently unfair to permit only 30 days for review of an agreement when many or most of the terms and conditions are negotiated and only a few are arbitrated. A party filing a petition for arbitration is thus able to determine that its agreement will have to be expedited to fit within the 30-day period because an agreement not approved during that time is deemed approved on the 31st day. This limits the time for

input from interested persons during the approval process, whereas a 90-day period would be more consistent with the approval of the negotiated terms and conditions as the Commission does not address these terms in the arbitration process.

The 1996 Act is not clear on this point, and although the proposed rule arguably is consistent with the Act, the Commission will amend Rule XXIV as suggested by AT&T, USWC and MTA to provide that arbitrated agreements must be approved within 30 days. Rule XXIV is amended to reflect this change.

The Commission believes that the Act is clear, however, in that the approval process is not a part of the nine-month period and declines to amend Rule XXIV(1) as suggested by MTA.

COMMENT: AT&T objects to the requirement in Rule XXIV(2) that a copy of the petition for approval and all accompanying documents be served on the Commission's telecommunications mailing list.

RESPONSE: The time period for approval of agreements is extremely brief and the time for interested persons to respond is severely restricted for agreements which are arbitrated by the Commission. However, an interested party has the opportunity to observe the proceedings in an arbitration and should not be prejudiced by not receiving this information at the time it is filed with the Commission. Negotiated agreements allow more time for interested parties to react and the Commissions's existing notice procedures should be sufficient. In order to allow adequate time for commenting during the approval process, notice must be given to persons on the telecommunications mailing list as early as possible. The Commission amends Rule XXIV(2) to remove the notification requirement and to require that the parties submit a proposed notice of the application and opportunity to comment to enable the Commission to provide notice as early as possible.

COMMENT: MTA comments that Rule XXIV(5) should be amended to exclude reference to "other interested persons" because they have no standing to file comments regarding a negotiated or arbitrated agreement.

RESPONSE: The Commission agrees that the reference should be deleted to conform to the amendment to Rule XIV.

COMMENT: MTA comments that Rule XXIV(7) is not permitted because once the arbitration agreement is approved or disapproved, the Commission would lose jurisdiction to act on it. This section permits parties to an agreement that has been rejected to petition for reconsideration or resubmit the agreement for approval if the parties have remedied the deficiencies found by the Commission in its order. MTA further states that such post-decision relief is not provided for in the 1996 Act.

RESPONSE: MTA is correct in stating that this is not provided for in the Federal Act. The Act is silent on this point. However, § 252(e)(3) of the 1996 Act preserves the authority of the Commission by providing that "notwithstanding [the grounds for rejection in paragraph (2)], but subject to section 253, nothing in [§ 252] shall prohibit a State commis-

sion from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service qualify standards or requirements." The Commission believes subsection (7) is not inconsistent with the Federal Act and declines to amend this subsection.

COMMENT: AT&T comments that Rule XXIV(6) should be amended to exclude the last sentence which provides that the Commission will hold a hearing using the MAPA contested case procedures if a hearing is reasonable or necessary.

RESPONSE: As explained in subsection (6), the Commission does not interpret the approval process to require a contested case type hearing. However, if a hearing is required, MAPA applies. Because the approval proceeding is not a rulemaking, it must be conducted with the contested case procedures, which may be informal if the parties agree. *See* 2-4-603, MCA.

COMMENT: AT&T comments that Rule XXIV(8) should be clarified to require compliance with § 252 of the 1996 Act. The Administrative Code Committee staff also questioned this provision.

RESPONSE: The Commission amends the proposed subsection (8) to include this clarification.

RULE XXV. 38.5.4055 APPROVED AGREEMENTS (1) The commission retains continuing jurisdiction and will maintain regulatory oversight of the approved interconnection agreements to the extent permitted by law. AUTH: Sec. 69-3-103, MCA; IMP, Secs. 69-3-102 and 69-3-201, MCA

COMMENT: MITS, MTA and USWC all object to Rule XXV which provides that the Commission retains continuing jurisdiction and will maintain regulatory oversight of the approved interconnection agreements. USWC comments that the appropriateness of this rule depends upon how the concepts of "continuing jurisdiction" and "regulatory oversight" are applied, and if applied to mean that the Commission can change the terms of an interconnection agreement, it is inappropriate. MITS comments that the Commission lacks judicial power and cannot use this rule to prevent any party subject to Commission jurisdiction from seeking judicial review of any Commission order.

