

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF REVENUE



PHONE: 717-787-1382
FAX: 717-772-1459

October 20, 1999

Original: 2061
Mizner
cc: Sandusky
Jewett
Markham
Smith
Legal

John R. McGinley, Jr.
Chairman
Independent Regulatory
Review Commission
14th Floor, Harristown 2
333 Market Street
Harrisburg, PA 17101

Re: Public Comment (15-410)
Office of Consumer Advocate

Dear Chairman McGinley:

In accordance with section 5(c) of the Regulatory Review Act (71 P.S. §745.5(c)), please find enclosed a public comment received by the Department on October 19, 1999, relating to Regulation 15-410, utility gross receipts tax.

If you have any questions regarding this matter, please contact me at (717) 787-1382, extension 3065.

Sincerely,

A handwritten signature in cursive script that reads "Anita M. Doucette".

Anita M. Doucette
Regulatory Coordinator

Enclosure

AMD:tlch

COMMONWEALTH OF PENNSYLVANIA



OFFICE OF CONSUMER ADVOCATE

555 Walnut Street 5th Floor, Forum Place
Harrisburg, Pennsylvania 17101-1923
(717) 783-5048

IRWIN A. POPOWSKY
Consumer Advocate

FAX (717) 783-7152
E-Mail: paoca@ptd.net

Original: 2061
Mizner
cc: Sandusky
Jewett
Markham
Smith
Legal

October 19, 1999

Anita M. Doucette, Esq.
Office of Chief Counsel
10th Floor, Strawberry Square
Department of Revenue
Dept. 281061
Harrisburg, PA 17128-1061

Re: Utility Gross Receipts Tax (61 Pa. Code Ch.160)

Dear Ms. Doucette:

Enclosed please find for filing with the Department of Revenue the Comments of the Office of Consumer Advocate regarding the Departments Proposed Rulmaking on the Utility Gross Receipts Tax, which was published in the September 18, 1999, edition of the Pennsylvania Bulletin.

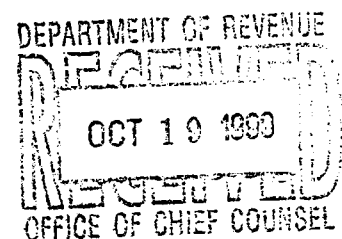
Sincerely,

A handwritten signature in cursive script that reads "Tanya J. McCloskey".

Tanya J. McCloskey
Senior Assistant Consumer Advocate

Enclosures
cc: Jim Smith (IRRC)

55003



BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

PROPOSED RULEMAKING 61 PA. :
CODE CH. 160 UTILITY GROSS :
RECEIPTS TAX :

COMMENTS
OFFICE OF CONSUMER ADVOCATE

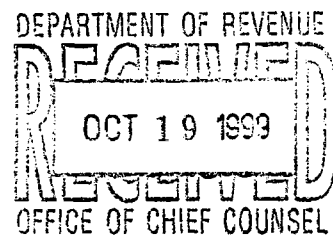
Tanya J. McCloskey
Senior Assistant Consumer Advocate

For:

Irwin A. Popowsky
Consumer Advocate

Office of Attorney General
Office of Consumer Advocate
555 Walnut Street 5th Floor, Forum Place
Harrisburg, PA 17101-1923
(717) 783-5048

DATED: October 19, 1999



I. INTRODUCTION

On December 3, 1996, Governor Tom Ridge signed into law the Electricity Generation Customer Choice and Competition Act, 66 Pa.C.S. §2801, et seq. The Act introduces competition into the generation sector of the electric utility industry and affords all Pennsylvania electric customers the opportunity to have direct access to the competitive generation market. This change in the manner in which electric generation is supplied to retail customers has a direct impact upon several taxes that were customarily paid to the Department of Revenue prior to electric restructuring, including the gross receipts tax. In the September 18, 1999 Pennsylvania Bulletin, the Department of Revenue proposed amendments to Chapter 160 to clarify the changes to the gross receipts tax brought about by the Act. In particular, Section 160.31 sets forth the proposed procedure under Sections 2806(g)(3)(iii) and 2809(c)(2) when a tax on the use of electricity is imposed. This subsection, among other things, explains the actions the Department is authorized to take if an electric generation supplier has not properly reported and remitted the tax and explains the indemnification or reimbursement process.

The Office of Consumer Advocate (OCA) has reviewed these proposed regulations and has some concerns about the consistency of these regulations with the Act, the regulations of the Pennsylvania Public Utility Commission regarding tax indemnification and the individual tariffs of the electric utilities which also contain specific procedures regarding tax indemnification that have been approved by the Pennsylvania Public Utility Commission. The OCA is a state agency authorized by law to represent the interests of consumers in matters involving public utilities before the Pennsylvania Public Utility Commission and other courts and agencies. 71 P.S. §309-1, et seq.

The OCA hereby files these Comments to assist the Department of Revenue in the development of its regulations.

II. SPECIFIC COMMENTS

A. The Proposed Regulations Regarding Indemnification Are Unclear And May Be Inconsistent With The Act, The Pennsylvania Public Utility Commission's Regulations, And The Electric Utilities' Tariffs.

In Section 160.31(a), the proposed regulations establish a tax on the use of electricity to be imposed upon the electric distribution company (EDC) if an electric generation supplier who supplied electricity in that EDC's service territory fails to properly report and remit the gross receipts tax associated with these sales. The proposed regulations further provide that once the EDC has made payment of the tax on the use of electricity, the EDC may collect or seek indemnification from the electric generation supplier or "from the end-user of the electricity in this Commonwealth." Section 160.31(c). The OCA submits that the intent of this indemnification language is unclear and may be inconsistent with the Act, the Commission's regulations, and the EDC's tariffs.

Initially, the OCA would note that the phrase "from the end-user of the electricity in this Commonwealth" should be clarified. It is uncertain whether this language refers only to the customer of the electric generation supplier (EGS) who used the electricity or whether it refers to all ratepayers of the EDC. Under either interpretation, however, the language raises significant issues. If, in fact, the language refers only to the customers of the EGS, the OCA submits that those customers may end up paying the tax twice—once to the EGS who failed to remit the payments and a second time to the EDC as a use tax. The OCA does not believe that it was the intention of the Act to require an individual ratepayer to provide such indemnification of the tax liability for the EGS. If the phrase refers to all ratepayers of the EDC, the OCA submits that this result too may be

inconsistent with the Act and may inappropriately require a result that is within the discretion of the Pennsylvania Public Utility Commission to decide. Specifically, the Commission must determine whether an EDCs request for recovery of any increased state tax liability will result in rates that are just and reasonable, and this decision should be left to the Commission after full review under the Act. In fact, as set forth below, the Commission has enacted regulations that require the provision of certain information if an EDC makes such a request so that the Commission can fully evaluate the proposal.

Sections 2806(g)(3)(iii) and 2809(c)(2) of the Public Utility Code, in relevant part, provide:

If an electricity supplier other than an electric distribution company does not pay the tax imposed upon gross receipts . . . , the electric distribution company to whose retail customer the electricity supplier provided generation service shall remit the unpaid tax, as a tax on the use of electricity in this Commonwealth, to the Department of Revenue and may collect or seek reimbursement of the tax so paid from the electricity provider or any other appropriate party that used the electricity in this Commonwealth.

66 Pa.C.S. 2806(g)(3)(iii) and 2809(c)(2). The term “any other appropriate party that used the electricity in this Commonwealth” is not defined in the Act.

In addition, the Act contains a specific provision on indemnification in Section 2810 and specifically references Sections 2806(g) and 2809(c). Section 2810(m) provides:

Indemnification.—The electric distribution company’s tariff shall provide that, if an electric distribution company becomes liable under sections 2806(g) and 2809(c) for State taxes not paid by an electric generation supplier, that electric generation supplier shall indemnify the electric distribution company for the amount of the liability so imposed upon the electric distribution utility.

66 Pa.C.S. §2810(m). In accordance with this Section, and with Sections 2806(g) and 2809(c), the Pennsylvania Public Utility Commission issued regulations and a Secretarial Letter directing each EDC to revise its Tariff to include tax indemnification language.

In Docket No. M-00991215, pursuant to Section 2809(c), the Commission directed each EDC to file a Tariff Supplement to include tax indemnification language in its Tariff. The Commission recommended the following language:

If (the Electric Distribution Company) becomes liable under Section 2806(g) or 2809(c) of the Public Utility Code, 66 Pa.C.S. §§2806(g) and 2809(f), for Pennsylvania state taxes not paid by an Electric Generation Supplier (EGS), the non-compliant EGS shall indemnify (the Electric Distribution Company) for the amount of additional state tax liability imposed upon (the Electric Distribution Company) by the Pennsylvania Department of Revenue due to the failure of the EGS to pay or remit to the Commonwealth the tax imposed on its gross receipts under Section 1101 of the Tax Report Code of 1971 or Chapter 28 of Title 66.

Commission Secretarial Letter, p.2 (attached hereto.) To the best of the OCA's knowledge, all EDCs filed Tariff Supplements in substantial conformity with this recommended language. Notably, the language proposed by the Commission does not specifically include recovery from the end user of the electricity.

The fundamental concern with the proposed regulation is that it appears to allow the EDC to seek recovery of the use tax from ratepayers. This result may be inconsistent with the Act, particularly Section 2810(m) and it may be inconsistent with the EDC's tariff. The question of the recovery of this liability from other ratepayers was a matter that was to be within the discretion of the Pennsylvania Public Utility Commission. It was the OCA's understanding that only upon failure of an EDC to collect the tax liability from the EGS, after exhausting all collection remedies, was the

EDC permitted to *request* the Pennsylvania Public Utility Commission for permission to collect this tax liability from other ratepayers.¹ The Commission, after consideration of all of the evidence, would then rule upon the EDC's request. Moreover, the Act set forth specific procedures and requirements for the Commission in addressing all state tax liabilities. See, e.g., Section 2804(16). These principles do not seem to be reflected in the proposed regulations.

The Pennsylvania Public Utility Commission has established regulations in accordance with Section 2804(16) to establish the time, manner, form and information content of the filings required of an EDC seeking recovery of changes in its state tax liability under the Act. Final Regulations Regarding Electric Distribution Company Rates For Changes In State Tax Liability, 52 Pa. Code §§54.91 to 54.98, Docket No. L-00970127. These regulations explicitly set forth the procedures that an EDC must follow to seek recovery of any increased costs associated with the state tax liability both under the rate cap and if the increased costs would result in a violation of the rate cap. Importantly, these regulations establish that the EDC must provide an affidavit detailing the procedures followed to collect the tax liability from the EGS. See, e.g. 52 Pa. Code §54.94(b)(5). It is only after the Commission has reviewed all of the data provided under these regulations that the Commission will determine whether recovery from ratepayers is just and reasonable and should be permitted.

¹ During the development of the Customer Choice Act, the OCA submits that every effort was made to ensure that an EDC's ratepayers would not be required to pay for an EGS's failure to pay taxes until all other avenues were exhausted. These avenues included tariff indemnification, PUC license revocation, a use tax on the supplier and its end use customers and Department of Revenue collection efforts.

The OCA submits that any recovery of this tax liability that may be permitted from ratepayers is a matter within the discretion of the Commission. As such, the Department of Revenue regulations should be consistent with, and recognize, this responsibility of the Commission.

B. The Proposed Regulations Must Ensure That The Effect Of Collection Of The Use Tax Is Properly Accounted For In The RNR Calculation.

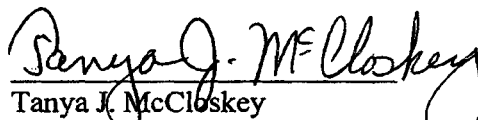
The Customer Choice Act provides for a Revenue Neutral Reconciliation (RNR) that tracks the amount of revenue that the Commonwealth receives from suppliers and distribution companies, including the gross receipts tax revenue. The RNR permits the Commonwealth to recoup any losses in tax revenue from certain affected taxes that may result from electric restructuring. The affected taxes include the corporate net income tax, the capital stock franchise tax, sales and use tax, public utility realty tax, and the utilities gross receipt tax.

The OCA submits that converting an EGS's defaulted gross receipts tax liability to a use tax must be properly accounted for in the RNR calculation. If the gross receipts tax liability is converted to a use tax, it should be made clear in the regulations that any collection of this use tax will be reflected in the "sales and use tax" component of the RNR. IF the collection of the use tax is not properly accounted for in the RNR calculation, it could result in an overrecovery of the affected taxes.

III. CONCLUSION

The Office of Consumer Advocate respectfully submits that the Department of Revenue's proposed regulations should be clarified and reviewed for consistency with the Act and the Orders of the Pennsylvania Public Utility Commission.

Respectfully submitted,


Tanya J. McCloskey
Senior Assistant Consumer Advocate

Counsel for:
Irwin A. Popowsky
Consumer Advocate

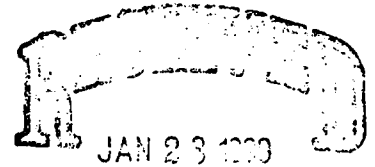
Office of Consumer Advocate
555 Walnut Street 5th Floor, Forum Place
Harrisburg, PA 17101-1923
(717) 783-5048

Dated: October 18, 1999

APPENDIX A



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



JANUARY 28, 1999

OFFICE OF
CONSUMER ADVOCATE

IN REPLY
PLEASE REFER
TO OUR FILE

M-00991215

TO ALL ELECTRIC DISTRIBUTION COMPANIES:

Pursuant to Section 2809(c) of the Pennsylvania Public Utility Code, 66 Pa. C.S. §2809(c), an electric generation supplier (EGS) will be subject to all taxes imposed by the Tax Reform Code of 1971 and Chapter 28 of Title 66. This section provides that if an EGS, other than an electric distribution company (EDC) acting in its role as provider of last resort, does not pay the tax imposed on its gross receipts under Section 1101 of the Tax Reform Code of 1971 or Chapter 28 of Title 66, it is the financial responsibility of the EDC, to whose retail customer the EGS provided generation service, to remit the unpaid tax, as a tax on the use of electricity in this Commonwealth, to the Pennsylvania Department of Revenue.

In order to protect the EDC and its customers from the financial impact of this potential additional state tax liability resulting from the failure of an EGS to pay or remit to the Commonwealth the tax imposed on its gross receipts, Section 2810(m) states that the EDC's retail tariff shall include "tax indemnification" language. The "tax indemnification" language provides that, if an EDC becomes liable under Section 2806(g) or 2809(c) for state taxes not paid by an EGS, the non-compliant EGS shall indemnify the EDC for the amount of additional state tax liability so imposed upon the EDC.

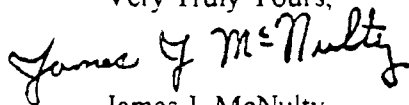
Your EDC's current retail and supplier tariffs do not include the required "tax indemnification" language. By this Secretarial Letter, you are directed to place "tax indemnification" language in these tariffs. It is recommend that a paragraph, similar to the following, be added to your EDC's retail tariff.

"If (the Electric Distribution Company) becomes liable under Section 2806(g) or 2809(c) of the Public Utility Code, 66 Pa. C.S. §§ 2806(g) and 2809(f), for Pennsylvania state taxes not paid by an Electric Generation Supplier (EGS), the non-compliant EGS shall indemnify (the Electric Distribution Company) for the amount of additional state tax liability imposed upon (the Electric Distribution Company) by the Pennsylvania Department of Revenue due to the failure of the EGS to pay or remit to the Commonwealth the tax imposed on its gross receipts under Section 1101 of the Tax Report Code of 1971 or Chapter 28 of Title 66."

The actual tariff language submitted in response to this Secretarial Letter will be subject to final approval by the Commission.

This tariff change, to become effective on one (1) days notice, should be filed with the Commission within ten (10) days of receipt of this Secretarial Letter. If you have any questions, please contact Robert F. Wilson, Manager, Tariff/Finance Division, Bureau of Fixed Utility Services, at 717-783-6162.

