

PENNSYLVANIA PUBLIC UTILITY COMMISSION
Uniform Cover and Calendar Sheet

1. REPORT DATE: October 9, 2002	2. <u>BUREAU AGENDA NO.</u> OCT-2002-TSM-0162* REV
3. BUREAU: Transportation and Safety	
4. SECTION(S): MCS&E	5. <u>PUBLIC MEETING DATE:</u>
6. APPROVED BY: Director: Hoffman 3-3846 <i>MEH</i> Supervisor: Zeigler 3-5946	October 10, 2002
7. PERSONS IN CHARGE: Travitz 7-5513 <i>A</i>	DOCKETED NOV 4 2002
8. DOCKET NO.: A-00119007, F. 2	

9. (a) **CAPTION** (abbreviate if more than 4 lines)
(b) **Short summary of history & facts, documents & briefs**
(c) **Recommendation**

(a) Application of Williams Moving & Storage, Inc., Warrendale, Butler County, a corporation of the Commonwealth of Pennsylvania, for the approval of the transfer to applicant of all of the common carrier household goods in use rights held by B & B Systems, Inc., t/d/b/a Tosh Moving & Storage, Inc. at A-00105085, F. 2.

(b) Transferor proposes to transfer all of its P.U.C. common carrier household goods in use rights for a total consideration of \$2,000.

(c) The Bureau of Transportation and Safety recommends that the Commission adopt the proposed tentative order approving the transfer application. A copy of this tentative order shall be published in the Pennsylvania Bulletin for a ten (10) day public comment period. A certificate to be issued to the applicant upon the order becoming final and upon compliance with the requirements in the order. The certificate issued to the transferor to be canceled by supplemental order.

10. **MOTION BY:** Commissioner Chm. Thomas Commissioner Wilson - Yes
Commissioner Fitzpatrick - No
SECONDED: Commissioner Bloom Commissioner Pizzingrilli - Yes

CONTENT OF MOTION: Staff recommendation adopted.

Statement of Chairman Glen R. Thomas attached.

Concurring & Dissenting Statement of Commissioner Terrance J. Fitzpatrick attached.



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE
REFER TO OUR FILE

October 10, 2002

A-00119007F0002

HENRY M WICK JR ESQ
1450 TWO CHATHAM CENTER
PITTSBURGH PA 15219-3427

DOCUMENT
FOLDER

DOCKETED

OCT 11 2002

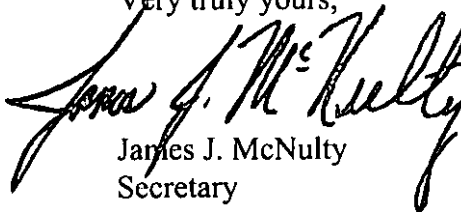
Application of Williams Moving & Storage, Inc...

To Whom It May Concern:

This is to advise you that the Commission in Public Meeting on October 10, 2002 has adopted a Tentative Order in the above entitled proceeding.

A Tentative Order has been enclosed for your records.

Very truly yours,



James J. McNulty
Secretary

Enclosure
tab

SRB

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265

Public Meeting held October 10, 2002

Commissioners Present:

Glen R. Thomas, Chairman, Statement attached
Robert K. Bloom, Vice-Chairman
Aaron Wilson, Jr.
Terrance J. Fitzpatrick, Statement Dissenting in part attached
Kim Pizzingrilli

Application of Williams Moving & Storage, Inc., for the transfer of all of the operating right(s) of B & B Systems, Inc., t/d/b/a Tosh Moving & Storage, Inc., under the certificate issued at A-00105085, F. 2, subject to the same limitations and conditions.

A-00119007

F. 2

DOCKETED
OCT 11 2002

Wick, Streiff, Meyer, O'Boyle & Szeligo, P.C. by Henry M. Wick, Jr. for the applicant.

**DOCUMENT
FOLDER**

**TENTATIVE
ORDER**

BY THE COMMISSION:

This matter comes before the Commission on an application filed May 24, 2002. Public notice of the application was given in the Pennsylvania Bulletin of August 4, 2002. The unopposed application is certified to the Commission for its decision without oral hearing.

