



**INDEPENDENT REGULATORY REVIEW COMMISSION  
COMMONWEALTH OF PENNSYLVANIA  
333 MARKET STREET  
14TH FLOOR  
HARRISBURG, PA 17101**

**(717) 783-5417  
Fax (717) 783-2664**

**July 9, 1998**

**Honorable John M. Quain, Chairman  
Pennsylvania Public Utility Commission  
104 North Office Building  
Harrisburg, PA 17105**

**Re: IRRC Regulation #57-195 (#1945)  
Pennsylvania Public Utility Commission  
Competitive Safeguards for the Electric Industry**

**Dear Chairman Quain:**

**Enclosed are our comments on your proposed regulation #57-195. These comments outline areas of concern raised by the Commission. The comments also offer suggestions for your consideration when you prepare the final version of this regulation. These comments should not, however, be viewed as a formal approval or disapproval of the proposed version of this regulation.**

**If you or your staff have any questions on these comments or desire to meet to discuss them in greater detail, please contact James M. Smith at 783-5439. He has been assigned to review this regulation.**

**Sincerely,**

A handwritten signature in black ink that reads "Robert E. Nyce".

**Robert E. Nyce  
Executive Director**

**REN:kcg  
Enclosure  
cc: John Levin  
Shirley Leming  
Office of General Counsel  
Office of Attorney General  
Pete Tartline**

**COMMENTS OF THE INDEPENDENT REGULATORY REVIEW COMMISSION  
ON**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION REGULATION NO. 57-195  
COMPETITIVE SAFEGUARDS FOR THE ELECTRIC INDUSTRY**

**JULY 9, 1998**

We have reviewed this proposed regulation from the Pennsylvania Public Utility Commission (PUC) and submit for your consideration the following objections and recommendations. Subsections 5.1(h) and 5.1(i) of the Regulatory Review Act specify the criteria the Commission must employ to determine whether a regulation is in the public interest. In applying these criteria, our Comments address issues that relate to statutory authority, duplication of existing regulations, consistency with the statute, adverse effects on competition, reasonableness, implementation procedures, and clarity. We recommend that these Comments be carefully considered as you prepare the final-form regulation.

**1. Section 54.121. Purpose. - Duplication of Existing Regulation, Consistency with the Statute and Clarity**

*Subsection (1)*

This Subsection is not clear because it does not state what the phrase "open access" means or who would be responsible. Presumably, the PUC is referring to the responsibilities of the Electric Distribution Company (EDC). However, the actual language of Subsection (1) is vague on this point. The PUC should clarify Subsection (1) accordingly.

*Subsection (2)*

Subsection (2) states that the purpose of this Subsection is to prevent "unlawful" discrimination in rates, terms or conditions of service. We see little value in using the word "unlawful." The statutory provisions of 66 Pa.C.S. Chapter 28 and numerous other standards provide guidance on what is lawful and unlawful. It is inherent that the interpreting regulations would be designed to prevent discrimination within the bounds of the law. If there is a specific statutory requirement that is needed to understand the bounds of discrimination, that specific statutory requirement should be used in place of the general term "unlawful." Further, since these are competitive safeguards, it is not clear what "lawful" discrimination could take place that would not hamper competition. Therefore, we see no value in including the term "unlawful" in this Subsection and suggest it be deleted.

Subsection (2) also uses the phrase "electric distribution *utilities*." The statute (66 Pa.C.S. § 2803) defines the term "electric distribution *company*." For clarity, the statutory term "electric distribution company" should be used in Subsection (2).

This same concern appears elsewhere in the proposed rulemaking. The statute defines "electric generation *supplier*," not "electric generation *utilities*." However, the regulation uses the term "utilities" in several locations, including Sections 54.121(3) and (4), the opening sentence of Section 54.122 and Sections 54.122(11)(iv) and (12). The PUC should review the

entire regulation and replace the phrases that use the term "utilities" with "supplier." In this manner the PUC would more clearly be addressing entities within its jurisdiction.

#### *Subsection (3)*

Subsection (3) states the purpose of this Subsection is to prevent "unlawful" cross subsidization amongst customers, customer classes, or between related EDCs and electric generation suppliers (EGSs). Similar to our concerns with Subsection (2), we see little value in using the term "unlawful."