Very Truly Yours,



James J. McNulty
Secretary



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

October 18, 1999

Anita M. Doucette
Office of the Chief Counsel
Department of Revenue
Dept. 281061
Harrisburg, PA 17128-1061

Original: 2061
Mizner
cc: Sandusky
Jewett
Markham
Smith
Legal

IN REPLY PLEASE
REFER TO OUR FILE
1999 OCT 20 AM 8:58
RECEIVED
INDEPENDENT REGULATORY
REVIEW COMMISSION

Re: Proposed Rulemaking:
61 Pa. Code Ch. 160 (relating to Utility Gross Receipts Tax)
IRRC No. 15-410

Dear Ms. Doucette:

Enclosed for consideration at the above-captioned proposed rulemaking, please
find a copy of the Comments of the Pennsylvania Public Utility Commission.

Respectfully submitted,

Patricia Krise Burket
Assistant Counsel

Enclosure

cc: IRRC
Chairman, Senate Finance Committee
Chairman, House Finance Committee
Pa. Public Utility Commission, Secretary's Bureau - New Assignments and Filings

Original: 2061
Mizner
cc: Sandusky
Jewett
Markham
Smith
Legal

**BEFORE
THE PENNSYLVANIA DEPARTMENT OF REVENUE**

PROPOSED RULEMAKING: :
61 PA. CODE CH. 160 (RELATING : IRRC No. 15-410
TO UTILITY GROSS RECEIPTS TAX :
:

**COMMENTS OF THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

RECEIVED
1999 OCT 20 AM 8:58
INDEPENDENT REGULATORY
REVIEW COMMISSION

On September 18, 1999, the Pennsylvania Department of Revenue (hereinafter Department) published for comment the above-captioned proposed rulemaking in the Pennsylvania Bulletin. 29 Pa. B. 4873. The Department proposed these amendments “to clarify changes to the utility gross receipts tax brought about by utility deregulation and to provide guidance to out-of-state businesses and the emerging industry.”

The Pennsylvania Public Utility Commission (hereinafter the Commission) is the state agency charged, *inter alia*, with the oversight of the restructuring of the electric utility industry. Pursuant to its authority under Section 2809(c) of the Public Utility Code, 66 Pa. C.S. §2809(c), the Commission has promulgated regulations for the licensing of electric generation suppliers. 52 Pa. Code §§ 54.31 - 54.43. One of these regulations, 52 Pa. Code § 54.40, addresses the security requirement for licensing and establishes that one of the purposes for

the security is to ensure the payment of Gross Receipts Tax (GRT). A copy of these regulations are attached for informational purposes.

I. In Section 160.31 (b)(2), the shopping credit should not be used in the formula for calculating a non-reporting EGS's gross receipts.

Proposed Section 160.31 (b)(2) reads as follows:

(b) *Failure of the electricity supplier to report and pay tax on gross receipts.* Upon ascertaining that an electricity supplier has not properly reported and remitted the tax imposed upon gross receipts, the Department is authorized under section 1102 of the TRC (72 P.S. 8102) to:

* * * * *

(2) Settle or resettle and collect within 30 days of notice any unpaid tax, but not any interest or penalty imposed on the electricity supplier on the use of electricity from the electric distribution company with respect to the retail customers that it served. The tax shall be calculated by multiplying the kilowatt hours distributed on behalf of the electricity supplier for which no gross receipts tax has been remitted, by the electric distribution company's shopping credit provided to customers and filed with the Commission for electricity supply during the tax period. In the event that the actual gross receipts of the electricity supplier for which no gross receipts were received are known and available, the tax shall consist of these gross receipts multiplied by the applicable tax rate.

The Commission agrees that the actual gross receipts should be used when possible and believes that the Department should first contact the non-reporting EGS for this information. If the EGS is no longer in operation and did not perform its own billing, the Department should obtain gross receipts information from the EGS's billing agent. In most cases, the billing agent would

be the EDC, but could also be a competitive metering and billing provider. Only after the Department has attempted to obtain this information and failed, should gross receipts be estimated.

As to the estimation of gross receipts, the Commission has several concerns about using “kilowatt hours times shopping credit” calculation as a substitute for gross receipts.¹ The proposed calculation provides only a rough estimate of an electric generation supplier’s gross receipts and thus, is not a reliable basis upon which a tax can be calculated. Because electric distribution companies (EDCs) are statutorily obligated to pay GRT not paid by electric generation suppliers (EGSs), 66 Pa. C.S. §2809 (c)(2), the EDCs may need to do numerous recalculations to verify the actual amount of gross receipts.

Another problem with using the shopping credit is that it is transitory in nature and will be used only for as long as an EDC collects “stranded costs” through a competitive transition charge (CTC) from its ratepayers. During the collection period the shopping credit would exist. At the conclusion of these “stranded costs” collection periods, the shopping credit will disappear and the EDC, like other electric generation suppliers, would be allowed to charge market prices for the electric generation it supplied.

¹ The Commission notes that the number of kilowatts multiplied by a shopping credit does not result in the GRT. To calculate the GRT, the product of the “kilowatt times shopping credit” calculation must be also multiplied by the percent tax represented by the GRT.

Moreover, the shopping credit will cease to exist at different times for different EDCs. As a result of negotiated settlements, the Metropolitan Edison Company (Docket Number R-00974008) and the PECO Energy Company (Docket Number R-00973953) are permitted a 12-year period of time to collect "stranded costs", meaning that their shopping credits will be on the books for as long as 12 years. On the other hand, the Duquesne Light Company (Docket Number R-00974104) has proposed to terminate its collection of "stranded costs" in 2001 as the result of its auction of its generating facilities. Therefore the "shopping credit" for Duquesne's customers could end many years sooner than it would for the other electric distribution utilities. Considering the aforementioned problems, the Commission believes that it is unwise to promulgate a regulation that bases the calculation of gross receipts and ultimately the calculation of the GRT on the shopping credit.

Instead, the Commission believes that the better surrogate for gross receipts for a non-reporting EGS would be the number of kilowatt hours distributed by the EDC on behalf of the EGS multiplied by the EDC's provider of last resort (PLR) generation rate. The PLR generation rate is the rate the EDC or other PLR would charge to consumers who did not, or could not for financial reasons, choose an alternative electricity supplier. Based on the foregoing

comments, the Commission requests that proposed section 160.31(b)(2) be revised as follows:

(2) Settle or resettle and collect within 30 days of notice any unpaid tax, but not any interest or penalty imposed on the electricity supplier on the use of electricity from the electric distribution company with respect to the retail customers that it served. The tax shall be calculated by multiplying the kilowatt hours distributed on behalf of the electricity supplier for which no gross receipts tax has been remitted, by the electric distribution company's [shopping credit provided to customers and filed with the Commission for electricity supply] provider of last resort generation rate that was in force during the tax period. In the event that the actual gross receipts of the electricity supplier for which no gross receipts tax [were] was received can be obtained by the Department from the electricity supplier or the electricity supplier's billing agent [are known and available], the tax shall consist of these gross receipts multiplied by the applicable tax rate.

II. The Direction that the Commission Provide Information About Individual Licensed Electric Generation Suppliers to the Department in Proposed Section 160.41 Must Be Deleted as Being Inconsistent with the Law.

A. The Department does not have statutory authority to direct the Commission, an independent agency, to provide it with information about individual licensed electric generation suppliers.

Proposed Section 160.41 (relating to licensed generation suppliers)

reads as follows:

By May 1, 1998, and every year thereafter the Commission shall provide the Department with a list of licensed electric generation suppliers with their accompanying State tax numbers, similar identification numbers and any other information the Department will require. By July 30, 1998, the Department will review the tax records of the licenses and will determine whether a licensed electric generation supplier has a tax liability or failure to otherwise comply.

The Commission is an independent state agency established by the Legislature to oversee the utility industry in Pennsylvania and enforce the Public Utility Code, 66 Pa. C.S. §§ 101, et seq. It is also the state agency charged with licensing electric generation suppliers and ensuring that the license applicants meet the various statutory requirements for grant and continued maintenance of such a license. 66 Pa. C.S. § 2809(c).

The Commission objects to the proposed regulation as it is inconsistent with the law. The Commission can find no provision in the Electricity Generation Customer Choice and Competition Act, 66 Pa. C.S. §§ 2801 - 2812, that gives the Department the authority to direct the Commission to provide it with information on individual licensed generation suppliers.² Without this legal authority, the Department is powerless to direct the Commission to provide it with such information.

² The Commission notes that Section 2809(e)(6)(ii) does direct that the Commission report and certify to the Department by August 1, 1998 and each August 1 thereafter, “the total amount of electricity distributed for ultimate consumption in this Commonwealth during the previous two calendar years and the total gross receipts for the past year”. 66 Pa. C.S. § 2809(e)(6)(ii).

B. The Commission will continue to cooperate with the Department to provide it with information as requested.

Having established that the Department has no legal authority over the Commission's actions in regard to the provision of information, the Commission states unequivocally that it is willing to continue its past practice of cooperation with Department personnel to provide requested public information regarding individual electric generation supplier license applicants and licensees on an informal basis.³ Requests that involve information that is not of public record should be in writing and be directed to the Commission's Chief Counsel. See also, 52 Pa. C.S. § 5.423 (relating to proprietary information).

The Commission believes it has an excellent track record of cooperating with other Commonwealth agencies to achieve a common goal. See Memoranda of Understanding Involving the Attorney General's Office⁴, and the Department of Community and Economic Development⁵. Copies of these memoranda are attached. If entering into an MOU with the Department will facilitate the mutual sharing of information about licensed electric generation

³ The Commission Staff has cooperated fully with Department Staff in the licensing application process by providing required information about applicants to the Department.

⁴ Memorandum of Understanding relating to prosecution of electric generation suppliers for engaging in unfair or deceptive marketing practices and other anticompetitive or discriminatory conduct, February 5, 1998.

⁵ Memorandum of Understanding relating to the processing by the Commission of Section 2806(g)(4) petitions for waiver for pilot participation, March 12, 1999.

suppliers' payment of State taxes⁶, the Commission is open to discussing the matter. In the meantime, the Commission respectfully requests that the first sentence of proposed Section 160.41(b) be revised as follows:

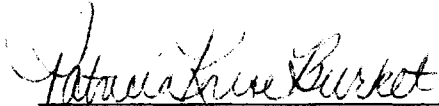
By May 1, 1998, and every year thereafter, the Commission will provide the Department with a list of licensed electric generation suppliers with their accompanying State tax numbers, similar identification numbers and any other information the Department may [will] require pursuant to a Memorandum of Understanding executed between the Commission and the Department.

⁶ The Legislature has directed that for purposes of enforcing Section 2806 and 2809 (relating to the requirements for electric generation suppliers), electric generation supplier applicants waive confidentiality as to state tax information regarding the payment of State taxes by filing with the Commission an application for grant, renewal or transfer of a license and consent to the Department providing this information to the Commission. 66 Pa.C.S. §2809(e)(6)(iv). The Department thus has no basis to refuse to release this type of information to the Commission upon request.

CONCLUSION

WHEREFORE the Pennsylvania Public Utility Commission respectfully requests that the revisions to the proposed regulations involving the Utility Gross Receipts Tax offered in our comments be adopted.

Respectfully submitted,


Patricia Krise Burket
Assistant Counsel

Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 787-3464

Date: October 18, 1999

- (1) The customer's telephone number.
 - (2) The customer's historical billing data.
- (b) Customers shall be permitted to restrict information as specified in subsection (a) by returning a signed form, orally or electronically.
- (c) Nothing in this section prohibits the EGS and EDC from performing their mandatory obligations to provide electricity service as specified in the disclosure statement and in the code.

Cross References

This section cited in 52 Pa. Code § 54.1 (relating to purpose).

§ 54.9. Complaint handling process.

EDCs and EGSs shall disclose to consumers the following with respect to the rights of consumers in the handling and resolution of complaints:

- (1) Residential and small business customers shall directly contact the party responsible for the service in question as an initial step for complaint and problem resolution. If the customer mistakenly contacts the wrong entity, the customer shall be promptly referred to the appropriate contact. In the event of a power outage, the customer shall be directed to the EDC.
- (2) Complaints that pertain to Chapter 56 (relating to standards and billing practices for residential utility service) matters shall be handled and resolved in accordance with the applicable standards in Chapter 56.
- (3) EDCs and EGSs shall give the Commission access to disclosure statements, billing and other customer information resources for compliance reviews as deemed necessary by the Commission. When complaints arise and are brought before the Commission for resolution, the obligation of the EGS shall be extended to the provision of pricing information.

Cross References

This section cited in 52 Pa. Code § 54.1 (relating to purpose).

Subchapter B. ELECTRICITY GENERATION SUPPLIER LICENSING

Sec.	
54.31.	Definitions.
54.32.	Application process.
54.33.	Application form.
54.34.	Change in organizational structure or operational status.
54.35.	Publication of notice of filing.
54.36.	Protests to applications.
54.37.	Approval.
54.38.	Regulatory assessments.
54.39.	Reporting requirements.

- 54.40. Bonds or other security.
- 54.41. Transfer or abandonment of license.
- 54.42. License suspension; license revocation.
- 54.43. Standards of conduct and disclosure for licensees.

Authority

The provisions of this Subchapter B issued under the Public Utility Code, 66 Pa.C.S. § 501; and the Electricity Generation Customer Choice and Competition Act, 66 Pa.C.S. §§ 2801—2812, unless otherwise noted.

Source

The provisions of this Subchapter B adopted August 7, 1998, effective August 8, 1998, 28 Pa.B. 3760, unless otherwise noted.

§ 54.31. Definitions.

The following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicate otherwise:

Aggregator—An entity licensed by the Commission, that purchases electric energy and takes title to electric energy as an intermediary for sale to retail customers. See section 2803 of the code (relating to definitions).

Applicant—A person or entity seeking to obtain a license to supply retail electricity or electric generation service.

Broker—An entity, licensed by the Commission, that acts as an intermediary in the sale and purchase of electric energy but does not take title to electric energy. See section 2803 of the code.

Code—The Public Utility Code, 66 Pa.C.S. §§ 101—3316.

Department—The Department of Revenue of the Commonwealth.

EDC—Electric distribution company.

Electric generation supplier—A person or corporation, including municipal corporations which choose to provide service outside their municipal limits except to the extent provided prior to the effective date of this chapter (*Editor's Note: The reference to "this chapter" refers to the code.*) brokers and marketers, aggregators or any other entities, that sells to end-use customers electricity or related services utilizing the jurisdictional transmission and distribution facilities of an electric distribution company, or that purchases, brokers, arranges or markets electricity or related services for sale to end-use customers utilizing the jurisdictional transmission and distribution facilities of an electric distribution company. The term excludes building or facility owner/operators that manage the internal distribution system serving such building or facility and that supply electric power and other related power services to occupants of the building or the facility. The term excludes electric cooperative corporations except as provided in 15 Pa.C.S. Ch. 74 (relating to generation choice for customers of electric cooperatives). See section 2803 of the code.

Interim license—A temporary license granted to an electric generation supplier under interim standards adopted in the Commission's Final Order on Licensing Requirements for Electricity Generation Suppliers, entered February 13, 1997 at Dkt. No. M-00960890 F0004.

License—A license granted to an electric generation supplier under this subchapter.

Licensee—A person or entity which has obtained a license to provide retail electricity or electric generation service.

Market aggregator—An entity licensed by the Commission, that purchases electric energy and takes title to electric energy as an intermediary for sale to retail customers. See section 2803 of the code.

Marketer—An entity, licensed by the Commission, that acts as an intermediary in the sale and purchase of electric energy but does not take title to electric energy. See section 2803 of the code.

Marketing—The publication, dissemination or distribution of informational and advertising materials regarding the electric generation supplier's services and products to the public by print, broadcast, electronic media, direct mail or by telecommunication.

Offer to provide service—The extension of an offer to provide services or products communicated orally, or in writing to a customer.

Provider of last resort—A supplier approved by the Commission under section 2807(e)(3) of the code (relating to duties of electric distribution companies) to provide generation service to customers who contracted for electricity that was not delivered, or who did not select an alternative electric generation supplier, or who are not eligible to obtain competitive energy supply, or who return to the provider of last resort after having obtained competitive energy supply.

Renewable resource—As defined in section 2803 of the code.

§ 54.32. Application process.

(a) An electric generation supplier may not engage in marketing, or may not offer to provide, or provide retail electricity or electric generation service until it is granted a license by the Commission.

(b) An application for a license shall be made on the form provided by the Commission. A copy of the application may be obtained from the Commission's Secretary. The application form will also be made available on the Commission's Internet web site. An application shall be verified by an oath or affirmation as required in § 1.36 (relating to verification). See section 2809(b) of the code (relating to requirements for electric generation suppliers).