RESPONSE: The Commission intends to do no more than is permitted by law and modifies Rule XXV as above.

RULE XXVII. 38.5.4065 UNBUNDLING OF LOCAL EXCHANGE NETWORK ELEMENTS (1) remains as proposed.

(2) At a minimum LECs shall unbundle the local loop, network interface device, switching, transport, databases and signaling systems. Unbundling of networks shall include access to necessary customer databases, such as, but not limited to, 9-1-1 databases, billing name and address, directory assistance, local exchange routing guide, line information database and 800 databases. Unbundling shall also include operator services, directory assistance, and signaling system functionalities. If a LEC receives a bona fide request for the

purchase of a network element, the LEC receiving the request for unbundling shall have the burden of proving that the provision of the network element is not technically feasible.

(3) The commission may ~~conclude that the unbundling of a network element is technically feasible but decline to unbundle the network element. The commission may~~ decline to unbundle a network element if it determines the network element is proprietary and the proposed telecommunication service can be provided through the use of other, nonproprietary unbundled network elements.

(4) remains as proposed

(5) Once an unbundled network element has been made available to an interconnecting carrier, on a contractual basis, the providing carrier shall make that unbundled network element available for purchase for all similar requests to the extent that technical compatibility exists between the LEC and the interconnecting carrier.

(6) remains as proposed. AUTH: Sec. 69-3-103, MCA; IMP, Secs. 69-3-102 and 69-3-201, MCA

COMMENT: AT&T comments that Rule XXVII(2) and (4) are inconsistent with the 1996 Act because they require new entrants to unbundle their networks, a requirement not found in the Act. AT&T also states that (2) needs to include an expanded list of network elements that an incumbent LEC must unbundle if it is to mirror the elements identified by the FCC. AT&T proposes modifying (3) to remove any ambiguity that the first sentence creates.

MTA objects to certain provisions in (1), (2), (4) and (5). MTA argues that LECs should not be required to unbundle any network element until a bona fide request for interconnection has been received; competitors "should not have direct access to customer databases until systems are in place that can assure the confidentiality of customer information and the integrity of the databases is not jeopardized;" the Commission should require requesting parties to prove that the request is technically feasible and to pay for security systems that adequately protect the databases; and the rule should specifically authorize LECs to negotiate rates that reflect the costs of implementation and special work. MTA also objects to the requirement that unbundled elements be generally available once they are provided to any carrier, stating that the requirement should only apply to the extent that technical compatibility exists between the LEC and the interconnecting carrier. USWC and MTA both comment that the rule fails to recognize locational technical feasibility.

RESPONSE: The Commission agrees with USWC and MTA regarding the need to clarify that an unbundled element must be made available only to the extent that it is technically feasible at the location requested. The Commission also agrees with AT&T's suggestion for modifying (3) and with the proposal that (2) be expanded to included the list of network elements that an incumbent LEC must unbundle to more closely mirror the elements identified by the FCC.

The Commission disagrees with AT&T's comments on (2) and (4) which require all LECs to provide unbundling of their network elements. For true competition to exist, once facilities based competitive LECs operate in Montana, all LECs must unbundle network elements. If only the incumbent LECs are required to unbundle their systems, there will be a substantial loss of economic and/or operational efficiency. If telecommunication carriers wanting to provide local exchange service are limited to obtaining elements from the incumbent LEC and the incumbent LEC is foreclosed from obtaining elements from its competitors, subscribers are not well served as they may not benefit from technological improvements employed by the new LEC because it is not obligated to provide its network elements to other telecommunication carriers.