We also see two separate categories being addressed in this provision. Cross subsidization between customers and customer classes is one category, and cross subsidization between an EDC and an EGS is another. It is not clear why cross subsidization between customers and customer classes is addressed using the term "unlawful." The term "unreasonable" may be more appropriate with regard to customers and customer classes. Cross subsidization between customers and customer classes has historically occurred and will likely continue to some extent under PUC approved tariffs. However, in regard to the other category, any cross subsidization between related EDCs and EGSs can clearly be unlawful and contrary to the public interest. Therefore, this provision may be clearer if it is broken into two separate subsections. The first could address unreasonable cross subsidization between customers and customer classes. The second could address preventing cross subsidization between EDCs and EGSs who are affiliated in any manner.

#### *Subsection (4)*

This provision duplicates a recently approved final regulation which presumably will be published in the *Pennsylvania Bulletin* prior to submittal of this final-form regulation. The Commission approved the PUC's final rulemaking #57-191 *Licensing Requirements for Electric Generation Suppliers* on June 18, 1998. Included in the approved final regulation is a new 52 Pa. Code § 54.43 which provides the standards of conduct and disclosure for licensed EGSs. Any further provisions regarding EGS conduct should be added to 52 Pa. Code § 54.43 rather than § 54.121. Therefore, Subsection (4) should be deleted.

## **2. Section 54.122. Code of conduct. - Need, Reasonableness, Adverse Effects on Competition, Duplication of Existing Regulations and Clarity**

The opening of Section 54.122 states that EGSs and EDCs shall comply with the requirements. One commentator stated that application of the proposed code of conduct to EGSs is illogical and unjustified. EGSs are subject to their own code of conduct as part of PUC licensing requirements. We agree that recently approved final regulations (to be implemented as 52 Pa. Code § 54.43) govern the standards of conduct and disclosure for licensed EGSs. We are concerned that the PUC's overall regulations may become confusing if the code of conduct for any entity is found in two separate sections of the regulations.

The PUC states in the Preamble that the competitive safeguards govern the interaction between an EDC, an EGS and customers. This is true as far as the type of interactions that will

occur. However, the keystone of these interactions is the EDC. Thus, responsibility to conform to the proposed code of conduct for competitive safeguards is most appropriately and effectively applied to the EDC. For this reason, the PUC should delete the requirement in the opening of Section 54.122 that requires EGSs to comply with the code of conduct requirements. If the PUC sees a need to impose additional requirements on EGSs, those requirements would more appropriately be included in 52 Pa. Code § 54.43.

#### *Subsection (1)*

Subsection (1) states an EDC may not give an EGS a preference or advantage over any other EGS in processing a request by an EDC customer for EGS service. This requirement needs to be broadened in two ways. First, the regulation only prohibits an EDC from giving preference or advantage to an EGS. Competition is equally compromised by giving disadvantage to an EGS. While disadvantage may be inherent in the proposed language of "preference or advantage," it would be clearer to also include the term disadvantage so that no ambiguity exists for the front line customer service representatives of the EDC.

Second, the regulation is silent on giving preference, advantage or disadvantage to the EDC itself, who is the provider of last resort. While we recognize that continuing existing services with the EDC is an option under 66 Pa. C.S. Chapter 28, the transition to competition is confusing to the general public. An EDC could exploit this confusion by advocating the simplicity of not signing up with an EGS. To avoid this, Subsection (1) should be amended to prevent an EDC from giving itself any preference as the provider of last resort.

#### *Subsection (2)*

Subsection (2) essentially requires an EDC to be even handed in disclosing information to EGSs. However, it is not clear how an EDC is expected to comply with proposed Subsection (2), or how the PUC intends to enforce this provision. For example, if an EGS requests information from an EDC, how would the EDC then assure that disclosure would occur "at the same time and in a comparable manner" to all other EGSs, or potential EGSs? It would appear that an EDC could comply by disclosing information through a public file, which could be accessed by all EGSs, or that the EDC would have to make standard information available at standard time intervals. However, the regulation is vague on this point. The PUC needs to amend the regulation to specify how an EDC must disclose information without having an adverse effect on competition.

The regulation also only prohibits an EDC from giving preference or advantage to an EGS. As stated above, competition is equally compromised by giving disadvantage to an EGS. While disadvantage may be inherent in the proposed language of "preference or advantage," it would be clearer to also include the term disadvantage so that no ambiguity exists.

We are also concerned that Subsection (2) is vague concerning customer information. Customer information is defined as virtually all information the EDC would have, subject to customer privacy or confidentiality constraints. It is not clear how this definition is a competitive safeguard. Rather than allowing individual EDC interpretation of what customer information may be disclosed, the PUC should prescribe in more detail what information may be disclosed and what information may not be disclosed.