DISCUSSION AND FINDINGS

Williams Moving & Storage, Inc. (applicant, transferee or Williams) seeks to acquire all the household goods in use rights from B & B Systems, Inc., t/d/b/a Tosh Moving & Storage, Inc. Applicant is currently certificated to transport property, excluding household goods in use, between points in Pennsylvania. Transferee will operate from facilities located at 740 Commonwealth Drive, Warrendale, Butler County. Communications will be by regular telephone. Williams will utilize two (2) straight trucks and two (2) trailers. A comprehensive safety and maintenance program is in effect.

The balance sheet of the transferee as of April 25, 2002 shows current and total assets of \$1,000, no liabilities, for total owner's equity of \$1,000.

The total consideration for the right(s) is \$2,000.

A review of the record before us indicates that the applicant possesses the requisite experience and equipment to provide the proposed service.

The authority to be transferred has been operated by the transferor, therefore, it is presumed that there is a continuing need, which may be overcome only by evidence to the contrary. In re: Byerly, 440 Pa. 521 (1970); Hostetter v. Pa. P.U.C., 160 Super. Ct. 94 (1947). Since the record is void of any such evidence, this presumption of continuing public need applies in this transfer proceeding.

We find:

1. The applicant is fit, willing and able to provide the service proposed.
2. Transfer of the authority is in the public interest and is necessary for the continued accommodation and convenience of the public; **THEREFORE,**

IT IS ORDERED: That the transfer application be and is hereby tentatively approved granting the following right(s):

To transport, as a common carrier, household goods, in use:

- (1) between points in the borough of Freedom, Beaver County, and within forty (40) miles by the usually traveled highways, of the limits of the said borough; and
- (2) from points in the county of Beaver, to other points in Pennsylvania, and vice versa.

subject to the following general conditions:

1. That the operating authority granted herein, or now held, or subsequently granted to the applicant to the extent that it is duplicative, shall not be construed as conferring more than one operating right.
2. That the approval hereby given is not to be understood as committing the Commission, in any proceedings that may be brought before it for any purpose, to fix a valuation on the property and/or right(s) to be acquired by applicant from the present certificate holder equal to the consideration to be paid therefor, or

equal to any value that may be placed thereon by applicant, or to approve or prescribe rates sufficient to yield a return thereon.

3. That the certificate holder shall not transfer, sell or in any way convey any of its outstanding capital stock to any individual, partnership, corporation or any other entity, without the prior filing of an application and approval thereof by the Commission under Section 1102(a)(3) of Title 66, PA C.S.A.

IT IS FURTHER ORDERED: The applicant shall not engage in any transportation granted in this application until the following is submitted to the Commission:

1. A tariff establishing just and reasonable rates.

IT IS FURTHER ORDERED: That a copy of this Tentative Order be published in the *Pennsylvania Bulletin* giving the public ten (10) days from the date of publication to file written comments or request oral hearing.

IT IS FURTHER ORDERED: That absent the filing of adverse public comment or request for oral hearing within ten (10) days from the date of publication, the Tentative Order shall become final without further Commission action.

IT IS FURTHER ORDERED: That upon the Tentative Order becoming final and upon compliance with the requirements herein before set forth, a certificate shall issue evidencing the Commission's approval of the right to operate as above determined.

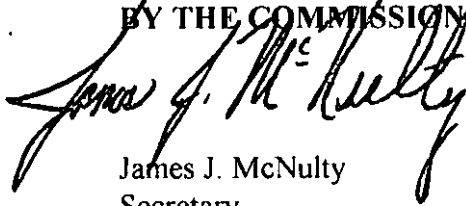
IT IS FURTHER ORDERED: That the authority granted herein, to the extent that it duplicates authority now held by or subsequently granted to the applicant, shall not be construed as conferring more than one operating right.

IT IS FURTHER ORDERED: That in the event said applicant has not, on or before sixty (60) days from the date that the Tentative Order becomes final, complied with the requirements hereinbefore set forth, the application shall be dismissed without further proceedings.

IT IS FURTHER ORDERED: That you must demonstrate safety fitness by completing a Safety Fitness Review. You will be contacted by the Commission's Bureau of Transportation and Safety, which will schedule a review to be completed within 180 days of the date your certificate is issued. Failure to submit to a Safety Fitness Review or to attain a satisfactory evaluation may result in cancellation of the certificate.