RULE XXVIII. 38.5.4068 EXEMPTIONS, SUSPENSIONS AND MODIFICATIONS FROM ~~THE~~ INTERCONNECTION REQUIREMENTS ~~OF THIS SUBCHAPTER~~ ~~(1) The commission shall determine whether a LEC is entitled to exemption from the requirements of this subchapter.~~

~~(2)~~ (1) The ~~requirements of this subchapter~~ incumbent LEC interconnection requirements in § 251(c) of the 1996 Act shall not apply to a rural LEC until:

(a) the rural LEC has received a bona fide request for interconnection, services or network elements; and

(b) the commission ~~determines that such request is not unduly economically burdensome, is technically feasible, and is consistent with universal service considerations~~ terminates the exemption according to (2).

(2) The party making a bona fide request of a rural LEC for interconnection, services, or network elements shall submit a notice of its request to the commission. The commission shall conduct an inquiry to determine whether to terminate the exemption. Within 120 days of receiving notice of the request, the commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with 47 U.S.C. 254 as it existed on February 8, 1996, except subsections (b)(7) and (c)(1)(D). Upon termination of the exemption, the commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with the federal communications commission's regulations.

(3) A LEC with fewer than 2 percent of the nation's subscriber lines installed in the aggregate nationwide may petition the commission for a suspension or modification of the application of a requirement or requirements of § 251(b) or (c) of the 1996 Act to telephone exchange service facilities specified in the petition. The commission shall grant the petition for the suspension or modification to the extent and for the duration that the commission determines is necessary

(a) to avoid a significant adverse economic impact on users of telecommunications services generally;

(b) to avoid imposing a requirement that is unduly economically burdensome; or

(c) consistent with the public interest, convenience, and necessity.

(4) The commission shall act upon any petition filed under (3) above within 180 days after receiving the petition. Pending such action, the commission may suspend enforcement of the requirement to which the petition applies with respect to the petitioning carrier or carriers.

~~(3) Upon receipt of a bona fide request for interconnection, services or access to unbundled network elements, a rural LEC must prove to the commission that the LEC is entitled to continued exemption from the requirements of this subchapter.~~

~~(4) In order to justify continued exemption under this rule once a bona fide request has been made, a rural LEC must offer evidence that the application of the requirements in this subchapter would likely cause undue economic burden beyond the economic burden that is typically associated with efficient competitive entry.~~ AUTH: Sec. 69-3-103, MCA; IMP, Secs. 69-3-102 and 69-3-201, MCA

COMMENT: MTA, MITS, and AT&T all comment that proposed Rule XXVIII is inconsistent with the standards in the 1996 Act and should be changed accordingly. MTA believes that the exemptions in the Act should apply rather than the Commission's determination as proposed in (1). MTA comments that (2) appears to exempt all rural LECs from all of the interconnection rules, and that the standards for removing exemptions vary between (2) and (4). Both MTA and MITS comment that the provisions in the 1996 Act that allow small LECs to petition for suspensions or modifications of the requirements of § 251(b) of the 1996 Act are absent from Rule XXVII. Finally, MITS comments that (4) contravenes Congress's intent by requiring exempted LECs to take affirmative action to maintain their exemptions.

RESPONSE: The Commission agrees with commenters that the rules should more closely mirror the exemption, suspension and modification provisions contained in § 251(f) of the 1996 Act.

Although the "burden of proof" language is deleted from Rule XXVII, in most cases the rural LEC may be the only entity that knows whether or not interconnection is unduly economically burdensome or technically infeasible. The Commission will likely need to look to the LECs for such evidence when making its determinations on continuing rural LEC's exemptions from the requirements of § 251(b) or suspending or modifying the requirements in § 251 (b) or (c) for rural LECs.

RULE XXX. 38.5.4071 TELEPHONE NUMBER PORTABILITY

(1) remains as proposed.

(2) A facilities-based LEC not offering permanent number portability shall provide interim number portability. Interim number portability shall be provided using remote call for-

warding, direct inward dialing or any other comparable and technically feasible method.

~~(a)~~ Prices for interim number portability using remote call forwarding or direct inward dialing shall be set at a level that recognizes the relative inferior quality of the service.