(c) An original and eight copies of the completed application and supporting attachments shall be filed. An application for a license shall be accompanied by the application fee as established in § 1.43 (relating to schedule of fees payable to the Commission).

(d) Copies of the completed application with supporting documentation shall be served on the following: the Office of Consumer Advocate, the Office of Small Business Advocate, the Department and the Office of the Attorney General, and the EDCs through whose transmission and distribution facilities the applicant intends to supply customers.

(e) Incomplete applications and those without supporting attachments, when needed, will be rejected without prejudice. The license application, with supporting attachments, shall be completed in its entirety.

(f) When an answer on the application requires the disclosure of privileged or confidential information not otherwise available to the public, the applicant may designate at each point in the application where information is disclosed that is confidential and privileged.

(1) One copy of this confidential or privileged information conspicuously marked at the top as "CONFIDENTIAL" may be submitted to the Office of the Secretary with the application. An applicant must provide reasons for protecting this information.

(2) The request for confidentiality will be treated as a petition for protective order and will be ruled on by the Commission in conjunction with the license application.

(3) Pending disposition, the information will be used solely for the purpose of evaluating the license application, and the confidentiality of this information will be maintained consistent with regulations in this title pertaining to confidentiality.

(g) An electric generation supplier who has been granted an interim license shall apply for a license under this subchapter by updating its prior license application to include additional and updated information required by § 54.33 (relating to application form). An updated application shall be submitted by December 7, 1998.

(h) An EDC acting within its certified service territory as a provider of last resort is not required to obtain a license.

§ 54.33. Application form.

(a) The application form includes information that will be used in the evaluation of the financial fitness and technical fitness to render service. This information includes the following:

(1) An identification of the geographic area that the applicant proposes to serve.

(2) An identification of the type of service that the applicant proposes to furnish.

(3) An identification of the class of customers to which the applicant proposes to provide these services.

(4) An identification of the applicant's utility affiliates.

(5) A description of the applicant's business structure.

(6) Financial information sufficient to demonstrate financial fitness. This information may include credit ratings and history, audited financial statements, and insurance pertinent to the conduct of the applicant's business as an electric generation supplier.

(7) Evidence of competency and experience in providing the scope and nature of the applicant's proposed services. This evidence may include descriptions of the applicant's prior experience, proposed staffing and employee training commitments, business plans, and agreements, arrangements and contracts for generation, transmission and related services. Documentation of the applicant's membership in the East Central Area Reliability Coordination Agreement (ECAR), the Mid Atlantic Area Council (MAAC) or other National American Electric Reliability Council (NERC) regional reliability councils shall be submitted if applicable to the scope and nature of the applicant's proposed services.

(8) Evidence of information demonstrating the applicant's ability to comply with Commission's applicable requirements concerning customer billing, customer education, billing and terms of service, and customer information. This evidence may include prior regulatory experience of the applicant, prior business experience in energy or other service-oriented industries, staffing and staff training commitments, agreements, arrangements and contracts for customer education and information service, customer satisfaction survey results, government agency reports and complaint statistics compiled by the Better Business Bureau or similar business organizations.

(9) Certification that notice of the application was published in accordance with § 54.35 (relating to publication of notice of filing) shall be filed with the Commission's Secretary. The certification shall be notarized and include a photostatic copy of the notices as published. An application will not be considered complete for Commission review without this certification.

(b) The application also directs, under sections 2806(g)(3)(i), 2809(c)(1) and 2810(c)(6) of the code (relating to implementation, pilot programs and performance-based rates; requirements for electric generation suppliers; and revenue-neutral reconciliation), that the applicant provide tax information. This tax information includes:

- (1) The name, address, telephone number, electronic numbers and addresses used to transmit tax and related information of the persons responsible for preparing and filing the applicant's Pennsylvania tax returns.
- (2) Trade names or fictitious names used by the applicant.
- (3) The type of business association (for example, sole proprietor, partnership and corporation).
- (4) The names of the owners, general partners or corporate officers.
- (5) The number of the applicant's current and anticipated employees working in this Commonwealth.
- (6) An identification of the applicant's assets in this Commonwealth.

- (7) The principal office in this Commonwealth or of its registered agent.
- (8) An applicant's Department tax identification numbers including Sales Tax license number, employer identification number and corporate box number. If tax numbers have not yet been obtained, an applicant shall provide the filing date of its application for these numbers.
- (c) Tax information provided under subsection (b) shall be filed with the Secretary of the Department at the time that application is made with the Commission.

Cross References

This section cited in 52 Pa. Code § 54.32 (relating to application process); and 52 Pa. Code § 54.39 (relating to reporting requirements).

§ 54.34. Change in organizational structure or operational status.

- (a) The applicant is under a duty to inform the Commission of a material change in the information provided in the application during the pendency of the application, or while the licensee is operating in this Commonwealth.
- (b) A material change in the organizational structure or operation that affects an applicant's or a licensee's operation in this Commonwealth shall be reported to the Commission within 30 days of the date of the change. Specifically, notification shall be given to the Commission of a change in the following:
 - (1) The ownership of generation or transmission facilities or other inputs to electric power production.
 - (2) An affiliation with an EDC, or an entity which owns generation or transmission facilities or other inputs to electric power production.
 - (3) An affiliation with an entity that has a franchised service area.
- (c) Unless directed otherwise by the Commission, the licensee does not need to file an amended application with the Commission.

§ 54.35. Publication of notice of filing.

- (a) Notice of filing an application shall be published in newspapers of general circulation covering each county in which the applicant intends to provide service as required by § 5.14(a)(2) (relating to applications requiring notice). Applicants may contact the Commission's Press Secretary to confirm the identity of the newspapers of general circulation in which notice shall be published.
- (b) The notice shall be written in plain language and include the name, address and telephone number of the applicant, a description of the proposed services to be provided and the geographic area to be served. The notice shall include the application docket number and a statement that protests related to the technical or financial fitness of the applicant shall be filed within 15 days of the publication date of the notice with the Commission's Secretary, Public Utility Commission, P. O. Box 3265, Harrisburg, PA 17105-3265. The notice in an acceptable electronic format shall be submitted to the Commission's Secretary for

posting on the Commission's Internet web site and, if appropriate, on the Commission's electronic bulletin board.

Cross References

This section cited in 52 Pa. Code § 54.33 (relating to application form).

§ 54.36. Protests to applications.

(a) Consistent with § 5.14(b) (relating to applications requiring notice), a 15-day protest period commences on the date notice of the application filing is published in newspapers. An interested party may file a protest to an application in compliance with § 5.52(a) (relating to content of a protest to an application) and shall set out clearly and concisely the facts upon which challenge to the fitness of the applicant is based. An applicant may file an answer to the protest within 10 days of when the protest is filed. Protests which do not fully comply with § 5.52(a) will be rejected.

(b) Protests may challenge only the applicant's financial and technical fitness to provide the service for which a license is requested. Consistent with the requirements of due process, sanctions, such as revocation or suspension of a supplier's license or the imposition of a fine, may be imposed on parties who intentionally misuse the protest process by repeated filing of competitive protests.

(c) A protest to the applicant's technical or financial fitness to provide service will be assigned to Commission staff for review. Staff will determine if the protest fully complies with § 5.52(a) and sets out clearly and concisely the facts upon which the challenge to the fitness of the applicant is based. Staff will determine if the protest is sufficiently documented. If a protest is not sufficiently documented, Commission staff will prepare a recommendation for Commission consideration dismissing the protest and granting the application. If a protest is sufficiently documented, the application will be transferred to the Office of Administrative Law Judge for hearings or mediation as deemed appropriate.

§ 54.37. Approval.

(a) A license will be issued, authorizing the whole or any part of service requested, if the Commission finds that:

(1) The applicant is fit, willing and able to properly perform the service proposed in conformance with applicable provisions of the code and the lawful Commission orders and regulations, specifically including Chapter 56 (relating to Standards and Billing Practices for Residential Utility Service).

(2) The proposed service is consistent with the public interest and the policy declared in Chapter 28 of the code (relating to the Electricity Generation Customer Choice and Competition Act. See section 2809(b) of the code (relating to requirements for electric generation suppliers).

(b) Completed applications, with all supporting documentation, including any documentation or clarifying information requested by Commission staff, if unpro-

tested, will be processed within 45 days after acceptance by the Commission. If the application is not processed within the time period, the application will be deemed approved. The review period may be extended for a reasonable period of time by Secretarial Letter.

§ 54.38. Regulatory assessments.

(a) A licensee shall be required to pay assessments to be used to defray regulatory costs. See section 510 of the code (relating to assessment for regulatory expenses upon public utilities). Assessments will be based upon the administrative costs incurred by the Commission related to generation suppliers. These costs include:

(1) Maintaining records related to licensees and administering other provisions of the code related to maintenance of adequate reserve margins.

(2) Compliance with Chapter 56 (relating to standards and billing practices for residential utility service).

(3) Fulfilling consumer information and education obligations.

(b) Yearly assessments shall be paid by the licensee within 30 days of receipt of notice of the amount lawfully charged against it as a condition of maintaining a license to supply electricity or electric generation. See section 510(c) of the code.

§ 54.39. Reporting requirements.

(a) A licensee shall report its level of gross receipts to the Commission on a quarterly basis. Gross receipt information shall be filed with the Commission within the 30 days following the end of the first full quarter, and of each subsequent quarter that the license is in effect.

(b) A licensee shall file an annual report on or before April 30 of each year, for the previous calendar year. The annual report shall contain the following information (See section 2810(c)(6) of the code (relating to revenue-neutral reconciliation):

(1) Updates to the tax information requested in the application in § 54.33(b) (relating to application form).

(2) The total amount of gross receipts from the sales of electricity for the preceding calendar year.

(3) The total amount of electricity sold, stated in kilowatt hours, during the preceding calendar year.

(4) The percentage of total electricity supplied by each energy source, including a detailed breakdown of renewable resources as defined in section 2803 of the code (relating to definitions).

(c) A licensee shall be required to meet periodic reporting requirements as may be issued by the Commission to fulfill the Commission's duty under Chapter 28 of the code (relating to Electricity Generation Customer Choice and Com-

petition Act) pertaining to reliability and to inform the Governor and Legislature of the progress of the transition to a fully competitive electric market.

(d) The information requested in this section will be made available for public review upon request to the Commission subject to any rulings on confidentiality made by the Commission.

§ 54.40. Bonds or other security.

(a) A license will not be issued or remain in force until the licensee furnishes a bond or other security approved by the Commission. See section 2809(c) of the code (relating to requirements for electric generation suppliers).

(b) The purpose of the security requirement is to ensure the licensee's financial responsibility, the payment of gross receipts tax as required by section 2810 of the code (relating to revenue-neutral reconciliation), and the supply of electricity at retail in accordance with contracts, agreements or arrangement. See section 2809(c) of the code.

(c) The initial security level required from each applicant is \$250,000. Modifications of this amount commensurate with the nature and scope of business anticipated to be conducted in this Commonwealth may be granted where substantial evidence is submitted in support of the modification. A request for modification of this initial security level may be made in conjunction with the filing of the application. The license will be issued contingent on the submission of proof that the applicant has obtained a bond, or other approved security in the amount directed by the Commission.

(d) After the first year that the license is in effect, the security level for each licensee will be reviewed annually and modified primarily based on the licensee's reported annual gross receipts information. The security level will be 10% of the licensee's reported gross receipts. See section 2809 (c)(1)(i) of the code. Maintenance of a license will be contingent on the licensee providing proof to the Commission that a bond or other approved security in the amount directed by the Commission has been obtained. A licensee may seek approval from the Commission of an alternative level of bonding commensurate with the nature and scope of its operations.

(e) Payments pursuant to the security may result from the licensee's failure to pay the full amount of Gross Receipt Taxes, or failure to supply electricity or other services in accordance with contracts, agreements or arrangements.

(f) The bond or security shall include the following:

(1) The Pennsylvania Public Utility Commission, Commonwealth as the sole beneficiary.

(2) The purpose of the bond as follows:

This bond (or other security) is written in accordance with Section 2809(c)(1)(i) of the Public Utility Code, 66 Pa.C.S. § 2809(c)(1)(i), to assure compliance with applicable provisions of the Public Utility Code, 66 Pa.C.S. §§ 101, et seq., and the rules and regulation of the Pennsylvania Public Utility

Commission by the Principle as a licensed electric generation supplier; to ensure the payment of Gross Receipts Tax as required by Section 2810 of the Public Utility Code, 66 Pa.C.S. § 2810; and to ensure the supply of electricity at retail in accordance with contracts, agreements or arrangements.

(3) A listing of the prioritization of claims for payment under the security from highest priority to lowest priority as follows:

- (i) The Commonwealth.
- (ii) EDCs for the reimbursement of Gross Receipts Tax.

(c) Private individuals.

(4) A statement that the security shall be interpreted under law of the Commonwealth, or in the alternative, no choice of law is specified.

(g) The applicant may request the use of a security other than a bond. See section 2809 (c)(1)(i) of the code. The application shall include specific information about the licensee's need to use a security other than a bond; and shall provide the name, business address, the nature of the business of the entity issuing the security, and if available, the financial rating of the entity. The applicant shall demonstrate that the financial protection afforded by the security is equivalent to that of a bond.

(h) Licensee liability for unreasonable service, or for violations of the code and Commission orders and regulations is not limited by these security requirements.

§ 54.41. Transfer or abandonment of license.

(a) A license may not be transferred without prior Commission approval. See section 2809(d) of the code (relating to requirements for electric generation suppliers). Approval for transfer shall be obtained by petition to the Commission. The granting of such a petition does not eliminate the need for the transferee to complete and file with the Commission an application that demonstrates the transferee's financial and technical fitness to render service under the transferred license.

(b) A licensee may not abandon service without providing 90 days prior written notice to the Commission, the licensee's customers, the affected distribution utilities and providers of last resort prior to the abandonment of service. The licensee shall provide individual notice to its customers with each billing, in each of the three billing cycles preceding the effective date of the abandonment.

§ 54.42. License suspension; license revocation.

(a) A licensee shall comply with the applicable requirements of the code and Commission regulations and orders. Consistent with due process, a license may be suspended or revoked, and fines may be imposed against the licensee for:

- (1) The failure to pay the yearly assessment.
- (2) The failure to furnish and maintain a bond or other security approved by the Commission in the amount directed by the Commission.

(3) The nonpayment of taxes under Article II of the Tax Reform Code of 1971 (72 P. S. §§ 7201—7281.2) and Article XI of the Tax Reform Code of 1971 (72 P. S. §§ 8101—8104) and any taxes imposed by Chapter 28 of the code (relating to Electricity Generation Customer Choice and Competition Act). See sections 2806(g)(3) and 2809(c)(1) of the code (relating to implementation, pilot program and performance based rates; and requirements for electric generation suppliers).

(4) The failure to waive confidentiality with respect to tax information in the possession of the Department. See section 2810(c)(6)(iv) of the code (relating to revenue-neutral reconciliation).

(5) The failure to provide the address of its principal office in this Commonwealth or of its registered agent.

(6) The failure to follow the principles in § 54.43 (relating to standards of conduct and disclosure for licensees).

(7) A violation of applicable provisions of the code, this title and lawful Commission orders. See section 2809(b) of the code.

(8) A violation of Pennsylvania consumer protection law.

(9) The transfer of a customer without the customer's consent. See section 2807(d)(1) of the code (relating to duties of electric distribution companies).

§ 54.43. Standards of conduct and disclosure for licensees.

To protect consumers of this Commonwealth, licensees shall adhere to the following principles in the provision of electric generation service:

(1) A licensee shall provide accurate information about their electric generation services using plain language and common terms in communications with consumers. When new terms are used, the terms shall be defined again using plain language. Information shall be provided in a format that enables customers to compare the various electric generation services offered and the prices charged for each type of service.

(b) A licensee shall respond to reasonable consumer requests for information regarding energy sources by percentage, and plant emissions of its electric generation supply.

(c) A licensee shall provide notification of change in conditions of service, intent to cease operation as an electric generation supplier, explanation of denial of service, proper handling of deposits and proper handling of complaints in accordance with this title.

(d) A licensee shall maintain the confidentiality of a consumer's personal information including the name, address and telephone number, and historic payment information, and provide the right of access by the consumer to his own load and billing information.