IT IS FURTHER ORDERED: That upon compliance with this tentative order, the right(s) granted the transferor, B & B Systems, Inc., t/d/b/a Tosh Moving & Storage, Inc. at A-00105085, F. 2 be canceled and the record be marked "closed".

BY THE COMMISSION



James J. McNulty
Secretary

(SEAL)

ORDER ADOPTED: October 10, 2002

ORDER ENTERED: OCT 10 2002

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105**

PUBLIC MEETING:
OCTOBER 10, 2002

Application of Suburban Emergency Medical Services, Easton, Northampton County, for the right to begin to transport, as a common carrier, by motor vehicle, persons in paratransit service

OCT-2002-TSM-0146 2ndR*
Docket No. A-00118866

Application of Heritage Hills Associates, t/d/b/a Heritage Hills Golf Resort & Conference Center, York, York County, for the right to begin to transport, as a common carrier, by motor vehicle, persons in limousine service

OCT-2002-TSM-0153 2ndR*
Docket No. A-00119000

Application of McNaughton Latrobe Moving, Inc. (applied as Mark S. Williams and has since incorporated), Indiana County for the transfer to applicant of all of the common carrier rights held by Latrobe Moving and Storage Company at A-00116154, F. 1.

OCT-2002-TSM-0158 R*
Docket No. A-00119133

Application of Anderson Transfer, Inc., Washington County, for the approval of the transfer to applicant of all of the common carrier rights held by James M. Gregan, t/d/b/a Waynesburg Moving and Storage Company at A-00107906

OCT-2002-TSM-0159 R*
Docket No. A-00109593, F. 1, Am-B

Application of Robert Link, t/d/b/a B. & K. Moving, Havertown, Delaware County, for the approval of the transfer to applicant of all of the common carrier rights held by Douglas Kriebal, t/d/b/a Duble & Kriebel at A-00103060, F. 1.

OCT-2002-TSM-0160 R*
Docket No. A-00119130

Application of Glen & Gwen Transportation, Inc., t/d/b/a A.J. Taxi, Tunkhannock, Wyoming County, for approval of the transfer to applicant of all of the common carrier paratransit right held by Gerald E. Sands, t/d/b/a A.J. Taxi at A-00110392, F. 1.

OCT-2002-TSM-0161 R*
Docket No. A-00118924, F. 2

Application of Williams Moving & Storage, Inc., Warrendale, Butler County, for the approval of the transfer to applicant of all of the common carrier household goods in use rights held by B & B Systems, Inc., t/d/b/a Tosh Moving & Storage, Inc. at A-00105085, F. 2

OCT-2002-TSM-0162 R*
Docket No. A-00119007, F. 2 ✓

Applications filed on April 14, 2002, by Broadview NP Acquisition Corporation d/b/a Broadview Net Plus for approval to offer, render, furnish or supply telecommunications services as a Facilities-based Interexchange Carrier, and a Competitive Access Provider to the public in the Commonwealth of Pennsylvania

OCT-2002-FUS-0466 R*
Docket Nos. A-311188
A-311188F002
A-311188F003

Application filed on May 21, 2001, by Access Network Service, Inc., seeking approval of the Company's Abandonment of the Certificate of Public Convenience

OCT-2002-FUS-0470 R*
Docket No. A-310342F2000

Application filed July 17, 2002, by Quintelco, Inc., seeking approval of the Company's Abandonment of the Certificate of Public Convenience

OCT-2002-FUS-0481 R*
Docket No. A-310582F2000

Application filed March 7, 2002 by Pennsylvania Suburban Water Company for approval to begin to offer, render, furnish or supply domestic water service to the public in portions of Centre and Bern Townships, Berks County, PA

OCT-2002-FUS-0849 R*
Docket No. A-210104F0014

Application filed June 19, 2002 by Pennsylvania Suburban Water Company for approval of 1) the acquisition by Suburban of the water system assets of D.L.W.B. Water Systems, Inc., and 2) the right of Suburban to begin to offer, render, furnish or supply water service to the public in portions of Deer Lake Borough and West Brunswick Township in Schuylkill County, PA