~~(b) LECs shall not charge any non-recurring expenses to recover service order charges, installation, and similar up-front expenses associated with the provision of interim number portability.~~

(3) Pursuant to FCC regulations, beginning January 1, 1999, all facilities-based LECs that control the provision of numbers shall provide permanent number portability within six months after receiving a specific request by another telecommunications carrier. AUTH: Sec. 69-3-103, MCA; IMP, Secs. 69-3-102 and 69-3-201, MCA

COMMENT: USWC and MTA object to Rule XXX on number portability because LECs are entitled to recover their costs of providing it under the 1996 Act and the rule as proposed does not recognize that if non-recurring costs are not charged to the new entrant then the general body of ratepayers will have to absorb the costs. MTA also suggests that the rule should clarify that any LEC that controls the provision of numbers has the responsibility to provide number portability. AT&T believes the rule is too restrictive and should be amended to substitute "rate center" for NXX code in (1).

RESPONSE: The Commission agrees with MTA and USWC that the proposed rule regarding non-recurring expenses should be withdrawn. Appropriate pricing and equity require that the entity creating the expense should bear the cost. Subsection (3) is also amended to clarify the responsibility to provide permanent number portability. The Commission does not agree with AT&T's suggestion that number portability should be within the rate center. Number portability should require no more than is presently supplied to incumbent LEC customers who move to a location in the same rate center but would not be served by the same wire center. Rule XXX is amended as above.

RULE LVI. 38.5.4074 MINIMUM SERVICE STANDARDS (1) All regulated LECs shall comply with this commission's Telecommunication Service Standards, ARM 38.5.3301 through 38.5.3371, as these currently exist and as may be modified by this commission. AUTH: Sec. 69-3-103, MCA; IMP, Secs. 69-3-102 and 69-3-201, MCA

COMMENT: Rules LVI and LVII generated strong comments raising the parties' concern that the Commission is attempting to regulate cooperatives. MTA comments that the Commission already has a rule similar to Rule LVI at ARM 38.5.3301 through 38.5.3371 and this rule is unnecessary. MTA also states that Rule LVII unnecessarily mimics the requirements of the 1996 Act. MITS states that its members see these two rules as an attempt to regulate the cooperatives along with other regulated companies. MITS further states that the rules

should be deleted and stresses that the cooperatives are exempt from regulation by this Commission and the reasons for that exemption obviate the need to apply service standards to them. USWC states that Rules LVI and LVII on service standards seem appropriate, noting that the application of the service quality rules has been waived pursuant to a settlement agreement in a Montana district court action filed by the Commission.

RESPONSE: The Commission is surprised at the reaction these rules precipitated and strongly emphasizes that the purpose of proposing the two rules on service standards was to clarify that new LECs are subject to the Commission's minimum service standards and to encourage the incorporation of service standards in interconnection agreements. The Commission's service standards only apply to regulated public utilities as defined by Montana law and do not apply to unregulated entities such as cooperatives. The Commission amends Rule LVI to clarify this point.

RULE LVIII. 38.5.4085 SEVERABILITY (1) If any rule in this subchapter is held invalid or any part of any rule in this subchapter is held invalid, the remainder or its application to other situations or person(s), shall not be affected. AUTH: Sec. 69-3-103, MCA; IMP, Secs. 69-3-102 and 69-3-201, MCA

COMMENT: The Administrative Code Committee staff commented that the Rule LVIII(3) should be amended to insert a missing word.

RESPONSE: The Commission agrees and amends the rule as above.

4. The Department has withdrawn the following rules:

RULE III. COMMISSION NOTIFICATION

COMMENT: Rule III describes a process for Commission notification when a LEC receives a request for negotiations. MTA comments that any notification process should be confidential and that a new competitor or an incumbent should not be required to advertise its business plans, which can easily be classified as trade secrets, to the rest of the industry. USWC comments that the rule is unnecessary because the Commission is not called upon to act until one of the negotiating parties requests mediation or arbitration. USWC further states that the Commission has no reasonable basis for requiring the parties to notify it of negotiations or to provide a status report on those negotiations. USWC also states that the negotiation process would be harmed if the status of the parties' negotiations is injected into the public domain. At a minimum, USWC suggests that (1) should be deleted so that only one notification is required, with the burden to notify the Commission placed on the party requesting negotiation.