(e) A licensee may not discriminate in the provision of electricity as to availability and terms of service based on race, color, religion, national origin, sex, marital status, age, receipt of public assistance income, and exercise of rights

under Subchapter IV of the Consumer Credit Protection Act (15 U.S.C.A. §§ 1691—1691f), relating to Equal Credit Opportunity. See 12 CFR 202-1—202.14 (relating to equal credit opportunity Regulation B).

(f) A licensee is responsible for any fraudulent deceptive or other unlawful marketing or billing acts performed by the licensee, its employees, agents or representatives. Licensee shall inform consumers of state consumer protection laws that govern the cancellation or rescission of electric generation supply contracts. See section 7 of the Unfair Trade Practices and Consumer Protection Law (73 P. S. § 201-7).

(g) A licensee shall comply with relevant Commission regulations, orders and directives that may be adopted.

Cross References

This section cited in 52 Pa. Code § 54.42 (relating to license suspension; license revocation).

Subchapter C. UNIVERSAL SERVICE AND ENERGY CONSERVATION REPORTING REQUIREMENTS

Sec.

- 54.71. Statement of purpose and policy.
- 54.72. Definitions.
- 54.73. Universal service and energy conservation program goals.
- 54.74. Universal service and energy conservation plans.
- 54.75. Annual residential collection universal service and energy conservation program reporting requirements.
- 54.76. Evaluation reporting requirements.
- 54.77. Electric distribution companies with less than 60,000 residential accounts.
- 54.78. Public information.

Authority

The provisions of this Subchapter C issued under the Public Utility Code, 66 Pa.C.S. § 501; and the Electricity Generation Customer Choice and Competition Act, 66 Pa.C.S. § 2801—2812, unless otherwise noted.

Source

The provisions of this Subchapter C adopted August 7, 1998, effective August 8, 1998, 28 Pa.B. 3793, unless otherwise noted.

§ 54.71. Statement of purpose and policy.

Section 2804(9) of the code (relating to standards for restructuring of electric industry) mandates that the Commission ensure universal service and energy conservation policies, activities and services for residential electric customers are appropriately funded and available in each EDC territory. This subchapter requires covered EDCs to establish uniform reporting requirements for universal

MEMORANDUM OF UNDERSTANDING

This MEMORANDUM OF UNDERSTANDING is made this 5th day of February 1998, by and between the Pennsylvania Office of Attorney General (herein "OAG") and the Pennsylvania Public Utility Commission (herein "PUC").

WHEREAS, on December 3, 1996, Governor Tom Ridge signed into law the Electricity Generation Customer Choice and Competition Act, 66 Pa. C.S. §§ 2801-12 (herein "Electricity Competition Act"). The purpose of the Electricity Competition Act is to open up competition in the electric utility industry by giving all retail customers the ability to buy electric generation from their choice of electric generation suppliers.

WHEREAS, section 2809 of the new law gives the PUC the authority to license electric generation suppliers and section 2811 empowers the PUC to monitor the supply and distribution of electricity to retail customers to prevent anticompetitive or discriminatory conduct, and to prevent the unlawful exercise of market power.

WHEREAS, section 2811 also gives the PUC authority to conduct investigations, upon complaint or its own motion, and to refer its findings to the OAG or appropriate federal agencies whenever it has reason to believe that "anticompetitive or discriminatory conduct, including the unlawful exercise of market power is preventing the retail electricity customers in this Commonwealth from obtaining the benefits of a properly functioning and workable competitive retail electricity market."

WHEREAS, the potential now exists for electric generation suppliers to engage in unfair or deceptive marketing practices and other anticompetitive or discriminatory conduct, the PUC adopted internal procedures for handling electric competition complaints under section 2811, including appropriate referral procedures, which became effective August 8, 1997.

WHEREAS, both the PUC and the OAG recognize that other disputes related to terms, conditions and adequacy of service of a contractual nature often involve dual jurisdiction between the PUC under its service standards provision contained in 66 Pa. C.S. § 1501, and the OAG under Pennsylvania's Unfair Trade Practices and Consumer Protection Law, 73 P.S. §§ 201-1-209-6, the Plain Language Consumer Contract Act, 72 P.S. §§ 2201-12, and the Federal Trade Commission Act, 15 U.S.C. §§ 41-58.

WHEREAS, the OAG has enforcement authority under Pennsylvania's Unfair Trade Practices and Consumer Protection Law and the federal antitrust laws, 15 U.S.C. § 1, *et seq.*, to challenge unfair or deceptive marketing practices, terms-of-service provisions, and other anticompetitive or discriminatory conduct engaged in by electric generation suppliers.

WHEREAS, for both terms, conditions and adequacy of service complaints and section 2811 complaints, the PUC has authority under the Public Utility Code, 66 Pa. C.S. § 101, *et seq.*, to initiate proceedings to develop guidelines, policy statements or regulations to address an industry-wide issue

or to file a section 701 complaint seeking a cease and desist order (or any other relief authorized by law) where more immediate and company-specific action is warranted.

WHEREAS, it would be mutually advantageous for the PUC and the OAG to develop interagency protocol procedures to maximize the ability of the OAG to obtain effective and adequate relief on behalf of consumers who have been injured by violations of the state consumer protection or federal antitrust laws and the PUC to develop, in appropriate cases, guidelines, policy statements or regulations to address industry-wide problems or obtain cease and desist orders for specific violations of the Public Utility Code.

NOW, THEREFORE, the PUC and the OAG agree that the following protocol shall apply whenever the PUC or the OAG receive a complaint alleging unfair or deceptive marketing practices, terms-of-service disputes, or other anticompetitive or discriminatory conduct engaged in by electric generation suppliers.

1. The agency that receives the original complaint will endeavor to complete its initial review in a prompt and timely manner.
2. At the completion of its initial review, the reviewing agency shall refer the complaint and its findings to the other agency for review and possible action if the original reviewing agency believes that the matter complained of is within the authority and jurisdiction of the other agency.
3. The PUC and the OAG agree to provide each other with periodic status reports, as appropriate, of any investigation begun because of a referral pursuant to this protocol procedure, including a final report when the investigation is completed or closed.
4. The PUC and OAG agree to meet informally on a quarterly basis to discuss matters of common interest and to share statistical information or data and/or activity reports generated by either agency summarizing terms-of-service and/or electric competition complaints handled by that agency during the applicable reporting period.
5. In referring complaints or providing status reports to the other agency, the investigating agency should not disclose any information that is protected by a confidentiality agreement, order, or law unless a waiver has been obtained from the party protected by the agreement, order, or law.
6. Nothing in this protocol shall require or prohibit either the PUC or the OAG from initiating any informal or formal action at the conclusion of its own investigation that it would be authorized to bring under any existing law.
7. Nothing in this protocol shall require, prohibit, or otherwise restrict the PUC's Bureau of Consumer Services from continuing to handle individual complaints concerning account eligibility criteria, credit and deposit practices, account billing, and termination disputes consistent with the existing policies and procedures set out in Chapter 56 of the Pa. Code, Title 52.

8. Nothing in this protocol shall require, prohibit, or otherwise restrict the OAG from continuing to handle individual complaints concerning unfair trade practices, consumer protection law violations, or antitrust law violations.

This agreement may be modified or terminated only upon written agreement of the PUC and the OAG.

PENNSYLVANIA PUBLIC UTILITY COMMISSION

By: *John M. Quain*
John M. Quain, Chairman

2-9-98
Date

By: *Robert K. Bloom*
Robert K. Bloom, Vice Chairman

2-24-98
Date

By: *John Hanger*
John Hanger, Commissioner

2-9-98
Date

By: *David W. Rolka*
David W. Rolka, Commissioner

2-9-98
Date

By: *Nora Mead Brownell*
Nora Mead Brownell, Commissioner

2/9/98
Date

PENNSYLVANIA OFFICE OF ATTORNEY GENERAL

By: *D. Michael Fisher*
D. Michael Fisher, Attorney General

February 5, 1998
Date

The undersigned have reviewed and approved the foregoing Memorandum of Understanding:

COUNSEL, PUBLIC UTILITY COMMISSION

By: *J. F. Pavlitz*

2/5/98
Date

COMPTROLLER, PUBLIC UTILITY COMMISSION

By: *Debra Chernoff*

3/4/98
Date

Commonwealth of Pennsylvania
MEMORANDUM OF UNDERSTANDING

THIS Memorandum, dated this TWELFTH day of MARCH 1998, by and between the COMMONWEALTH OF PENNSYLVANIA PUBLIC UTILITY COMMISSION (hereinafter, the "Commission"), with its principal offices at North Office Building, Harrisburg, PA 17105 and the DEPARTMENT OF COMMUNITY AND ECONOMIC DEVELOPMENT (hereinafter, the "Department") with its principal offices at 423 Forum Building, Harrisburg, PA 17120.

WITNESSETH:

- Whereas: Sections 501 and 502 of the Administrative Code of 1929 (71 P.S. §§181 and 182) require Commonwealth departments and agencies to coordinate their work and activities with other Commonwealth departments and agencies.
- Whereas: Act 138 Of 1996 (P.L. 802), that added Chapter 28, 66 Pa. C.S. §§ 2801, et seq (relating to restructuring of the electric utility industry) to the Public Utility Code, 66 Pa. C.S. §§ 101, et seq., established Pennsylvania as the fourth state in the nation to implement electric utility deregulation and;
- Whereas: Electric utility restructuring is a fundamental step towards improving the economic competitiveness, creating and retaining jobs and enhancing the quality of life in Pennsylvania communities and;
- Whereas: Pursuant to 66 Pa. §2806 (g)(relating to retail access programs), Pennsylvania has embarked on the most extensive and aggressive direct access pilot program in the nation, opening five percent of the Commonwealth's electric utilities' load to choice in electric generation service and;
- Whereas: The Act provides the Commission with the authority to grant waivers in excess of the five percent load cap for compelling economic development opportunities (an "Economic Development Waiver") and;

Whereas: The pilot program and waivers granted by the Commission are essential to the effective transition to choice and competition and;

Whereas: The Commission and the Department have a shared interest in, and have established communication on the role of Pennsylvania's utility infrastructure in creating jobs and revitalizing communities.

NOW THEREFORE, the parties to this Memorandum set forth the following terms and conditions of their understanding:

1. A petitioner for an Economic Development Waiver:
 - a) must be an active job retention or attraction client of the Department.
 - b) must be committed to maintaining for three years the job level at the geographical area specified in the petition.
2. Promptly upon receipt of a petition requesting an Economic Development Waiver the Commission shall submit the petition to the Department for its review and comment.
3. Promptly upon receipt of a petition forwarded to it from the Commission pursuant to Paragraph 1, the Department shall analyze the petition. As part of its regular review consistent with its usual practice, the Department will conduct discussions with the electric utility involved. Among other things, the Department will determine whether the petition satisfactorily meets any or all of the following criteria:
 - (i) The petition holds the potential for significant new load generation and major job creation;
 - (ii) The petition holds the potential for new load generation and for providing job creation opportunities in leading technology industries; or
 - (iii) The petition holds the potential to enable communities to respond effectively to sudden and severe economic distress, to expand electric generation load by fostering the civilian reuse of former military bases, and/or to retain quality jobs threatened directly by clear competition from low cost energy locations.
4. No later than ten days after the petition's filing date, the Department shall notify the Commission whether the Department recommends that the petition be granted approving an Economic Development Waiver.
5. The Commission will make the final decision as to whether to grant any particular Economic Development waiver.
6. This Memorandum is not intended to and does not create any contractual rights or obligations with respect to the Commission or the Department.
7. This Memoranda is not intended to replace any existing Commission procedures that provide interested parties with notice and an opportunity to heard before final Commission action on a petition. However, the time period for filing an answer to the petition will be shortened and any necessary hearing will be expeditiously scheduled so as to allow for the processing of most waiver petitions within 30 days from the date of filing.
8. This Memorandum shall be effective as of March 12, 1998 and shall continue in effect until terminated.

9. The parties acknowledge the foregoing as the terms and conditions of their understandings.

IN WITNESS WHEREOF, the parties to this Memorandum have executed it through their respective duly authorized officers as of the date first written above.

PUBLIC UTILITY COMMISSION

DEPARTMENT OF COMMUNITY
AND ECONOMIC DEVELOPMENT

/s/ John M. Quain 3/13/98
Chairman Date

/s/Samuel C. McCullough 3/12/98
Secretary Date

/s/Bohdan R. Pankiw 3/16/98
Chief Counsel Date

/s/Russell Belavance 3/16/98
Chief Counsel Date

Office of General Counsel

/s/Donna L. Kreiser 3/16/98
Deputy General Counsel Date



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

Original: 2061
Mizner
cc: Sandusky
Jewett
Markham
Smith
IN REPLY PLEASE
REFER TO OUR FILE
Legal

October 18, 1999

Anita M. Doucette
Office of the Chief Counsel
Department of Revenue
Dept. 281061
Harrisburg, PA 17128-1061

Re: Proposed Rulemaking:
61 Pa. Code Ch. 160 (relating to Utility Gross Receipts Tax)
IRRC No. 15-410

Dear Ms. Doucette:

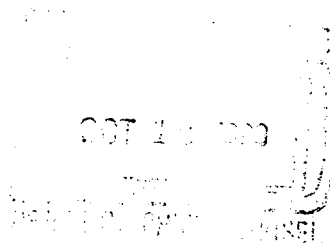
Enclosed for consideration at the above-captioned proposed rulemaking, please find a copy of the Comments of the Pennsylvania Public Utility Commission.

Respectfully submitted,

Patricia Krise Burket
Assistant Counsel

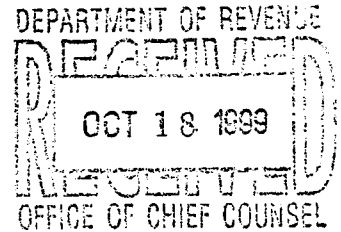
Enclosure

cc: IRRC
Chairman, Senate Finance Committee
Chairman, House Finance Committee
Pa. Public Utility Commission, Secretary's Bureau - New Assignments and Filings



**BEFORE
THE PENNSYLVANIA DEPARTMENT OF REVENUE**

PROPOSED RULEMAKING: :
61 PA. CODE CH. 160 (RELATING : IRRC No. 15-410
TO UTILITY GROSS RECEIPTS TAX :
:



**COMMENTS OF THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

On September 18, 1999, the Pennsylvania Department of Revenue (hereinafter Department) published for comment the above-captioned proposed rulemaking in the Pennsylvania Bulletin. 29 Pa. B. 4873. The Department proposed these amendments “to clarify changes to the utility gross receipts tax brought about by utility deregulation and to provide guidance to out-of-state businesses and the emerging industry.”

The Pennsylvania Public Utility Commission (hereinafter the Commission) is the state agency charged, *inter alia*, with the oversight of the restructuring of the electric utility industry. Pursuant to its authority under Section 2809(c) of the Public Utility Code, 66 Pa. C.S. §2809(c), the Commission has promulgated regulations for the licensing of electric generation suppliers. 52 Pa. Code §§ 54.31 - 54.43. One of these regulations, 52 Pa. Code § 54.40, addresses the security requirement for licensing and establishes that one of the purposes for

the security is to ensure the payment of Gross Receipts Tax (GRT). A copy of these regulations are attached for informational purposes.

- I. In Section 160.31 (b)(2), the shopping credit should not be used in the formula for calculating a non-reporting EGS's gross receipts.

Proposed Section 160.31 (b)(2) reads as follows:

(b) Failure of the electricity supplier to report and pay tax on gross receipts. Upon ascertaining that an electricity supplier has not properly reported and remitted the tax imposed upon gross receipts, the Department is authorized under section 1102 of the TRC (72 P.S. 8102) to:

* * * * *

(2) Settle or resettle and collect within 30 days of notice any unpaid tax, but not any interest or penalty imposed on the electricity supplier on the use of electricity from the electric distribution company with respect to the retail customers that it served. The tax shall be calculated by multiplying the kilowatt hours distributed on behalf of the electricity supplier for which no gross receipts tax has been remitted, by the electric distribution company's shopping credit provided to customers and filed with the Commission for electricity supply during the tax period. In the event that the actual gross receipts of the electricity supplier for which no gross receipts were received are known and available, the tax shall consist of these gross receipts multiplied by the applicable tax rate.