### *Subsection (3)*

As stated previously, recently approved final regulations (to be implemented as 52 Pa. Code § 54.43) govern the standards of conduct and disclosure for licensed EGSs. Section 54.43(f) makes an EGS responsible for any fraudulent, deceptive or other unlawful marketing acts. The PUC should delete the EGSs from the requirement in Subsection (3) because it is duplicative of Section 54.43(f). If the PUC sees a need to impose additional requirements on EGSs, those requirements would more appropriately be included in § 54.43.

This provision addresses false or deceptive advertising. It may be clearer to also prohibit misleading advertising.

### *Subsection (4)*

Subsection (4) is vague in six respects. First, it is not clear how an EDC would cooperate with “all stakeholders” since this would include potential EGSs. Second, it is not clear what components the PUC would accept in the dispute resolution procedures, including timelines. Third, it is not clear whether the procedures must be approved by the PUC or simply filed with the PUC. Fourth, the regulation does not state when the procedures must be filed. Fifth, it is not clear why the PUC is not prescribing a standard set of dispute resolution procedures. Absent a standard set of dispute resolution procedures, the procedure will vary from EDC to EDC. This may cause unneeded confusion for an EGS who has disputes with multiple EDCs. Finally, the PUC needs to explain how an alternative dispute resolution would be reviewed by the PUC, and how this resolution is consistent with the PUC’s statutory procedures. For these reasons, the PUC should amend Subsection (4) to address all of the points noted above.

### *Subsection (5)*

Subsection (5) states that “an EDC may not illegally tie the provision of electric distribution service within the jurisdiction of the Commission [PUC] to one or both of the following.” We have three concerns with this portion of the regulation. First, the term “illegally” would require an affected market entity to prove legality before reporting a suspected violation of the code to the PUC. It is not clear what the PUC’s intent is by including the term “illegally” in Subsection (5). The PUC needs to explain the need for the term “illegally” in Subsection (5) or delete it.

Second, Subsection (5) states the EDC may not tie provision of “electric distribution service” to other services. There is no specific definition of “electric distribution service” in this proposed rulemaking, and no reference to a definition elsewhere in the regulations. Therefore, it is not clear what actions on the part of the EDC would constitute a violation. The PUC should either define or reference a definition of the phrase “electric distribution service.” It may also be possible to designate a category of tariffed services that the EDC may not tie other services to, but this may vary from EDC to EDC.

Third, since the PUC may only enforce provisions within its jurisdiction, we find the phrase “within the jurisdiction of the PUC” to be redundant. Unless the PUC can establish that this phrase is needed to demonstrate the scope of Subsection (5), the PUC should delete it.

Finally, in Subsection (ii), the phrase “not to deal with” lacks clarity. The PUC should replace this phrase with clearer language such as “to exclude the services of.”

#### *Subsection (6)*

The Pennsylvania Rural Electric Association and the Allegheny Electric Cooperative, Inc. (PREA) suggest expanding Subsection (6) to include the supply of other information that could be of competitive significance. PREA suggests prescriptive language to expand Subsection (6). We agree that the EDC must disclose all information in a manner that does not affect competition. These effects are not limited to operational status and availability of the distribution system. However, more prescriptive language may not necessarily be the best approach. Instead, the PUC should expand the scope of this Subsection to include all information. This could be done by deleting the limiting phrase “about operational status and availability of the distribution system,” or replace the word “about” with the word “including” and then provide a list of the types of information.

Subsection (6) states an EDC may not provide a preference or advantage to an EGS in disclosure of information. We believe this requirement needs to be broadened. The regulation only prohibits an EDC from giving preference or advantage to an EGS. Competition is equally compromised by giving disadvantage to an EGS. While disadvantage may be inherent in the proposed language of “preference or advantage,” it would be clearer to also include the term disadvantage so that no ambiguity exists.

#### *Subsection (8)*

The phrase “and its affiliate or divisional EGS” should be deleted. If the PUC sees a need to impose additional requirements on EGSs, those requirements would more appropriately be included in 52 Pa. Code § 54.43.

#### *Subsection (9)*

One commentator expressed a concern that Subsection (9) does not specifically prohibit an EDC from steering customers to an EGS or an affiliate of the EDC. We agree that an EDC should not render any opinions about an EGS or the EDC’s affiliates. Any description of an EGS should be limited to the information on the PUC’s list. Therefore, the PUC should add language to Subsection (9) to specifically prohibit an EDC from rendering opinions on an EGS or steering customers in their selection of an EGS.