RESPONSE: The Commission has a small staff with which to accomplish a heavy workload, much of which is generated by the

1996 Act. Rule III was proposed so that the Commission would have information to assist in planning and managing its work load. Prior notification has not been a problem with the petitions the Commission has received so far. Therefore, the Commission will defer to the concerns expressed by the commenters and withdraw Rule III. Although the Commission will not require notification, it encourages negotiating parties to voluntarily provide any information about their negotiations which may help the Commission administratively.

RULE IV. DUTY TO NEGOTIATE

COMMENT: The duty to negotiate included in Rule IV generated numerous comments. USWC commented that this duty arises under federal statute, and does not need to be restated in the Commission's rules. USWC further states that it is inappropriate for the Commission to attempt to legislate evidentiary presumptions by administrative rule as this power is vested exclusively in the Montana Legislature. USWC also asserts that the Commission has no power to adjudicate claims of bad faith negotiations and impose sanctions.

MTA comments that Rule IV(1) improperly raises a presumption of bad faith upon refusal to provide cost or other relevant information when requested by another party without providing for review for reasonableness for purposes of maintaining confidentiality; Rule IV(1)(d) refers to certification which is non-existent in Montana and which should be removed; Rule IV(3) proposes to vest in the Commission the authority to impose sanctions which the Commission is not authorized to do; and Rule IV(5) invokes the Commission's existing complaint procedures for allegations of failure to negotiate in good faith, yet the Commission has no jurisdiction over telephone cooperatives.

AT&T also commented about the Rule IV(1) presumption of bad faith for refusal to provide cost and other relevant information, stating that it goes beyond the duties imposed by the FCC Order in imposing these duties on the new entrant.

RESPONSE: The Commission has accommodated a number of the concerns expressed in comments to other rules by withdrawing rules rather than restating federal law. The negotiating parties have the duties included in the proposed rule imposed on them by FCC rules that are not subject to the 8th Circuit stay. Therefore, it is unnecessary to restate them here and the Commission withdraws Rule IV in its entirety.

RULE XVIII. BURDEN OF PROOF IN ARBITRATION PROCEEDINGS

COMMENT: Rule XVIII imposes the burden of proof on incumbent LECs with respect to all issues, presuming that the critical information relevant to costs and other issues will be within their control and possibly known only to them. TRA and AT&T had no specific comment on this and support the inclusion. USWC comments that the rule is wholly inappropriate and that the Commission does not have the power to arbitrarily assign the burden of proof in an arbitration proceeding to one

party. Further, it claims that this rule gives the Commission the power to predetermine that the incumbent LEC will always lose in arbitration proceedings if there is a conflict in the evidence presented. MITS comments that this rule assumes that the incumbent LEC will have every conceivable piece of critical information on every conceivable issue in any arbitration. MITS also cites an Alaska case to assert that the party seeking the change in the status quo has the burden of proof, and in most cases, according to MITS, this would be the party seeking interconnection. MTA comments that although it may make sense to place the initial burden on the party that holds the information, a blanket rule raises serious concerns that the burden of proof would be left to one party for all reasons and purposes. MTA contends that the Commission cannot alter the law by administrative rules and that imposing the burden on the incumbent LEC would violate due process rights.

RESPONSE: In many cases, it may be appropriate to impose the burden of proof on the incumbent LEC. The incumbent will often possess information which is critical to the decision and to which the interconnecting carrier has no access. Some states have imposed the burden of proof in all cases on the incumbent LEC. Although the Commission does not agree that the burden should be placed on the party seeking interconnection as argued by MITS, there is merit in MITS' suggestion that the rule as proposed could be unfair. The Commission believes that the issue of placing the burden of proof on a particular party is too complex to be addressed without a great deal of further consideration and should be addressed with regard to the particular circumstances of each case. Rule XVIII is withdrawn in its entirety.