The Commission agrees that the actual gross receipts should be used when possible and believes that the Department should first contact the non-reporting EGS for this information. If the EGS is no longer in operation and did not perform its own billing, the Department should obtain gross receipts information from the EGS's billing agent. In most cases, the billing agent would

be the EDC, but could also be a competitive metering and billing provider. Only after the Department has attempted to obtain this information and failed, should gross receipts be estimated.

As to the estimation of gross receipts, the Commission has several concerns about using “kilowatt hours times shopping credit” calculation as a substitute for gross receipts.¹ The proposed calculation provides only a rough estimate of an electric generation supplier’s gross receipts and thus, is not a reliable basis upon which a tax can be calculated. Because electric distribution companies (EDCs) are statutorily obligated to pay GRT not paid by electric generation suppliers (EGSs), 66 Pa. C.S. §2809 (c)(2), the EDCs may need to do numerous recalculations to verify the actual amount of gross receipts.

Another problem with using the shopping credit is that it is transitory in nature and will be used only for as long as an EDC collects “stranded costs” through a competitive transition charge (CTC) from its ratepayers. During the collection period the shopping credit would exist. At the conclusion of these “stranded costs” collection periods, the shopping credit will disappear and the EDC, like other electric generation suppliers, would be allowed to charge market prices for the electric generation it supplied.

¹ The Commission notes that the number of kilowatts multiplied by a shopping credit does not result in the GRT. To calculate the GRT, the product of the “kilowatt times shopping credit” calculation must be also multiplied by the percent tax represented by the GRT.

Moreover, the shopping credit will cease to exist at different times for different EDCs. As a result of negotiated settlements, the Metropolitan Edison Company (Docket Number R-00974008) and the PECO Energy Company (Docket Number R-00973953) are permitted a 12-year period of time to collect "stranded costs", meaning that their shopping credits will be on the books for as long as 12 years. On the other hand, the Duquesne Light Company (Docket Number R-00974104) has proposed to terminate its collection of "stranded costs" in 2001 as the result of its auction of its generating facilities. Therefore the "shopping credit" for Duquesne's customers could end many years sooner than it would for the other electric distribution utilities. Considering the aforementioned problems, the Commission believes that it is unwise to promulgate a regulation that bases the calculation of gross receipts and ultimately the calculation of the GRT on the shopping credit.

Instead, the Commission believes that the better surrogate for gross receipts for a non-reporting EGS would be the number of kilowatt hours distributed by the EDC on behalf of the EGS multiplied by the EDC's provider of last resort (PLR) generation rate. The PLR generation rate is the rate the EDC or other PLR would charge to consumers who did not, or could not for financial reasons, choose an alternative electricity supplier. Based on the foregoing

comments, the Commission requests that proposed section 160.31(b)(2) be revised as follows:

(2) Settle or resettle and collect within 30 days of notice any unpaid tax, but not any interest or penalty imposed on the electricity supplier on the use of electricity from the electric distribution company with respect to the retail customers that it served. The tax shall be calculated by multiplying the kilowatt hours distributed on behalf of the electricity supplier for which no gross receipts tax has been remitted, by the electric distribution company's [shopping credit provided to customers and filed with the Commission for electricity supply] provider of last resort generation rate that was in force during the tax period. In the event that the actual gross receipts of the electricity supplier for which no gross receipts tax [were] was received can be obtained by the Department from the electricity supplier or the electricity supplier's billing agent [are known and available], the tax shall consist of these gross receipts multiplied by the applicable tax rate.

II. The Direction that the Commission Provide Information About Individual Licensed Electric Generation Suppliers to the Department in Proposed Section 160.41 Must Be Deleted as Being Inconsistent with the Law.

A. The Department does not have statutory authority to direct the Commission, an independent agency, to provide it with information about individual licensed electric generation suppliers.

Proposed Section 160.41 (relating to licensed generation suppliers)

reads as follows:

By May 1, 1998, and every year thereafter the Commission shall provide the Department with a list of licensed electric generation suppliers with their accompanying State tax numbers, similar identification numbers and any other information the Department will require. By July 30, 1998, the Department will review the tax records of the licenses and will determine whether a licensed electric generation supplier has a tax liability or failure to otherwise comply.

The Commission is an independent state agency established by the Legislature to oversee the utility industry in Pennsylvania and enforce the Public Utility Code, 66 Pa. C.S. §§ 101, et seq. It is also the state agency charged with licensing electric generation suppliers and ensuring that the license applicants meet the various statutory requirements for grant and continued maintenance of such a license. 66 Pa. C.S. § 2809(c).

The Commission objects to the proposed regulation as it is inconsistent with the law. The Commission can find no provision in the Electricity Generation Customer Choice and Competition Act, 66 Pa. C.S. §§ 2801 - 2812, that gives the Department the authority to direct the Commission to provide it with information on individual licensed generation suppliers.² Without this legal authority, the Department is powerless to direct the Commission to provide it with such information.

² The Commission notes that Section 2809(e)(6)(ii) does direct that the Commission report and certify to the Department by August 1, 1998 and each August 1 thereafter, “the total amount of electricity distributed for ultimate consumption in this Commonwealth during the previous two calendar years and the total gross receipts for the past year”. 66 Pa. C.S. § 2809(e)(6)(ii).

B. The Commission will continue to cooperate with the Department to provide it with information as requested.

Having established that the Department has no legal authority over the Commission's actions in regard to the provision of information, the Commission states unequivocally that it is willing to continue its past practice of cooperation with Department personnel to provide requested public information regarding individual electric generation supplier license applicants and licensees on an informal basis.³ Requests that involve information that is not of public record should be in writing and be directed to the Commission's Chief Counsel. See also, 52 Pa. C.S. § 5.423 (relating to proprietary information).

The Commission believes it has an excellent track record of cooperating with other Commonwealth agencies to achieve a common goal. See Memoranda of Understanding Involving the Attorney General's Office⁴, and the Department of Community and Economic Development⁵. Copies of these memoranda are attached. If entering into an MOU with the Department will facilitate the mutual sharing of information about licensed electric generation

³ The Commission Staff has cooperated fully with Department Staff in the licensing application process by providing required information about applicants to the Department.

⁴ Memorandum of Understanding relating to prosecution of electric generation suppliers for engaging in unfair or deceptive marketing practices and other anticompetitive or discriminatory conduct, February 5, 1998.

⁵ Memorandum of Understanding relating to the processing by the Commission of Section 2806(g)(4) petitions for waiver for pilot participation, March 12, 1999.

suppliers' payment of State taxes⁶, the Commission is open to discussing the matter. In the meantime, the Commission respectfully requests that the first sentence of proposed Section 160.41(b) be revised as follows:


By May 1, 1998, and every year thereafter, the Commission will provide the Department with a list of licensed electric generation suppliers with their accompanying State tax numbers, similar identification numbers and any other information the Department may [will] require pursuant to a Memorandum of Understanding executed between the Commission and the Department.

⁶ The Legislature has directed that for purposes of enforcing Section 2806 and 2809 (relating to the requirements for electric generation suppliers), electric generation supplier applicants waive confidentiality as to state tax information regarding the payment of State taxes by filing with the Commission an application for grant, renewal or transfer of a license and consent to the Department providing this information to the Commission. 66 Pa.C.S. §2809(e)(6)(iv). The Department thus has no basis to refuse to release this type of information to the Commission upon request.

CONCLUSION

WHEREFORE the Pennsylvania Public Utility Commission respectfully requests that the revisions to the proposed regulations involving the Utility Gross Receipts Tax offered in our comments be adopted.

Respectfully submitted,


Patricia Krise Burket
Assistant Counsel

Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 787-3464

Date: October 18, 1999

- (1) The customer's telephone number.
 - (2) The customer's historical billing data.
- (b) Customers shall be permitted to restrict information as specified in subsection (a) by returning a signed form, orally or electronically.
- (c) Nothing in this section prohibits the EGS and EDC from performing their mandatory obligations to provide electricity service as specified in the disclosure statement and in the code.

Cross References

This section cited in 52 Pa. Code § 54.1 (relating to purpose).

§ 54.9. Complaint handling process.

EDCs and EGSs shall disclose to consumers the following with respect to the rights of consumers in the handling and resolution of complaints:

- (1) Residential and small business customers shall directly contact the party responsible for the service in question as an initial step for complaint and problem resolution. If the customer mistakenly contacts the wrong entity, the customer shall be promptly referred to the appropriate contact. In the event of a power outage, the customer shall be directed to the EDC.
- (2) Complaints that pertain to Chapter 56 (relating to standards and billing practices for residential utility service) matters shall be handled and resolved in accordance with the applicable standards in Chapter 56.
- (3) EDCs and EGSs shall give the Commission access to disclosure statements, billing and other customer information resources for compliance reviews as deemed necessary by the Commission. When complaints arise and are brought before the Commission for resolution, the obligation of the EGS shall be extended to the provision of pricing information.

Cross References

This section cited in 52 Pa. Code § 54.1 (relating to purpose).

Subchapter B. ELECTRICITY GENERATION SUPPLIER LICENSING

Sec.	
54.31.	Definitions.
54.32.	Application process.
54.33.	Application form.
54.34.	Change in organizational structure or operational status.
54.35.	Publication of notice of filing.
54.36.	Protests to applications.
54.37.	Approval.
54.38.	Regulatory assessments.
54.39.	Reporting requirements.

- 54.40. Bonds or other security.
- 54.41. Transfer or abandonment of license.
- 54.42. License suspension; license revocation.
- 54.43. Standards of conduct and disclosure for licensees.

Authority

The provisions of this Subchapter B issued under the Public Utility Code, 66 Pa.C.S. § 501; and the Electricity Generation Customer Choice and Competition Act, 66 Pa.C.S. §§ 2801—2812, unless otherwise noted.

Source

The provisions of this Subchapter B adopted August 7, 1998, effective August 8, 1998, 28 Pa.B. 3760, unless otherwise noted.

§ 54.31. Definitions.

The following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicate otherwise:

Aggregator—An entity licensed by the Commission, that purchases electric energy and takes title to electric energy as an intermediary for sale to retail customers. See section 2803 of the code (relating to definitions).

Applicant—A person or entity seeking to obtain a license to supply retail electricity or electric generation service.

Broker—An entity, licensed by the Commission, that acts as an intermediary in the sale and purchase of electric energy but does not take title to electric energy. See section 2803 of the code.

Code—The Public Utility Code, 66 Pa.C.S. §§ 101—3316.

Department—The Department of Revenue of the Commonwealth.

EDC—Electric distribution company.

Electric generation supplier—A person or corporation, including municipal corporations which choose to provide service outside their municipal limits except to the extent provided prior to the effective date of this chapter (*Editor's Note*: The reference to "this chapter" refers to the code.) brokers and marketers, aggregators or any other entities, that sells to end-use customers electricity or related services utilizing the jurisdictional transmission and distribution facilities of an electric distribution company, or that purchases, brokers, arranges or markets electricity or related services for sale to end-use customers utilizing the jurisdictional transmission and distribution facilities of an electric distribution company. The term excludes building or facility owner/operators that manage the internal distribution system serving such building or facility and that supply electric power and other related power services to occupants of the building or the facility. The term excludes electric cooperative corporations except as provided in 15 Pa.C.S. Ch. 74 (relating to generation choice for customers of electric cooperatives). See section 2803 of the code.

Interim license—A temporary license granted to an electric generation supplier under interim standards adopted in the Commission's Final Order on Licensing Requirements for Electricity Generation Suppliers, entered February 13, 1997 at Dkt. No. M-00960890 F0004.

License—A license granted to an electric generation supplier under this subchapter.

Licensee—A person or entity which has obtained a license to provide retail electricity or electric generation service.

Market aggregator—An entity licensed by the Commission, that purchases electric energy and takes title to electric energy as an intermediary for sale to retail customers. See section 2803 of the code.

Marketer—An entity, licensed by the Commission, that acts as an intermediary in the sale and purchase of electric energy but does not take title to electric energy. See section 2803 of the code.

Marketing—The publication, dissemination or distribution of informational and advertising materials regarding the electric generation supplier's services and products to the public by print, broadcast, electronic media, direct mail or by telecommunication.

Offer to provide service—The extension of an offer to provide services or products communicated orally, or in writing to a customer.

Provider of last resort—A supplier approved by the Commission under section 2807(e)(3) of the code (relating to duties of electric distribution companies) to provide generation service to customers who contracted for electricity that was not delivered, or who did not select an alternative electric generation supplier, or who are not eligible to obtain competitive energy supply, or who return to the provider of last resort after having obtained competitive energy supply.

Renewable resource—As defined in section 2803 of the code.

§ 54.32. Application process.

(a) An electric generation supplier may not engage in marketing, or may not offer to provide, or provide retail electricity or electric generation service until it is granted a license by the Commission.

(b) An application for a license shall be made on the form provided by the Commission. A copy of the application may be obtained from the Commission's Secretary. The application form will also be made available on the Commission's Internet web site. An application shall be verified by an oath or affirmation as required in § 1.36 (relating to verification). See section 2809(b) of the code (relating to requirements for electric generation suppliers).

(c) An original and eight copies of the completed application and supporting attachments shall be filed. An application for a license shall be accompanied by the application fee as established in § 1.43 (relating to schedule of fees payable to the Commission).

(d) Copies of the completed application with supporting documentation shall be served on the following: the Office of Consumer Advocate, the Office of Small Business Advocate, the Department and the Office of the Attorney General, and the EDCs through whose transmission and distribution facilities the applicant intends to supply customers.

(e) Incomplete applications and those without supporting attachments, when needed, will be rejected without prejudice. The license application, with supporting attachments, shall be completed in its entirety.

(f) When an answer on the application requires the disclosure of privileged or confidential information not otherwise available to the public, the applicant may designate at each point in the application where information is disclosed that is confidential and privileged.

(1) One copy of this confidential or privileged information conspicuously marked at the top as "CONFIDENTIAL" may be submitted to the Office of the Secretary with the application. An applicant must provide reasons for protecting this information.

(2) The request for confidentiality will be treated as a petition for protective order and will be ruled on by the Commission in conjunction with the license application.

(3) Pending disposition, the information will be used solely for the purpose of evaluating the license application, and the confidentiality of this information will be maintained consistent with regulations in this title pertaining to confidentiality.

(g) An electric generation supplier who has been granted an interim license shall apply for a license under this subchapter by updating its prior license application to include additional and updated information required by § 54.33 (relating to application form). An updated application shall be submitted by December 7, 1998.

(h) An EDC acting within its certified service territory as a provider of last resort is not required to obtain a license.

§ 54.33. Application form.

(a) The application form includes information that will be used in the evaluation of the financial fitness and technical fitness to render service. This information includes the following:

(1) An identification of the geographic area that the applicant proposes to serve.

(2) An identification of the type of service that the applicant proposes to furnish.

(3) An identification of the class of customers to which the applicant proposes to provide these services.

(4) An identification of the applicant's utility affiliates.

(5) A description of the applicant's business structure.

(6) Financial information sufficient to demonstrate financial fitness. This information may include credit ratings and history, audited financial statements, and insurance pertinent to the conduct of the applicant's business as an electric generation supplier.

(7) Evidence of competency and experience in providing the scope and nature of the applicant's proposed services. This evidence may include descriptions of the applicant's prior experience, proposed staffing and employee training commitments, business plans, and agreements, arrangements and contracts for generation, transmission and related services. Documentation of the applicant's membership in the East Central Area Reliability Coordination Agreement (ECAR), the Mid Atlantic Area Council (MAAC) or other National American Electric Reliability Council (NERC) regional reliability councils shall be submitted if applicable to the scope and nature of the applicant's proposed services.

(8) Evidence of information demonstrating the applicant's ability to comply with Commission's applicable requirements concerning customer billing, customer education, billing and terms of service, and customer information. This evidence may include prior regulatory experience of the applicant, prior business experience in energy or other service-oriented industries, staffing and staff training commitments, agreements, arrangements and contracts for customer education and information service, customer satisfaction survey results, government agency reports and complaint statistics compiled by the Better Business Bureau or similar business organizations.

(9) Certification that notice of the application was published in accordance with § 54.35 (relating to publication of notice of filing) shall be filed with the Commission's Secretary. The certification shall be notarized and include a photostatic copy of the notices as published. An application will not be considered complete for Commission review without this certification.