OCT-2002-FUS-0869 R*
Docket No. A-210104F0018

Joint Application filed June 24, 2002, by Pennsylvania Suburban Water Company and White Rock Water Corporation for approval of 1) the acquisition by Suburban of the water system assets of White Rock, 2) the right of Suburban to begin to offer, render, furnish or supply water service to the public in portions of Monroe and South Middleton Townships, Cumberland County, PA, 3) the right of White Rock to abandon water service and 4) the right of Suburban to abandon water service in South Middleton Township

OCT-2002-FUS-0870 R*
Docket Nos. A-210104F0019
A-213440F2000
A-210104F2002

Application of Kenneth Songer d/b/a Corsica Gas Company filed May 31, 2002, for approval of Certificate of Public Convenience to supply natural gas service in Union and Eldred Townships, Jefferson County, PA

OCT-2002-FUS-1088 R*
Docket No. A-125115

Application filed on March 29, 2002, by Tri-Valley Water Supply, Inc. for approval of the transfer of control of the Utility from the majority owners to their son

OCT-2002-FUS-1401 R*
Docket No. A-211890F5000

Application filed on August 1, 2002, by Budget Phone, Inc. for approval to offer, render, furnish or supply telecommunications services as a reseller of Interexchange (IXC) Toll Services

OCT-2002-FUS-1410 R*
Docket No. A-311159F0002

Joint Application of ITC^DeltaCom Communications, Inc. and its Indirect Parent, ITC^DeltaCom, Inc. for approval of a Change in Indirect Control of the Former

OCT-2002-FUS-1411*
Docket No. A-310467F0003

STATEMENT OF CHAIRMAN GLEN R. THOMAS

On September 18, 2002, the Commonwealth Court issued a 2-1 decision in Chester Water Authority v. Pennsylvania Public Utility Commission. No. 2967 C.D. 2001. The case involved an application by the Philadelphia Suburban Water Company ("PSW")¹ for a certificate of public convenience to provide water service in a portion of Thornbury, Delaware County. The Court held that the Commission properly granted PSW's motion for judgment on the pleadings, dismissing the protest of the Chester Water Authority. Nevertheless, the Court *sua sponte* found that the Commission "abused its discretion by granting PSW's application for a certificate of public convenience without conducting a public hearing on the application." Slip Op. at 9. The Court reasoned that a "public hearing" is required by Section 1103 of the Public Utility Code, 66 Pa. C.S. § 1103.² The decision specifies that the Commission has a statutorily mandated duty "to provide the *public* with an opportunity to attend and be heard." Slip Op. at 9 (emphasis in original). The Commission's order granting PSW's application for certificate of public convenience was vacated and remanded to the Commission for a public hearing.

I disagree with the Court's interpretation of Section 1103 and believe that the Commission's current process provides interested members of the public with sufficient notice and opportunity to be heard. However, I recognize that -- as a practical matter -- the Commission cannot sit idly by while this issue works its way through the appellate process. The Commission deals with hundreds of applications every year. The Commission has a responsibility to continue to process applications in a timely and legal fashion.

The Commission has modified its notice for new Chapter 11 applications to comply with the Court's decision.³ In addition to formal protests filed by interested parties with standing,⁴ the public will be afforded "an opportunity to attend and be heard." The public will be given both the opportunity for a "paper hearing," through the filing of written comments, and the opportunity for an oral hearing, if requested. As has always been permitted, the public may inspect and copy evidence submitted in support of an application and is free to attend Public Meetings at which applications are finally decided. While the Commission has traditionally accepted public input, this change will formalize the process and ensure that public input is given due consideration.

¹ The Philadelphia Suburban Water Company is now the Pennsylvania Suburban Water Company.

² Subsection (b) of Section 1103 states:

(b) Investigations and hearings. -- For the purpose of enabling the commission to make such finding or determination, it shall hold such hearings, which shall be public, and before or after hearing, it may make such inquiries, physical examinations, valuations, and investigations, and may require such plans, specifications, and estimates of cost, as it may deem necessary or proper in enabling it to reach a finding or determination.

66 Pa. C.S. § 1103(b).

³ This action by the Commission should not be construed as a waiver of any of its appellate rights.

⁴ Formal protests and petitions to intervene will continue to be handled in accordance with Title 52 of the Pennsylvania Code.