RULE XX. STAFF INVOLVEMENT

COMMENT: MTA and USWC both object to Rule XX. They contend that staff is not a party to the arbitration and should not be developing the record through questioning the witnesses or issuing discovery. USWC states that the if the staff is to fulfill its role as the "helpmate" for the Commission in the approval process, it must steer well clear of even the slightest hint of an advocacy position.

RESPONSE: The role of Commission staff has been thoroughly discussed in the Commission's response to comments on Rule II(2). The Commission withdraws this rule as it is not necessary.

RULE XXIII. PREEXISTING AGREEMENTS

COMMENT: Rule XXIII requires the filing of all preexisting interconnection agreements between an incumbent LEC and a telecommunications carrier for Commission approval. USWC, MITS and MTA all comment that this rule should be deleted. USWC claims it is contrary to the Act, an argument also made with the FCC. MITS and MTA also reiterate arguments that failed at the federal level. MTA further comments that this

proposed rule and Rule XXIV(10) both pertain to approval of pre-existing agreements.

RESPONSE: Despite the arguments made by the parties in response to this proposed rule, the Commission must follow federal law on this matter. Rule XXIII repeats the requirements from the FCC Order. The Commission does not agree completely with MTA's assessment that requirements to file pre-existing agreements never come into play unless arbitration is requested or until a fully negotiated agreement is filed for approval, but does agree that all pre-existing interconnection agreements need not be filed for Commission approval at this time. The Commission does not intend to require the filing of all preexisting agreements unless it becomes reasonable and necessary to do so. Unless mandated by Federal law, the Commission will not require the filing of all preexisting agreements. The Commission withdraws this rule and amends Rule XXIV(10) to include the provisions of (2) and (3) of Rule XXIII.

RULE LVII. MINIMUM INTERCONNECTION SERVICE REQUIREMENTS

COMMENT: (See comment and response to Rule LVI.)

RULE XXVI. INTERCONNECTION

RULE XXIX. METHODS OF OBTAINING INTERCONNECTION AND ACCESS TO UNBUNDLED ELEMENTS

RULE XXXI. STANDARDS FOR PHYSICAL COLLOCATION AND VIRTUAL COLLOCATION

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RULE LV. RENEGOTIATION OF EXISTING NON-RECIPROCAL ARRANGEMENTS

Comments on interconnection (Rules XXVI, XXIX and XXXI) and pricing rules (XXXII through LV):

COMMENT: USWC comments that the duty to interconnect in accordance with the Act is imposed on carriers by federal law, not the Commission's administrative rules, and the Commission does not have the authority to impose such rules on many of the carriers affected by the 1996 Act. In many of its comments regarding specific rules, MTA argues that the proposed rules inappropriately place a burden of proof on the incumbent LEC. MTA generally believes any burden of proof should be on the carrier requesting the interconnection. MITS echos this concern stating that the rules inappropriately place the burden of proof on every issue on the small incumbent LECs. MTA also comments that there is no reason for the Commission's rules to mimic the Federal Act. MITS comments that the proposed rules seem to be "designed to harm MITS' regulated members," although significant reconsideration of them would be a step in the right direction toward restoring its members' trust and confidence in the Commission.

RESPONSE: In light of the comments, and with the uncertainty surrounding the appeals of the FCC's interconnection rules, the Commission chooses to withdraw the proposed interconnection rules in their entirety. Rule XXVI, as originally proposed, is nearly identical to one of the FCC's rules which carriers are obligated to follow (47 C.F.R. § 51.305). The Commission withdraws Rule XXVI and Rule XXIX relating to interconnection. Similarly, the FCC's rules on collocation are not stayed and because physical and virtual collocation are extremely technical issues that the Commission must confront during arbitration proceedings, Rule XXXI is withdrawn also.