(b) The application also directs, under sections 2806(g)(3)(i), 2809(c)(1) and 2810(c)(6) of the code (relating to implementation, pilot programs and performance-based rates; requirements for electric generation suppliers; and revenue-neutral reconciliation), that the applicant provide tax information. This tax information includes:

(1) The name, address, telephone number, electronic numbers and addresses used to transmit tax and related information of the persons responsible for preparing and filing the applicant's Pennsylvania tax returns.

(2) Trade names or fictitious names used by the applicant.

(3) The type of business association (for example, sole proprietor, partnership and corporation).

(4) The names of the owners, general partners or corporate officers.

(5) The number of the applicant's current and anticipated employees working in this Commonwealth.

(6) An identification of the applicant's assets in this Commonwealth.

- (7) The principal office in this Commonwealth or of its registered agent.
- (8) An applicant's Department tax identification numbers including Sales Tax license number, employer identification number and corporate box number. If tax numbers have not yet been obtained, an applicant shall provide the filing date of its application for these numbers.
- (c) Tax information provided under subsection (b) shall be filed with the Secretary of the Department at the time that application is made with the Commission.

Cross References

This section cited in 52 Pa. Code § 54.32 (relating to application process); and 52 Pa. Code § 54.39 (relating to reporting requirements).

§ 54.34. Change in organizational structure or operational status.

- (a) The applicant is under a duty to inform the Commission of a material change in the information provided in the application during the pendency of the application, or while the licensee is operating in this Commonwealth.
- (b) A material change in the organizational structure or operation that affects an applicant's or a licensee's operation in this Commonwealth shall be reported to the Commission within 30 days of the date of the change. Specifically, notification shall be given to the Commission of a change in the following:
 - (1) The ownership of generation or transmission facilities or other inputs to electric power production.
 - (2) An affiliation with an EDC, or an entity which owns generation or transmission facilities or other inputs to electric power production.
 - (3) An affiliation with an entity that has a franchised service area.
- (c) Unless directed otherwise by the Commission, the licensee does not need to file an amended application with the Commission.

§ 54.35. Publication of notice of filing.

- (a) Notice of filing an application shall be published in newspapers of general circulation covering each county in which the applicant intends to provide service as required by § 5.14(a)(2) (relating to applications requiring notice). Applicants may contact the Commission's Press Secretary to confirm the identity of the newspapers of general circulation in which notice shall be published.
- (b) The notice shall be written in plain language and include the name, address and telephone number of the applicant, a description of the proposed services to be provided and the geographic area to be served. The notice shall include the application docket number and a statement that protests related to the technical or financial fitness of the applicant shall be filed within 15 days of the publication date of the notice with the Commission's Secretary, Public Utility Commission, P. O. Box 3265, Harrisburg, PA 17105-3265. The notice in an acceptable electronic format shall be submitted to the Commission's Secretary for

posting on the Commission's Internet web site and, if appropriate, on the Commission's electronic bulletin board.

Cross References

This section cited in 52 Pa. Code § 54.33 (relating to application form).

§ 54.36. Protests to applications.

(a) Consistent with § 5.14(b) (relating to applications requiring notice), a 15-day protest period commences on the date notice of the application filing is published in newspapers. An interested party may file a protest to an application in compliance with § 5.52(a) (relating to content of a protest to an application) and shall set out clearly and concisely the facts upon which challenge to the fitness of the applicant is based. An applicant may file an answer to the protest within 10 days of when the protest is filed. Protests which do not fully comply with § 5.52(a) will be rejected.

(b) Protests may challenge only the applicant's financial and technical fitness to provide the service for which a license is requested. Consistent with the requirements of due process, sanctions, such as revocation or suspension of a supplier's license or the imposition of a fine, may be imposed on parties who intentionally misuse the protest process by repeated filing of competitive protests.

(c) A protest to the applicant's technical or financial fitness to provide service will be assigned to Commission staff for review. Staff will determine if the protest fully complies with § 5.52(a) and sets out clearly and concisely the facts upon which the challenge to the fitness of the applicant is based. Staff will determine if the protest is sufficiently documented. If a protest is not sufficiently documented, Commission staff will prepare a recommendation for Commission consideration dismissing the protest and granting the application. If a protest is sufficiently documented, the application will be transferred to the Office of Administrative Law Judge for hearings or mediation as deemed appropriate.

§ 54.37. Approval.

(a) A license will be issued, authorizing the whole or any part of service requested, if the Commission finds that:

(1) The applicant is fit, willing and able to properly perform the service proposed in conformance with applicable provisions of the code and the lawful Commission orders and regulations, specifically including Chapter 56 (relating to Standards and Billing Practices for Residential Utility Service).

(2) The proposed service is consistent with the public interest and the policy declared in Chapter 28 of the code (relating to the Electricity Generation Customer Choice and Competition Act. See section 2809(b) of the code (relating to requirements for electric generation suppliers).

(b) Completed applications, with all supporting documentation, including any documentation or clarifying information requested by Commission staff, if unpro-

tested, will be processed within 45 days after acceptance by the Commission. If the application is not processed within the time period, the application will be deemed approved. The review period may be extended for a reasonable period of time by Secretarial Letter.

§ 54.38. Regulatory assessments.

(a) A licensee shall be required to pay assessments to be used to defray regulatory costs. See section 510 of the code (relating to assessment for regulatory expenses upon public utilities). Assessments will be based upon the administrative costs incurred by the Commission related to generation suppliers. These costs include:

(1) Maintaining records related to licensees and administering other provisions of the code related to maintenance of adequate reserve margins.

(2) Compliance with Chapter 56 (relating to standards and billing practices for residential utility service).

(3) Fulfilling consumer information and education obligations.

(b) Yearly assessments shall be paid by the licensee within 30 days of receipt of notice of the amount lawfully charged against it as a condition of maintaining a license to supply electricity or electric generation. See section 510(c) of the code.

§ 54.39. Reporting requirements.

(a) A licensee shall report its level of gross receipts to the Commission on a quarterly basis. Gross receipt information shall be filed with the Commission within the 30 days following the end of the first full quarter, and of each subsequent quarter that the license is in effect.

(b) A licensee shall file an annual report on or before April 30 of each year, for the previous calendar year. The annual report shall contain the following information (See section 2810(c)(6) of the code (relating to revenue-neutral reconciliation):

(1) Updates to the tax information requested in the application in § 54.33(b) (relating to application form).

(2) The total amount of gross receipts from the sales of electricity for the preceding calendar year.

(3) The total amount of electricity sold, stated in kilowatt hours, during the preceding calendar year.

(4) The percentage of total electricity supplied by each energy source, including a detailed breakdown of renewable resources as defined in section 2803 of the code (relating to definitions).

(c) A licensee shall be required to meet periodic reporting requirements as may be issued by the Commission to fulfill the Commission's duty under Chapter 28 of the code (relating to Electricity Generation Customer Choice and Com-

petition Act) pertaining to reliability and to inform the Governor and Legislature of the progress of the transition to a fully competitive electric market.

(d) The information requested in this section will be made available for public review upon request to the Commission subject to any rulings on confidentiality made by the Commission.

§ 54.40. Bonds or other security.

(a) A license will not be issued or remain in force until the licensee furnishes a bond or other security approved by the Commission. See section 2809(c) of the code (relating to requirements for electric generation suppliers).

(b) The purpose of the security requirement is to ensure the licensee's financial responsibility, the payment of gross receipts tax as required by section 2810 of the code (relating to revenue-neutral reconciliation), and the supply of electricity at retail in accordance with contracts, agreements or arrangement. See section 2809(c) of the code.

(c) The initial security level required from each applicant is \$250,000. Modifications of this amount commensurate with the nature and scope of business anticipated to be conducted in this Commonwealth may be granted where substantial evidence is submitted in support of the modification. A request for modification of this initial security level may be made in conjunction with the filing of the application. The license will be issued contingent on the submission of proof that the applicant has obtained a bond, or other approved security in the amount directed by the Commission.

(d) After the first year that the license is in effect, the security level for each licensee will be reviewed annually and modified primarily based on the licensee's reported annual gross receipts information. The security level will be 10% of the licensee's reported gross receipts. See section 2809 (c)(1)(i) of the code. Maintenance of a license will be contingent on the licensee providing proof to the Commission that a bond or other approved security in the amount directed by the Commission has been obtained. A licensee may seek approval from the Commission of an alternative level of bonding commensurate with the nature and scope of its operations.

(e) Payments pursuant to the security may result from the licensee's failure to pay the full amount of Gross Receipt Taxes, or failure to supply electricity or other services in accordance with contracts, agreements or arrangements.

(f) The bond or security shall include the following:

(1) The Pennsylvania Public Utility Commission, Commonwealth as the sole beneficiary.

(2) The purpose of the bond as follows:

This bond (or other security) is written in accordance with Section 2809(c)(1)(i) of the Public Utility Code, 66 Pa.C.S. § 2809(c)(1)(i), to assure compliance with applicable provisions of the Public Utility Code, 66 Pa.C.S. §§ 101, et seq., and the rules and regulation of the Pennsylvania Public Utility

Commission by the Principle as a licensed electric generation supplier; to ensure the payment of Gross Receipts Tax as required by Section 2810 of the Public Utility Code, 66 Pa.C.S. § 2810; and to ensure the supply of electricity at retail in accordance with contracts, agreements or arrangements.

(3) A listing of the prioritization of claims for payment under the security from highest priority to lowest priority as follows:

(i) The Commonwealth.

(ii) EDCs for the reimbursement of Gross Receipts Tax.

(c) Private individuals.

(4) A statement that the security shall be interpreted under law of the Commonwealth, or in the alternative, no choice of law is specified.

(g) The applicant may request the use of a security other than a bond. See section 2809 (c)(1)(i) of the code. The application shall include specific information about the licensee's need to use a security other than a bond; and shall provide the name, business address, the nature of the business of the entity issuing the security, and if available, the financial rating of the entity. The applicant shall demonstrate that the financial protection afforded by the security is equivalent to that of a bond.

(h) Licensee liability for unreasonable service, or for violations of the code and Commission orders and regulations is not limited by these security requirements.

§ 54.41. Transfer or abandonment of license.

(a) A license may not be transferred without prior Commission approval. See section 2809(d) of the code (relating to requirements for electric generation suppliers). Approval for transfer shall be obtained by petition to the Commission. The granting of such a petition does not eliminate the need for the transferee to complete and file with the Commission an application that demonstrates the transferee's financial and technical fitness to render service under the transferred license.

(b) A licensee may not abandon service without providing 90 days prior written notice to the Commission, the licensee's customers, the affected distribution utilities and providers of last resort prior to the abandonment of service. The licensee shall provide individual notice to its customers with each billing, in each of the three billing cycles preceding the effective date of the abandonment.

§ 54.42. License suspension; license revocation.

(a) A licensee shall comply with the applicable requirements of the code and Commission regulations and orders. Consistent with due process, a license may be suspended or revoked, and fines may be imposed against the licensee for:

(1) The failure to pay the yearly assessment.

(2) The failure to furnish and maintain a bond or other security approved by the Commission in the amount directed by the Commission.

(3) The nonpayment of taxes under Article II of the Tax Reform Code of 1971 (72 P. S. §§ 7201—7281.2) and Article XI of the Tax Reform Code of 1971 (72 P. S. §§ 8101—8104) and any taxes imposed by Chapter 28 of the code (relating to Electricity Generation Customer Choice and Competition Act). See sections 2806(g)(3) and 2809(c)(1) of the code (relating to implementation, pilot program and performance based rates; and requirements for electric generation suppliers).

(4) The failure to waive confidentiality with respect to tax information in the possession of the Department. See section 2810(c)(6)(iv) of the code (relating to revenue-neutral reconciliation).

(5) The failure to provide the address of its principal office in this Commonwealth or of its registered agent.

(6) The failure to follow the principles in § 54.43 (relating to standards of conduct and disclosure for licensees).

(7) A violation of applicable provisions of the code, this title and lawful Commission orders. See section 2809(b) of the code.

(8) A violation of Pennsylvania consumer protection law.

(9) The transfer of a customer without the customer's consent. See section 2807(d)(1) of the code (relating to duties of electric distribution companies).

§ 54.43. Standards of conduct and disclosure for licensees.

To protect consumers of this Commonwealth, licensees shall adhere to the following principles in the provision of electric generation service:

(1) A licensee shall provide accurate information about their electric generation services using plain language and common terms in communications with consumers. When new terms are used, the terms shall be defined again using plain language. Information shall be provided in a format that enables customers to compare the various electric generation services offered and the prices charged for each type of service.

(b) A licensee shall respond to reasonable consumer requests for information regarding energy sources by percentage, and plant emissions of its electric generation supply.

(c) A licensee shall provide notification of change in conditions of service, intent to cease operation as an electric generation supplier, explanation of denial of service, proper handling of deposits and proper handling of complaints in accordance with this title.

(d) A licensee shall maintain the confidentiality of a consumer's personal information including the name, address and telephone number, and historic payment information, and provide the right of access by the consumer to his own load and billing information.

(e) A licensee may not discriminate in the provision of electricity as to availability and terms of service based on race, color, religion, national origin, sex, marital status, age, receipt of public assistance income, and exercise of rights

under Subchapter IV of the Consumer Credit Protection Act (15 U.S.C.A. §§ 1691—1691f), relating to Equal Credit Opportunity. See 12 CFR 202-1—202.14 (relating to equal credit opportunity Regulation B).

(f) A licensee is responsible for any fraudulent deceptive or other unlawful marketing or billing acts performed by the licensee, its employes, agents or representatives. Licensee shall inform consumers of state consumer protection laws that govern the cancellation or rescission of electric generation supply contracts. See section 7 of the Unfair Trade Practices and Consumer Protection Law (73 P. S. § 201-7).

(g) A licensee shall comply with relevant Commission regulations, orders and directives that may be adopted.

Cross References

This section cited in 52 Pa. Code § 54.42 (relating to license suspension; license revocation).

Subchapter C. UNIVERSAL SERVICE AND ENERGY CONSERVATION REPORTING REQUIREMENTS

- Sec.
- 54.71. Statement of purpose and policy.
 - 54.72. Definitions.
 - 54.73. Universal service and energy conservation program goals.
 - 54.74. Universal service and energy conservation plans.
 - 54.75. Annual residential collection universal service and energy conservation program reporting requirements.
 - 54.76. Evaluation reporting requirements.
 - 54.77. Electric distribution companies with less than 60,000 residential accounts.
 - 54.78. Public information.

Authority

The provisions of this Subchapter C issued under the Public Utility Code, 66 Pa.C.S. § 501; and the Electricity Generation Customer Choice and Competition Act, 66 Pa.C.S. § 2801—2812, unless otherwise noted.

Source

The provisions of this Subchapter C adopted August 7, 1998, effective August 8, 1998, 28 Pa.B. 3793, unless otherwise noted.

§ 54.71. Statement of purpose and policy.

Section 2804(9) of the code (relating to standards for restructuring of electric industry) mandates that the Commission ensure universal service and energy conservation policies, activities and services for residential electric customers are appropriately funded and available in each EDC territory. This subchapter requires covered EDCs to establish uniform reporting requirements for universal

MEMORANDUM OF UNDERSTANDING

This MEMORANDUM OF UNDERSTANDING is made this 5th day of February 1998, by and between the Pennsylvania Office of Attorney General (herein "OAG") and the Pennsylvania Public Utility Commission (herein "PUC").

WHEREAS, on December 3, 1996, Governor Tom Ridge signed into law the Electricity Generation Customer Choice and Competition Act, 66 Pa. C.S. §§ 2801-12 (herein "Electricity Competition Act"). The purpose of the Electricity Competition Act is to open up competition in the electric utility industry by giving all retail customers the ability to buy electric generation from their choice of electric generation suppliers.

WHEREAS, section 2809 of the new law gives the PUC the authority to license electric generation suppliers and section 2811 empowers the PUC to monitor the supply and distribution of electricity to retail customers to prevent anticompetitive or discriminatory conduct, and to prevent the unlawful exercise of market power.

WHEREAS, section 2811 also gives the PUC authority to conduct investigations, upon complaint or its own motion, and to refer its findings to the OAG or appropriate federal agencies whenever it has reason to believe that "anticompetitive or discriminatory conduct, including the unlawful exercise of market power is preventing the retail electricity customers in this Commonwealth from obtaining the benefits of a properly functioning and workable competitive retail electricity market."