Recognizing that there are numerous pending applications for which the old notice has already been published, the Commission will generally provide for public hearing in one of three ways: (1) a tentative order (such as those captioned above); (2) supplemental notice soliciting written comments and requests for oral hearing; or, (3) immediately setting an oral hearing. All three options provide the public with "an opportunity to attend and be heard." Because many applications have been pending for several months, the Commission will strive to minimize the burden upon the applicants.

We, as public servants, have an absolute duty to uphold the law -- even if we disagree with how the judicial branch has interpreted it. We cannot simply ignore a court decision in hopes that no one will appeal a Commission order. Nor should we attempt to come up with convoluted legal theories to circumvent the law. The law is the law -- until it is changed.⁵

I am pleased that the Commission has chosen to comply with the Commonwealth Court's decision until the issue is resolved on appeal. It is the right thing to do. I also wish to thank the numerous Commission staff members who have worked diligently to develop a good solution to a tough issue.

10/10/02
DATE



Glen R. Thomas, Chairman

⁵ I note that the Commission does not have a stay of the Chester Water Authority decision. Even if the Commission had a stay of this particular case, other similar cases would certainly follow.

PENNSYLVANIA PUBLIC UTILITY COMMISSION
HARRISBURG, PENNSYLVANIA 17105

**Application of Suburban
Emergency Medical Services,
Easton, Northampton County,
for the right to begin to
transport, as a common carrier,
by motor vehicle, persons in
paratransit service, et al**

PUBLIC MEETING October 10, 2002
OCT-2002-TSM-0146* 2nd REV
A-00118866

OCT-2002-TSM-0153* 2nd REV
A-00119000

OCT-2002-TSM-0158* REV
A-00119133

OCT-2002-TSM-0159* REV
A-00109593, F. 1, Am-B

OCT-2002-TSM-0160* REV
A-00119130

OCT-2002-TSM-0161* REV
A-00118924, F. 2

OCT-2002-TSM-0162* REV ✓
A-00119007, F. 2

OCT-2002-FUS-0466R*
A-311188;
A-311188F002;
A-311188F003

OCT-2002-FUS-0470R*
A-310342F2000

OCT-2002-FUS-0481R*
A-310582F2000

OCT-2002-FUS-0849R*
A-210104F0014

OCT-2002-FUS-0869R*
A-210104F0018

OCT-2002-FUS-0870R*
A-210104F0019
A-213440F2000
A-210104F2002

OCT-2002-FUS-1088R*
A-125115

OCT-2002-FUS-1401R*
A-211890F5000

OCT-2002-FUS-1410R*
A-311159F0002

OCT-2002-FUS-1411*
A-310467F0003

**STATEMENT OF
COMMISSIONER TERRANCE J. FITZPATRICK
CONCURRING IN PART AND DISSENTING IN PART**

The above-referenced matters all involve unprotested applications for certificates of public convenience pursuant to §1103 of the Public Utility Code, 66 Pa. C.S. §1103. I agree with the actions of the majority on these matters to the extent that they grant the Applications, but I do not agree with these actions to the extent that:

- 1) the decisions are made via Tentative Orders, rather than Final Orders;
- 2) the Tentative Orders will be published in the Pennsylvania Bulletin; and
- 3) the public is given an additional ten-day period to file written comments or to request an "oral hearing."

Accordingly, I respectfully dissent in part.

The additional procedures outlined above are being implemented in an attempt to follow the decision of the Commonwealth Court in Chester Water Authority v. PA Public Utility Commission, 2967 C.D. 2001, Opinion and Order filed September 18, 2002. In this decision, a divided panel of the Court (President Judge Colins dissenting) held that the Commission erred by not holding a hearing and not requiring an applicant to submit evidence before granting a certificate of public convenience. The Commission has filed a Petition for Reargument and a request for expedited treatment in Commonwealth Court. In the event that the Court denies this Petition, the Commission will almost surely file a Petition for Allowance of Appeal with the Supreme Court of Pennsylvania. When the latter Petition is filed, an automatic stay of Commonwealth Court's decision would take effect pursuant to the Pennsylvania Rules of Appellate Procedure, Rule 1736(b).

