



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

May 31, 2000

Original: 1945

Mr. Robert E. Nyce, Executive Director
Independent Regulatory Review Commission
333 Market Street
14th Floor
Harrisburg, PA 17101
(Delivery by Hand)

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

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MAY 31 4:11:21
PENNSYLVANIA
PUBLIC UTILITY
COMMISSION

Dear Mr. Nyce:

Please accept the following supplemental explanations regarding the above regulation, as per your request of May 19, 2000.

As a general comment and as noted in the Commission's final order, Subsections 1 through 10 are the "consensus" provisions, that is, language agreed upon by the stakeholders involved in the Commission's Electric Competition Safeguards Working Group convened through the spring and summer of 1997. Much of the language in those provisions was the product of extensive negotiation and compromise amongst the stakeholders. In deference to the stakeholder process, the Commission has adopted much of the proposed language essentially verbatim.

Question 1. *Subsection (1) ...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.*

Response:

The actual language of subsection (1) prohibits giving any preference or advantage to a distribution utility's own division or affiliate generation supplier in "processing a request". Subsection (1) thus does not cover claims or statements made in the context of advertising. Under other Commission orders applying to electric choice, all EDCs must furnish a complete retail choice information packet to customers making service inquiries. This information must be supplied to all customers twice a year.

The Commission has, however, directed an extensive, successful and ongoing statewide customer education program at the grassroots level specifically to inform electric generation customers of their options under the Electric Competition Act. With respect to your specific concern that this subsection should apply to the EDC itself as the provider of last resort, we note that the Commission has addressed the issue through issuance of guidelines relating to the activities of EDCs in fulfilling their provider of last resort (PLR) responsibilities. By order adopted November 19, 1998 at Docket M-0096089F0017, we ordered that EDCs may not use consumer education funds to advertise the advantages of staying with PLR service, and stressed the need to avoid anticompetitive advertising of the PLR function. Additionally, and as we indicated in that order, we intend to initiate a proposed rulemaking pursuant to 66 Pa.C.S. §2807(e)(2) specifically establishing standards applicable to PLR service. Until such time as that rulemaking has been completed, the Commission intends to continue resolving these issues through the adjudicatory process.

The statutory scheme of the Electric Competition Act expressly permits electric utilities with distribution and generation assets to continue operations as a single corporate enterprise, if the management desires. 66 Pa.C.S. §2804(5).

The final regulations prohibit false or deceptive advertising "with respect to retail sale of electricity in the Commonwealth". 52 Pa.Code §54.122(3). The suggestion that it is "simpler" to continue to purchase electric energy from the distribution company division or affiliate might constitute false or deceptive advertising. Such a determination would, of necessity, be based upon the actual advertising copy and facts supporting such a claim. In any event, such advertising would be required to pass the test of §54.122(10), which prohibits claims of superiority of service solely upon the basis of affiliation, and which further requires express disclosure requirements relating to purchases from affiliated or divisional suppliers. Since subsection 10 is not specifically targetted at electric generation suppliers, it could be applied to regulated advertising with respect to PLR service.

Question 2. *Subsection (2) ...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.

Response:

The actual text of the provision defines “customer information” as:

all information pertaining to retail electric customer identity and current and future retail electric customer usage patterns, including appliance usage patterns, service requirements or service facilities.

Information disclosure regulation is a competitive safeguard because electric generation suppliers must have access to some customer information in order to properly determine the cost and requirements of providing service to such customers. Historical customer usage patterns provide information about future demand and usage patterns that are commercially important. If the only generation supplier which has access to such information is the supplier associated with the distribution company, that affiliate will have an extremely important competitive advantage over unaffiliated competitors. The Consensus Working Group agreed that some customer information must be available on a non-discriminatory basis, but could not agree on a shopping list of specific information. It found the broader definition of “customer information” to be extremely difficult and controversial.

The Commission agrees with the Consensus Working Group that some breadth of language is necessary to cover situations that are essentially unforeseeable. We therefore believe that the provision is sufficiently narrowly drafted, and adequately defines what information is covered on a conceptual basis.

Question 3. *Subsection (5) ...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 an 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. ...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”.*

Response:

66 Pa.C.S. §2803 defines “electric distribution company” as:

The public utility company providing facilities for the jurisdictional transmission and distribution of electricity to retail customers, except building or facility owners/operators that manage the internal distribution system serving such building facility and that supply electric power and other related electric power services to occupants of the building or facility”

Thus “electric distribution service within the jurisdiction of the Pennsylvania Public Utility Commission” is clearly tied to services provided by an electric distribution company which are jurisdictional in nature. The question of state jurisdiction over electric utilities is essentially legal in nature and subject to continual evolution, both by the General Assembly and by Congress. Given the evolving nature of the Federal-State jurisdictional demarcation, it does not appear prudent to attempt to define what may be a moving target. In addition, as your Commission properly notes, there are differences among electric distribution companies, which continue, as the business of distribution service in an unbundled, restructured electric power industry evolves.

Finally, the phrase “not to deal with” is in common use in the law of competition and boycotts. See, Eastern R.R. Presidents Conference v. Noerr Motor Freight, 365 U.S. 127, 142 (1961), Hartford Fire Insurance v. California, et al, 509 U.S. 764, 809(1993) (dissent of Justice Scalia).

Question 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 complementary 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.*

Response:

The “interim codes of conduct” referred to were, with respect to PECO, PP&L, GPU Energy (Met Ed and Penelec) and West Penn Power, prescribed as part of joint petitions for settlement filed in each respective restructuring case. Each of the preceding four electric distribution company is subject (pursuant to the joint

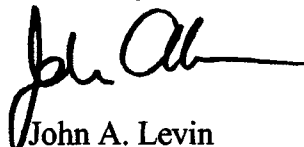
settlements approved by the Commission) to interim codes which expire upon the effective date of final competitive safeguard regulations or on January 1, 2001, whichever is earlier.

There was no joint petition filed with respect to Duquesne Light Company, Penn Power or UGI – Luzerne Electric. Each of those companies was restructured pursuant to a final commission order which directed that similar interim codes be adopted. Penn Power's interim code is filed as Tariff-Electric Pa.P.U.C. No. 35 (Rule 43). Citizen's Electric Company of Lewisburg, Pike County Light & Power, and UGI – Luzerne Electric are not presently subject to an interim code. Accordingly, at the time these regulations become final, all interim codes of conduct will expire and be replaced by a single uniform code of conduct, as was the intention of the Commission and stakeholders from the start.

We are aware that certain settlement codes of conduct contain provisions that differ from these final regulations. However, we do not view it as in the public interest that interim code provisions which diverge from these final regulations be preserved.

Thank you for your consideration in this matter. If you have any questions in reference to this, please contact the undersigned at 717-787-5978.

Sincerely,

A handwritten signature in black ink, appearing to read "John A. Levin", with a stylized flourish at the end.

John A. Levin
Assistant Counsel

cc: Mary S. Wyatte, Chief Counsel