WHEREAS, the potential now exists for electric generation suppliers to engage in unfair or deceptive marketing practices and other anticompetitive or discriminatory conduct, the PUC adopted internal procedures for handling electric competition complaints under section 2811, including appropriate referral procedures, which became effective August 8, 1997.

WHEREAS, both the PUC and the OAG recognize that other disputes related to terms, conditions and adequacy of service of a contractual nature often involve dual jurisdiction between the PUC under its service standards provision contained in 66 Pa. C.S. § 1501, and the OAG under Pennsylvania's Unfair Trade Practices and Consumer Protection Law, 73 P.S. §§ 201-1-209-6, the Plain Language Consumer Contract Act, 72 P.S. §§ 2201-12, and the Federal Trade Commission Act, 15 U.S.C. §§ 41-58.

WHEREAS, the OAG has enforcement authority under Pennsylvania's Unfair Trade Practices and Consumer Protection Law and the federal antitrust laws, 15 U.S.C. §§ 1, *et seq.*, to challenge unfair or deceptive marketing practices, terms-of-service provisions, and other anticompetitive or discriminatory conduct engaged in by electric generation suppliers.

WHEREAS, for both terms, conditions and adequacy of service complaints and section 2811 complaints, the PUC has authority under the Public Utility Code, 66 Pa. C.S. §§ 101, *et seq.*, to initiate proceedings to develop guidelines, policy statements or regulations to address an industry-wide issue

or to file a section 701 complaint seeking a cease and desist order (or any other relief authorized by law) where more immediate and company-specific action is warranted.

WHEREAS, it would be mutually advantageous for the PUC and the OAG to develop interagency protocol procedures to maximize the ability of the OAG to obtain effective and adequate relief on behalf of consumers who have been injured by violations of the state consumer protection or federal antitrust laws and the PUC to develop, in appropriate cases, guidelines, policy statements or regulations to address industry-wide problems or obtain cease and desist orders for specific violations of the Public Utility Code.

NOW, THEREFORE, the PUC and the OAG agree that the following protocol shall apply whenever the PUC or the OAG receive a complaint alleging unfair or deceptive marketing practices, terms-of-service disputes, or other anticompetitive or discriminatory conduct engaged in by electric generation suppliers.

1. The agency that receives the original complaint will endeavor to complete its initial review in a prompt and timely manner.
2. At the completion of its initial review, the reviewing agency shall refer the complaint and its findings to the other agency for review and possible action if the original reviewing agency believes that the matter complained of is within the authority and jurisdiction of the other agency.
3. The PUC and the OAG agree to provide each other with periodic status reports, as appropriate, of any investigation begun because of a referral pursuant to this protocol procedure, including a final report when the investigation is completed or closed.
4. The PUC and OAG agree to meet informally on a quarterly basis to discuss matters of common interest and to share statistical information or data and/or activity reports generated by either agency summarizing terms-of-service and/or electric competition complaints handled by that agency during the applicable reporting period.
5. In referring complaints or providing status reports to the other agency, the investigating agency should not disclose any information that is protected by a confidentiality agreement, order, or law unless a waiver has been obtained from the party protected by the agreement, order, or law.
6. Nothing in this protocol shall require or prohibit either the PUC or the OAG from initiating any informal or formal action at the conclusion of its own investigation that it would be authorized to bring under any existing law.
7. Nothing in this protocol shall require, prohibit, or otherwise restrict the PUC's Bureau of Consumer Services from continuing to handle individual complaints concerning account eligibility criteria, credit and deposit practices, account billing, and termination disputes consistent with the existing policies and procedures set out in Chapter 56 of the Pa. Code, Title 52.

8. Nothing in this protocol shall require, prohibit, or otherwise restrict the OAG from continuing to handle individual complaints concerning unfair trade practices, consumer protection law violations, or antitrust law violations.

This agreement may be modified or terminated only upon written agreement of the PUC and the OAG.

PENNSYLVANIA PUBLIC UTILITY COMMISSION

By: *John M. Quain*
John M. Quain, Chairman

2-9-98
Date

By: *Robert K. Bloom*
Robert K. Bloom, Vice Chairman

2-24-98
Date

By: *John Hanger*
John Hanger, Commissioner

2-9-98
Date

By: *David W. Rolka*
David W. Rolka, Commissioner

2-9-98
Date

By: *Nora Mead Brownell*
Nora Mead Brownell, Commissioner

2/9/98
Date

PENNSYLVANIA OFFICE OF ATTORNEY GENERAL

By: *D. Michael Fisher*
D. Michael Fisher, Attorney General

February 5, 1998
Date

The undersigned have reviewed and approved the foregoing Memorandum of Understanding:

COUNSEL, PUBLIC UTILITY COMMISSION

By: *J. R. F. Parilats*

2/5/98
Date

COMPTROLLER, PUBLIC UTILITY COMMISSION

By: *Debra Chernoff*

3/1/98
Date

Commonwealth of Pennsylvania
MEMORANDUM OF UNDERSTANDING

THIS Memorandum, dated this TWELFTH day of MARCH 1998, by and between the COMMONWEALTH OF PENNSYLVANIA PUBLIC UTILITY COMMISSION (hereinafter, the "Commission"), with its principal offices at North Office Building, Harrisburg, PA 17105 and the DEPARTMENT OF COMMUNITY AND ECONOMIC DEVELOPMENT (hereinafter, the "Department") with its principal offices at 423 Forum Building, Harrisburg, PA 17120.

WITNESSETH:

- Whereas: Sections 501 and 502 of the Administrative Code of 1929 (71 P.S. §§181 and 182) require Commonwealth departments and agencies to coordinate their work and activities with other Commonwealth departments and agencies.
- Whereas: Act 138 Of 1996 (P.L. 802), that added Chapter 28, 66 Pa. C.S. §§ 2801, et seq (relating to restructuring of the electric utility industry) to the Public Utility Code, 66 Pa. C.S. §§ 101, et seq., established Pennsylvania as the fourth state in the nation to implement electric utility deregulation and;
- Whereas: Electric utility restructuring is a fundamental step towards improving the economic competitiveness, creating and retaining jobs and enhancing the quality of life in Pennsylvania communities and;
- Whereas: Pursuant to 66 Pa. §2806 (g)(relating to retail access programs), Pennsylvania has embarked on the most extensive and aggressive direct access pilot program in the nation, opening five percent of the Commonwealth's electric utilities' load to choice in electric generation service and;
- Whereas: The Act provides the Commission with the authority to grant waivers in excess of the five percent load cap for compelling economic development opportunities (an "Economic Development Waiver") and;

Whereas: The pilot program and waivers granted by the Commission are essential to the effective transition to choice and competition and;

Whereas: The Commission and the Department have a shared interest in, and have established communication on the role of Pennsylvania's utility infrastructure in creating jobs and revitalizing communities.

NOW THEREFORE, the parties to this Memorandum set forth the following terms and conditions of their understanding:

1. A petitioner for an Economic Development Waiver:

a) must be an active job retention or attraction client of the Department.

b) must be committed to maintaining for three years the job level at the geographical area specified in the petition.

2. Promptly upon receipt of a petition requesting an Economic Development Waiver the Commission shall submit the petition to the Department for its review and comment.

3. Promptly upon receipt of a petition forwarded to it from the Commission pursuant to Paragraph 1, the Department shall analyze the petition. As part of its regular review consistent with its usual practice, the Department will conduct discussions with the electric utility involved. Among other things, the Department will determine whether the petition satisfactorily meets any or all of the following criteria:

(i) The petition holds the potential for significant new load generation and major job creation;

(ii) The petition holds the potential for new load generation and for providing job creation opportunities in leading technology industries; or

(iii) The petition holds the potential to enable communities to respond effectively to sudden and severe economic distress, to expand electric generation load by fostering the civilian reuse of former military bases, and/or to retain quality jobs threatened directly by clear competition from low cost energy locations.

4. No later than ten days after the petition's filing date, the Department shall notify the Commission whether the Department recommends that the petition be granted approving an Economic Development Waiver.

5. The Commission will make the final decision as to whether to grant any particular Economic Development waiver.

6. This Memorandum is not intended to and does not create any contractual rights or obligations with respect to the Commission or the Department.

7. This Memoranda is not intended to replace any existing Commission procedures that provide interested parties with notice and an opportunity to heard before final Commission action on a petition. However, the time period for filing an answer to the petition will be shortened and any necessary hearing will be expeditiously scheduled so as to allow for the processing of most waiver petitions within 30 days from the date of filing.

8. This Memorandum shall be effective as of March 12, 1998 and shall continue in effect until terminated.

9. The parties acknowledge the foregoing as the terms and conditions of their understandings.

IN WITNESS WHEREOF, the parties to this Memorandum have executed it through their respective duly authorized officers as of the date first written above.

PUBLIC UTILITY COMMISSION

DEPARTMENT OF COMMUNITY
AND ECONOMIC DEVELOPMENT

/s/ John M. Quain 3/13/98
Chairman Date

/s/Samuel C. McCullough 3/12/98
Secretary Date

/s/Bohdan R. Pankiw 3/16/98
Chief Counsel Date

/s/Russell Belavance 3/16/98
Chief Counsel Date

Office of General Counsel

/s/Donna L. Kreiser 3/16/98
Deputy General Counsel Date



October 19, 1999

Original: 2061
Mizner
cc: Sandusky
Jewett
Markham
Legal

John R. McGinley, Jr.
Chairman
Independent Regulatory
Review Commission
14th Floor, Harristown 2
333 Market Street
Harrisburg, PA 17101

Re: Public Comments (15-410)
David M. Kleppinger, Esq.
Pennsylvania Public Utility Commission

Dear Chairman McGinley:

In accordance with section 5(c) of the Regulatory Review Act (71 P.S. §745.5(c)), please find enclosed two public comments received by the Department on October 18, 1999, relating to Regulation 15-410, utility gross receipts tax.

If you have any questions regarding this matter, please contact me at (717) 787-1382, extension 3065.

Sincerely,

A handwritten signature in cursive script that reads "Anita M. Doucette".

Anita M. Doucette
Regulatory Coordinator

Enclosures

AMD:tlch

Original: 2061

Mizner

cc: Sandusky

Jewett, Markham, Smith, Legal

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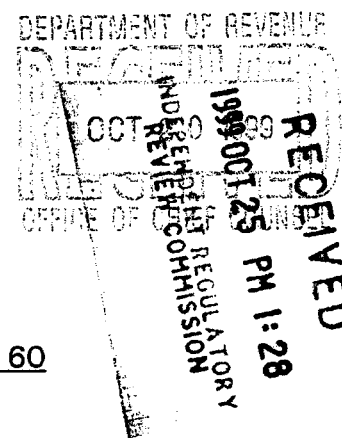
WRITER'S DIRECT DIAL:

October 18, 1999

(717) 255-8021

Anita M. Doucette
 Office of Chief Counsel
 Department of Revenue
 Strawberry Square-10th Floor
 Harrisburg, PA 17128-1061

Re: Utilities Gross Receipts Tax
Proposed Regulation 61 Pa. Code Chapter 160



Dear Ms. Doucette:

This letter is in regard to the proposed Utilities Gross Receipt Tax regulation as contained in the Pennsylvania Bulletin, Volume 29, No. 38 of September 18, 1999. I have the following comments and suggestions regarding the proposed regulatory sections indicated:

61 Pa. Code § 160.22 - Failure to Otherwise Comply.

The Department has indicated in this definition that failure to otherwise comply includes the situation where a taxpayer fails "to reasonably report and pay tax liabilities, which shall generally be construed as reporting or paying less than 75% of the settled or resettled tax liability without reasonable justification." Circumstances could easily arise where a taxpayer's filing position varies from the settled or resettled position of the Department by more than 25%. This places the electricity supplier of having its license denied based on the sole discretion of the Department in determining whether the variance was reasonably justified. There is seemingly no statutory authority for this regulatory provision.

Anita M. Doucette
October 18, 1999
Page 2

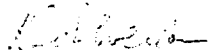
61 Pa. Code § 160.22 - Sales of Electric Energy.

The Department cannot expand the receipts subject to the Utilities Gross Receipts Tax by simply stating in a regulation that the term "sales of electric energy. . .also includes: customer charges, capacity charges, demand charges, stand-by charges or usage fees for electric energy and related services to the end-use customer." This is particularly the case since the definition of the term "sales of electric energy" is specifically statutorily set forth at 66 Pa. C.S.A. § 2810(j) and makes no reference to terms intended to be encompassed within that definition as set forth in the Department's proposed regulation.

Please let me know if you would like to discuss these comments in more detail. Thank you for your consideration.

Very truly yours,

KEEFER WOOD ALLEN & RAHAL, LLP



Robert L. Weldon

RLW/csc

MCNEES, WALLACE & NURICK
ATTORNEYS AT LAW

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Original: 2061
Mizner
cc: Sandusky
Jewett
Markham
Smith
Legal

DAVID M. KLEPPINGER
DIRECT DIAL: (717) 237-5214
E-MAIL ADDRESS: DKLEPPIN@MWN.COM

October 18, 1999

Anita M. Doucette, Esq.
Office of Chief Counsel
Department of Revenue
Dept. 281061
Harrisburg, PA 17128-1061

VIA HAND DELIVERY

Re: Utility Gross Receipts Tax (61 Pa. Code Ch. 160)

Dear Ms. Doucette:

Enclosed for filing with the Department are the Comments of the Industrial Energy Consumers of Pennsylvania regarding the Department's Proposed Rulemaking on the Utility Gross Receipts Tax, which was published in the September 18, 1999, edition of the Pennsylvania Bulletin.

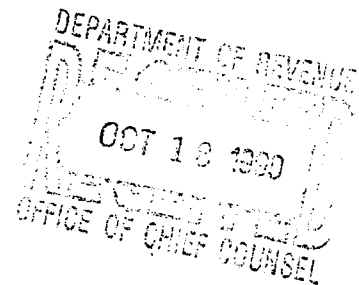
Please date stamp the extra copy of this transmittal letter and kindly return for our filing purposes.

Very truly yours,

MCNEES, WALLACE & NURICK

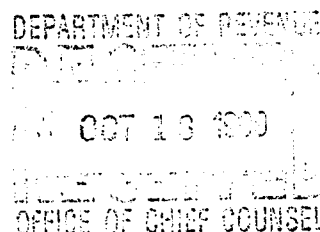
By *David M. Kleppinger*
David M. Kleppinger

DMK:mas
Enclosures



BEFORE THE
PENNSYLVANIA DEPARTMENT OF REVENUE

Proposed Rulemaking
61 Pa. Code Ch. 160
Utility Gross Receipts Tax



COMMENTS OF THE
INDUSTRIAL ENERGY CONSUMERS OF PENNSYLVANIA

Air Liquide America Corp.
Air Products and Chemicals, Inc.
Allegheny Ludlum Steel Corporation
Allentown Cement Co.
Aluminum Company of America
AMP Incorporated
Anchor Glass Container Corp.
Appleton Papers Inc.
Armco Inc.
Armstrong World Industries, Inc.
Baker Refractories
Bethlehem Steel Corporation
BOC Gases
Boeing Company Philadelphia
Buckeye Pipeline Company, LP
Carbide/Graphite Group, Inc., The
Carbone of America
Carpenter Technology Corporation
CertainTeed Corporation
Corning Asahi Video Products
Dana Corporation
East Penn Manufacturing Company
Ervin Industries, Inc.
FirstMiss Steel, Inc.
Ford Motor Company
Glen-Gery Corporation
Harley Davidson Motor Company
Hershey Foods Corporation
HON Company, The

Horsehead Resource Development Co., Inc.
IHFP, Inc.
International Paper Company
J&L Specialty Steel, Inc.
Knouse Foods Cooperative, Inc.
Koppel Steel Corporation
Lafarge Corporation — Whitehall Plant
LTV Steel Company
Lucent Technologies
Lyondell Chemical Worldwide, Inc.
M&M/Mars, Inc.
Merck & Company, Inc.
Messer
Nabisco Inc.
Nova Chemicals, Inc.
Owens-Illinois, Inc.
PPG Industries, Inc.
Praxair, Inc.
Procter & Gamble Paper Products Co., The
R. R. Donnelley & Sons Company
Rohm and Haas Company
Standard Steel
Sunoco, Inc. (R&M)
Temple University
Thomson Consumer Electronics, Inc.
US Steel/Div. of USX Corporation
Victaulic Company of America
WEA Manufacturing
Yuasa, Inc.