The majority's decision to implement these generic changes in the Commission's procedures is based upon the belief that the Commission has no choice but to do so in light of the recent Chester Water Authority decision. I agree that in the absence of a stay, the Commission has a clear legal duty to follow the Court's decision as to the facts and parties involved in that case. However, whether the Commission has an absolute legal duty to apply the Court's decision to other cases presents a different question—whether the Commission must immediately begin to treat the Court's decision as a binding precedent under the principle of *stare decisis*.

The principle of *stare decisis* is a "principle of policy" rather than "an inexorable command." Hohn v. United States, 524 U.S. 236, 259, 118 S. Ct. 1969, 1977, 141 L. Ed. 2d 242 (1998). The purpose of the principle is to promote stability and protection of property rights so that a principle declared in a judicial decision "...especially by a court of last resort...should be considered as settled and closed to further argument." 21 C.J.S. Courts §140 (1990). Also, the Supreme Court of Pennsylvania has stated that:

[T]he policy considerations supporting *stare decisis* are less compelling when the issue involves a question of procedure. See Hohn v. United States, 524 U.S. 236, 259, 118 S. Ct. 1969, 1977, 141 L. Ed. 2d 242 (1998) ('The role of *stare decisis*...is...reduced in the case of a procedural rule which does not serve as a guide to lawful behavior.')

Commonwealth v. Persichini, 558 Pa. 449, 737 A.2d 1208, 1212 (1999).

In light of the above principles, it is clear that the Commission is not legally compelled to initiate—on its own motion—generic changes to its procedures during the period that the Chester Water Authority case is before the appellate courts of Pennsylvania. Caselaw establishes that *stare decisis* is not "an inexorable command" and that it does not apply with equal force when a procedural rule is involved.¹ Moreover, the decision of the majority to initiate generic changes in the Commission's procedures without awaiting the ultimate resolution of this issue in the appellate courts does not promote stability—one of the policies underlying *stare decisis*. To the contrary, the hasty decision to change these procedures creates a risk that the changes will have to be undone in the near future—causing confusion among applicants and the public, and wasting the time and effort of our staff.

In a nutshell, the decision of the majority to change these procedures now is unnecessary and impractical.

Alternatively, assuming *arguendo*, that the Commission has a legal duty to make sweeping changes to its procedures based upon the Chester Water Authority decision, the changes implemented here do not comport with that decision. The Tentative Orders give the public the right to file comments or to request an "oral hearing." The majority does not define "oral hearing," but it is my

¹ I recognize that in the normal case, the Commission would treat a Commonwealth Court decision as precedent while it remains subject to review in the appellate courts. I have voted to follow a Commonwealth Court decision in this situation even though I disagreed with the manner in which the Court resolved an issue. Petition of Pike County Power and Light Co., Docket No. P-00011872 (dissenting statement dated March 28, 2002) (following ARIPPA v. Pa. PUC, 792 A.2d 636 (Pa. Cmwlth. 2002)). This case is different because of the practical difficulties involved in initiating across-the-board changes to the Commission's procedures when there is a substantial possibility that these changes may need to be undone within a short time.

understanding that this hearing is intended to be a perfunctory one in which members of the public can state their views, but is not intended to be a full-blown evidentiary hearing in which the applicant presents its witnesses, cross-examination is permitted, etc.

This type of perfunctory hearing does not comply with the plain language of the Chester Water Authority decision, which chided the Commission for not "taking evidence," and, more specifically, for not "require[ing] the applicant to submit evidence in support of the application." (Slip Opinion at pp. 6, 9) This point is also buttressed by the Court's reliance upon its decision in In Re: Petition of the Board of School Directors of the Hampton Township School District, 688 A.2d 279 (Pa. Cmwlth. 1997). The Court made clear in the latter case that its concept of a hearing was one in which members of the public had a right to cross-examine witnesses for the opposing party and to offer evidence in support of their position. 688 A.2d 280, 281. The "oral hearing" contemplated in the Tentative Order does not meet these requirements.

In summary, I dissent in part because the generic changes in the Commission's procedures reflected in these orders are unnecessary and impractical. Alternatively, assuming *arguendo* that the Commission is legally obligated to alter its procedures immediately, I do not believe that the procedure in these orders follows the Chester Water Authority decision.

DATE: October 10, 2002

Terrance J. Fitzpatrick
TERRANCE J. FITZPATRICK
COMMISSIONER