COMMENT: Rules XXXII through LV are all related to pricing. MTA, MITS and USWC all object to inclusion of pricing rules. Both MITS and MTA argue further that the pricing rules will harm negotiations. MTA, MITS and USWC all provided numerous specific objections to these rules and suggested revisions if the Commission chooses to adopt the pricing rules. The Administrative Code Committee staff commented that Rule XLVII(5) should be amended to clarify the meaning.

RESPONSE: The Commission generally concurs with the economic theory of forward-looking costs. However, the FCC's rules are too restrictive and may not allow states like Montana to establish rates that are tailored to local market conditions. The Commission has embraced economic costing for

many years, and routinely uses marginal cost of service studies to guide pricing decisions. The Commission believes its costing and pricing practices are generally consistent with the standards in the 1996 Act. The Commission will adhere to those standards when establishing rates during arbitrations. The Commission also agrees with both MTA and MITS that these pricing proxies may taint the negotiation process. The Commission believes these detailed rules are not necessary and withdraws the rules identified above that are related to pricing and which are affected by the 8th Circuit's stay based on jurisdictional grounds.

DAVE FISHER, CHAIRMAN

Reviewed By Robin A. McHugh

CERTIFIED TO THE SECRETARY OF STATE JANUARY 27, 1997.

NOTICE OF FUNCTIONS OF ADMINISTRATIVE CODE COMMITTEE

The Administrative Code Committee reviews all proposals for adoption of new rules, amendment or repeal of existing rules filed with the Secretary of State, except rules proposed by the Department of Revenue. Proposals of the Department of Revenue are reviewed by the Revenue Oversight Committee.

The Administrative Code Committee has the authority to make recommendations to an agency regarding the adoption, amendment, or repeal of a rule or to request that the agency prepare a statement of the estimated economic impact of a proposal. In addition, the Committee may poll the members of the Legislature to determine if a proposed rule is consistent with the intent of the Legislature or, during a legislative session, introduce a bill repealing a rule, or directing an agency to adopt or amend a rule, or a Joint Resolution recommending that an agency adopt or amend a rule.

The Committee welcomes comments from the public and invites members of the public to appear before it or to send it written statements in order to bring to the Committee's attention any difficulties with the existing or proposed rules. The address is Room 138, Montana State Capitol, Helena, Montana 59620.

HOW TO USE THE ADMINISTRATIVE RULES OF MONTANA AND THE MONTANA ADMINISTRATIVE REGISTER

Definitions: Administrative Rules of Montana (ARM) is a looseleaf compilation by department of all rules of state departments and attached boards presently in effect, except rules adopted up to three months previously.

Montana Administrative Register (MAR) is a soft back, bound publication, issued twice-monthly, containing notices of rules proposed by agencies, notices of rules adopted by agencies, and interpretations of statutes and rules by the attorney general (Attorney General's Opinions) and agencies (Declaratory Rulings) issued since publication of the preceding register.

Use of the Administrative Rules of Montana (ARM):

Known Subject Matter	1. Consult ARM topical index. Update the rule by checking the accumulative table and the table of contents in the last Montana Administrative Register issued.
Statute Number and Department	2. Go to cross reference table at end of each title which lists MCA section numbers and corresponding ARM rule numbers.

ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies which have been designated by the Montana Administrative Procedure Act for inclusion in the ARM. The ARM is updated through September 30, 1996. This table includes those rules adopted during the period October 1, 1996 through December 31, 1996 and any proposed rule action that was pending during the past 6-month period. (A notice of adoption must be published within 6 months of the published notice of the proposed rule.) This table does not, however, include the contents of this issue of the Montana Administrative Register (MAR).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through September 30, 1996, this table and the table of contents of this issue of the MAR.

This table indicates the department name, title number, rule numbers in ascending order, catchphrase or the subject matter of the rule and the page number at which the action is published in the 1995 and 1996 Montana Administrative Registers.

To aid the user, the Accumulative Table includes rulemaking actions of such entities as boards and commissions listed separately under their appropriate title number. These will fall alphabetically after department rulemaking actions. Accumulative Table entries will be listed with the department name under which they were proposed, e.g., Department of Health and Environmental Sciences as opposed to Department of Environmental Quality.

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