Subsection (9) also provides options for providing information to the customer. Those options are “over the phone, or in written form or by other comparable means.” The regulation does not specify who decides what option will be used. Since the customer’s modes of communication will vary widely, the regulation should specify that a customer may request the information “over the phone, or in written form or by other comparable means.”

There is also a minor typographical error in the first phrase of Subsection (9). There should be the word “an” before the first use of the acronym “EGS” in Subsection (9).

### *Subsection (10)*

The wording of Subsection (10) is so complicated that it lacks clarity. A clearer standard would be more effective in safeguarding competition. The language is also restrictive in that it is limited to "solely on the basis of its affiliation." Broader language would encompass any circumstance involving an affiliate of the EDC. We suggest the following: "An EDC may not state or imply that a customer's service is enhanced or superior when the services involve an affiliate of the EDC."

The *Pennsylvania Bulletin* publication of the proposed regulation has a substantive typographical error in Subsection (10). The acronym "EDS" appears in Subsection (10). This should be corrected in the final-form regulation.

### *Subsection (11)*

The provisions described in Paragraphs (i) through (vi) are important considerations. However, these provisions appear to simply duplicate the broader provisions of earlier Subsections in Section 54.122. In particular, Subsections (6), (7) and (8) require the EDC to treat EGSs equally as a matter of EDC policy. Since these are duplicative requirements, the PUC should either explain the need for Subsection (11) or delete Subsection (11).

If the PUC retains Subsection (11), the provisions directed at EGSs should be deleted. As stated earlier, the cornerstone of these interactions is the EDC. Thus, responsibility to conform to the proposed code of conduct for competitive safeguards is most appropriately and effectively applied to the EDC. If the PUC sees a need to impose additional requirements on EGSs, those requirements would more appropriately be included in § 54.43. Therefore, if the PUC retains Subsection (11), the PUC should delete the requirements in Subsection (11) that impose requirements on the EGS, or rewrite the provisions to describe the EDC's conduct.

At the end of the first sentence in Subsection (iv), the PUC should also insert the word "to" between the words "available" and "its" so that it will read "available to its competitors."

### *Subsection (12)*

Under 66 Pa.C.S. § 2811, the PUC only has authority to *investigate and make findings* on anticompetitive or discriminatory conduct and the unlawful exercise of market power. If, as a result of the investigation, the PUC has reason to believe there is conduct which is preventing customers from obtaining the benefits of competition, the PUC must *refer* its findings to the Attorney General, the United States Department of Justice, the Securities and Exchange Commission or the Federal Energy Regulatory Commission, where it is then adjudicated. The PUC has no authority to adjudicate cases on anticompetitive conduct. Nor does the PUC have authority to determine penalties or to determine what would be considered a mitigation of penalties for anticompetitive conduct. That authority rests with the Attorney General, the United States Department of Justice, the Securities and Exchange Commission or the Federal Energy Regulatory Commission, and ultimately the courts. We are also concerned that this Subsection could be interpreted as a directive, under the code of conduct, to the affected entities to divest or reorganize their corporate structures. We see no authority or need for Subsection (12) as part of a code of conduct. Therefore, the PUC should delete Subsection (12).

### **3. Additions to the code of conduct. - Feasibility and Reasonableness**

The commentators provided comments on several important issues, such as joint marketing, and former Commissioner Hanger's statement published with the Preamble to this rulemaking. We agree that these issues are of great importance and should be addressed. However, the PUC did not propose language on these subjects, which precluded the commentators from providing specific input. Therefore, we are very concerned that the addition of provisions to this rulemaking at the final-form stage would not allow the commentators a sufficient opportunity to review new language, and the PUC could not easily modify new language to address any concerns. Therefore, if the PUC decides to add additional items, the PUC should consider these issues in a separate rulemaking. If the PUC elects to add new provisions to this rulemaking, we urge the PUC to use an advanced notice of final rulemaking to solicit comment on the new provisions prior to submitting the final-form regulation.

### **4. Implementation procedures.**

The PUC has issued interim codes of conduct to several utilities. It is not clear, from the information filed with this rulemaking, when the interim codes of conduct would be terminated and whether or not the proposed code of conduct would supercede the interim codes of conduct. Consistent with the previous issue, we are particularly concerned that important competitive safeguards in the interim codes of conduct may be terminated without complimentary provisions being added to the new code of conduct. The PUC needs to explain how the proposed code of conduct will be implemented without affecting existing competitive safeguards.