David M. Kleppinger
McNEES, WALLACE & NURICK
P. O. Box 1166
Harrisburg, PA 17108-1166
(717) 237-5254

Counsel for the Industrial Energy
Consumers of Pennsylvania

Dated: October 18, 1999

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I. INTRODUCTION

On December 3, 1996, Pennsylvania Governor Thomas J. Ridge signed into law the Electricity Generation Customer Choice and Competition Act ("Competition Act" or "Act"). 66 Pa. C.S. §§ 2801, et seq. The Competition Act authorizes the restructuring of Pennsylvania's electric utility industry in order to afford all Pennsylvania electric customers the opportunity to access directly the competitive generation market. See id. § 2802(12). The enactment of the Competition Act fundamentally changes the regulation of electric utilities. Specifically, the Competition Act deregulates the generation component of electric service while maintaining traditional rate of return regulation for the distribution and transmission components of electric service. In this deregulated environment, competitive electric suppliers have access to electric utilities' (now known as "electric distribution companies") transmission and distribution systems to provide electric generation supply service directly to consumers in the Commonwealth. See id. § 2802(14).

This fundamental change in the manner in which electricity is supplied directly impacts several taxes that public utilities customarily paid to the Department of Revenue ("Department") prior to electric restructuring, including the utility gross receipts tax. In the September 18, 1999, edition of the Pennsylvania Bulletin, the Department proposed amendments to Chapter 160 to clarify the changes to the utility gross receipts tax brought about by electric restructuring. Interested parties were invited to submit comments regarding the proposed amendments to the Department within 30 days after the date of their publication. To that end, the Industrial Energy

Consumers of Pennsylvania (“IECPA”)¹ submit these Comments that focus on several significant flaws in the proposed regulations’ provisions regarding the tax on the use of electricity [hereinafter, “use tax”].

As explained fully below, the proposed regulations’ provision that electric distribution companies may seek reimbursement for the use tax from retail customers is inconsistent with the express language and intent of the Competition Act. Pursuant to the Act, distribution companies must be directed to seek reimbursement for the use tax only from defaulting suppliers.

The proposed regulations also overlook several important procedural requirements in the event that retail customers are deemed liable for indemnifying distribution companies for the use tax. Although IECPA opposes the use of such indemnification in the first instance, if such indemnification is determined to be appropriate, the proposed regulations must be revised to include procedures that establish each retail customer’s use tax liability. The proposed regulations must be further revised to ensure that retail customers are not responsible for a double tax liability. Moreover, the proposed regulations must be clarified to ensure that retail customers are not liable for defaulting suppliers’ unpaid gross receipts tax once the consumers indemnify distribution companies for the use tax.

Finally, the proposed regulations fail to address the impact of the use tax on the Competition Act’s revenue-neutral reconciliation mechanism (“RNR”), which was designed to be the primary vehicle for the Commonwealth to recoup any losses that may result from the restructuring of the electric industry.

¹IECPA members are listed on the cover of these Comments.

IECPA is an ad hoc association of energy-intensive industrial consumers of electricity. More than 100,000 Pennsylvanians are employed by IECPA member companies at nearly 200 plant locations and manufacturing facilities throughout the Commonwealth. IECPA's members annually consume approximately 12 billion kWh of electricity, which represents a significant cost of production and operation for IECPA members. Because of the economic impact of these costs, IECPA member companies are directly affected by the Department's proposed rulemaking.

II. COMMENTS

A. The Proposed Regulations' Provision That Distribution Companies May Seek Indemnification for the Use Tax from Retail Customers Is Inconsistent with the Competition Act.

The proposed regulations establish a use tax on distribution companies for the sale of electricity to a retail customer by an electric supplier that has failed to report and remit its gross receipts tax to the Department. See 61 Pa. Code § 160.31(a). The proposed regulations further provide that, upon payment of the use tax to the Department, the distribution company “may collect or seek indemnification or reimbursement from the electricity supplier or from the end-user of the electricity in this Commonwealth.” Id. § 160.31(c).

As support for permitting distribution companies to seek reimbursement from retail customers, the Department references Sections 2806(g)(3)(iii) and 2809(c)(2) of the Public Utility Code.² When read in concert with the Act's RNR provision, however, these Sections do not fully support the Department's claim that distribution companies may seek indemnification from residential, commercial, and industrial customers.

Sections 2806(g)(3)(iii) and 2809(c)(2) of the Public Utility Code provide that

If an electricity supplier other than an electric distribution company does not pay the tax imposed upon gross receipts ..., the electric distribution company to whose retail customer the electricity supplier provided generation service shall remit the unpaid tax, as

²Sections 2806(g)(3)(iii) and 2809(c)(2) contain identical language, and both Sections provide for a use tax in the event a supplier fails to satisfy its gross receipts tax liability. The only difference between the provisions is that Section 2806(g)(3)(iii) applies to the retail access pilot program and Section 2809(c)(2) applies to the restructured electric industry and the transition thereto. See 66 Pa. C.S. §§ 2806(g)(3)(iii), 2809(c)(2).

a tax on the use of electricity in this Commonwealth, to the Department of Revenue and may collect or seek reimbursement of the tax so paid from the electricity provider or any other appropriate party that used the electricity in this Commonwealth.

66 Pa. C.S. § 2806(g)(3)(iii)(emphasis added); see also id. § 2809(c)(2). Under these Sections, the distribution company may seek indemnification from suppliers or “any other appropriate party that used the electricity in this Commonwealth.” See id. While “supplier” is clearly defined in the Act, the phrase “any other appropriate party that used the electricity in this Commonwealth” is vague and does not necessarily signify a retail customer. Cf. id. § 2803.

In contrast, the Act’s RNR provision, which specifically addresses both the gross receipts tax and the use tax, directs in its “Indemnification” subpart that distribution companies’

tariffs must provide that, if an electric distribution company becomes liable under sections 2806(g) and 2809(c) for State taxes not paid by an electric generation supplier, that electric generation supplier shall indemnify the electric distribution company for the amount of the liability so imposed upon the electric distribution utility.

Id. § 2810(emphasis added). Under this provision, distribution companies’ tariffs must only provide that suppliers will indemnify distribution companies for the use tax. Notably, the Act does not require distribution companies’ tariffs to provide that retail customers will be responsible for indemnification.

This discrepancy suggests that the General Assembly did not contemplate distribution companies seeking indemnification from retail customers for the use tax, especially given the procedural quagmire that such a situation would create. See infra.

B. In the Event That Retail Customers Are Deemed Liable for Indemnifying Distribution Companies for the Use Tax, the Regulations Must Set Forth Procedures That Establish Each Retail Customer's Use Tax Liability.

The proposed regulations set forth an explicit methodology for calculating a distribution company's use tax liability. Specifically, the proposed regulations provide that:

the tax shall be calculated by multiplying the kilowatt hours distributed on behalf of the electricity supplier for which no gross receipts tax has been remitted, by the electric distribution company's shopping credit provided to customers and filed with the Commission for electricity supply during the tax period.

61 Pa. Code § 160.31(b)(2). If the actual gross receipts of the supplier are known and available, however, the use tax will be the gross receipts multiplied by the applicable tax rate. See id.

The proposed regulations fail to establish a similarly detailed methodology for apportioning the use tax liability among retail customers, if it is deemed appropriate under the Act for distribution companies to seek indemnification from retail customers. Instead, the proposed regulations merely state that "[u]pon payment to the Department of the tax on the use of electricity, the electric distribution company may collect or seek indemnification or reimbursement from the electricity supplier." Id. § 160.31(c). The methodology established by the Department must address, at a minimum, the basis for apportioning liability and how liability will be apportioned among retail customers if the supplier defaulted on only a portion of its gross receipts tax liability.

C. In the Event That Retail Customers Are Deemed Liable for Indemnifying Distribution Companies for the Use Tax, the Regulations Must Set Forth Procedures To Ensure That Retail Customers Are Not Responsible for a Double Tax Liability.

Under the proposed regulations, the situation may arise that an electric generation supplier may have collected money to cover the gross receipts tax as part of the price charged to the retail customer for electric supply but then failed to remit that money to the Department to cover its

gross receipts tax liability. If the retail customer must also indemnify a distribution company for the unpaid tax through a tax on the use of electricity, the consumer has paid the tax twice, even though the Department has only received one payment.

In enacting the Competition Act, the General Assembly could not have contemplated placing this heavy burden on retail consumers for a tax that is specifically directed to electric distribution companies and electric generation suppliers. See 72 P.S. § 8101(detailing the entities upon which utilities gross receipts tax will be imposed); 66 Pa. C.S. § 2810(b). The Competition Act specifically directs that the transition to a competitive generation market must “be fair to ratepayers.” 66 Pa. C.S. § 2804(14). Thus, the Act cannot be interpreted such that ratepayers effectively pay the gross receipts tax for their suppliers twice. The Department must promulgate regulations that ensure that retail customers are not taxed twice for essentially the same tax.

The Department could take one of two different approaches to ensure that retail customers are not double taxed. Both courses are fraught with procedural morass, but such procedures are necessary to guard against a consumer protection nightmare and to ensure that the Competition Act is implemented properly. As noted above, the complexity of these procedures connotes that the General Assembly never intended for retail customers to be responsible for indemnifying distribution companies for the use tax.

First, the Department could establish procedures to enable a retail customer to claim a credit for any money its supplier collected to cover its gross receipts tax liability but did not remit to the Department in the event that a distribution company seeks indemnification from that retail customer for the use tax. If a customer is able to claim such a credit, the Department would be assured that the ratepayer did not essentially pay for the same tax twice. By detailing procedures

for customers to claim credit for money already paid to cover a supplier's gross receipts tax, the Department promotes that Act's directive that the transition to a competitive generation market must be "fair to ratepayers." See id.

As part of these procedures, the Department must also establish a methodology for determining what credit a retail customer may claim against a distribution company seeking indemnification. For example, a supplier may not have accurately estimated its gross receipts tax liability, resulting in an electric supply charge that did not fully capture the supplier's gross receipts tax liability. In this situation, the retail customer was not charged for the supplier's full tax liability and may not be able to claim a full credit against the distribution company's indemnification. Accordingly, to ensure that the credit accurately reflects the amount that the retail customer already paid to the defaulting supplier, a clear methodology must be established to track the amount included in a supplier's charge to cover its gross receipts tax liability.

Alternately, the Department could establish specific procedures to ensure that retail customers may seek indemnification or reimbursement from their defaulting suppliers for any liability to distribution companies attributable to the use tax. Without explicit procedures that permit retail customers to be reimbursed by defaulting suppliers, retail customers may end up paying for both the gross receipts tax and the use tax, which is an inequitable result clearly not contemplated by the Competition Act.

To avoid this inequitable result, the final regulations must clearly set forth procedures to ensure that retail customers of all rate classes may seek reimbursement from their suppliers that

fail to remit their total gross tax receipts liability to the Department. As part of these procedures, a mechanism must exist to track the amount that the retail customer paid to the defaulting supplier to cover gross receipts tax in comparison to the amount that the consumer paid to indemnify the distribution company for the end use tax.

The final regulations must also carefully consider the forum in which retail customers will seek reimbursement. If a supplier serving a significant load in the Commonwealth fails to remit its gross receipts tax, the potential exists that tens of thousands of retail customers of all rate classes (i.e., residential, commercial and industrial) may be seeking indemnification. Will these customers, industrial and residential customers alike, have to file suit in civil court to secure reimbursement, at considerable expense and effort? Alternately, does the Department have the capacity to handle the heavy workload associated with tens of thousands of retail customers seeking indemnification through administrative channels? To avoid clogging up civil courts and administrative agencies and creating a consumer protection nightmare, the forum and procedures must be designed to expedite indemnification (including the tax, interest, penalties, and the customer's out-of-pocket costs).

For these reasons, the Department must establish efficient procedures that ensure that a retail customer does not effectively pay the gross receipts tax twice, once through the supplier's charge and once through the use tax. To that end, the final regulations must include specific procedures that permit a retail customer to claim a credit for money already paid to cover a defaulting supplier's gross receipts tax liability. Alternately, regulations must be promulgated to permit retail customers to seek indemnification from suppliers in the event that the retail customer is responsible for indemnifying its distribution company for use tax liability. Without this

protection, retail customers may pay the same tax twice, which is wholly inconsistent with the Competition Act's mandate that the transition to competition be achieved in a manner that is "fair to customers." See 66 Pa. C.S. § 2802(8).

D. The Proposed Regulations Must Be Clarified To Ensure That Retail Customers Are Not Liable for the Suppliers' Unpaid Gross Receipts Tax Once the Use Tax Is Paid.

The proposed regulations provide that the "liability for unpaid gross receipts tax, interest, or penalty of the electricity supplier is not extinguished by payment of a tax on the use of electricity." 61 Pa. Code § 160.31(e). The proposed regulations must be clarified to ensure that once the use tax is paid to the Department, whether by the distribution company or, if deemed appropriate, the retail customer, the liability for the defaulting suppliers' unpaid gross receipts tax rests solely on the shoulders of the defaulting supplier. To impose additional liability on distribution companies or retail customers for the continuing gross receipts tax liability would result in an impermissible double tax.

Furthermore, once a supplier remits its unpaid gross receipts tax to the Department, the Department must refund the money paid to the Department for the use tax to the ultimate payer of that tax. Refund of use tax revenue is necessary because the use tax is imposed on distribution companies only when a supplier fails to remit to the Department its gross receipts tax. Thus, the use tax must serve only as a vehicle by which the Commonwealth can recoup revenue lost when a supplier fails to pay the proper gross receipts tax.

If the Department retains the revenue attributable to the use tax once the defaulting supplier remits its gross receipts tax, the Department overcollects the tax, which is directly inconsistent with the Competition Act's express goal of revenue neutrality to the Commonwealth during the

restructuring process. See 66 Pa. C.S. § 2810(a). As demonstrated by the Act's RNR mechanism, the General Assembly did not intend for restructuring to result in a boon to the Commonwealth, just as it did not intend for restructuring to have a negative effect on the Commonwealth's coffers.

Accordingly, procedures must be established for the Department to refund money received through the use tax when the supplier for whom that use tax was imposed subsequently remits its gross receipts tax liability.

E. The Proposed Regulations Must Be Clarified To Address the Impact of the Use Tax on the Competition Act's RNR Mechanism.

As explicitly set forth in the Competition Act, the General Assembly's intent was to accomplish the restructuring process in a manner that, inter alia, "maintains revenue neutrality to the Commonwealth." See id. § 2810(a). To that end, the Competition Act provides for a "revenue-neutral reconciliation mechanism," or RNR, that tracks the amount of revenue that the Commonwealth receives from suppliers and distribution companies, including gross receipts tax revenue. The RNR also permits the Commonwealth to recoup losses that may result from electric restructuring by allowing the Department to adjust the gross receipts tax rate. See id. §§ 2810(a), 2810(b).

An integral part of the calculus to determine the applicable gross receipts tax rate for a given year is the total cash payments made to the Department during the preceding fiscal year that are attributable to the "affected taxes," which includes the gross receipts tax. Translating a defaulted suppliers' gross receipts tax liability to a use tax may skew the calculation of the applicable gross receipts tax rate because the formula for determining the tax rate does not

consider cash payments made to the Department that are attributable to the use tax. Thus, it may appear that the Department has under-recovered the revenue owed to the Commonwealth for the gross receipts tax when in fact the Department has recovered this money through the use tax. On this basis, the calculation of the gross receipts tax rate will be distorted by the payment of the use tax, which may cause the Department to increase the gross receipts tax rate to recoup phantom losses.

To ensure the accuracy of the gross receipts tax rate pursuant to the RNR, the proposed regulations must be revised to address the impact that the use tax will have on the RNR. The regulations must provide procedures that factor the revenues collected through the use tax into the calculation of the gross receipts tax rate to ensure that the restructuring of Pennsylvania's electric industry is accomplished in a manner that maintains revenue neutrality to the Commonwealth.

III. CONCLUSION

The Department's proposed regulations must be revised in several significant respects to ensure that the gross receipts tax and the use tax are assessed in a manner that is "fair to ratepayers." See 66 Pa. C.S. § 2804(14). As set forth above, the proposed regulations' directive that retail customers may be liable to distribution companies through a use tax for their defaulting suppliers' gross receipts tax liability is inconsistent with provisions in the Competition Act and raises serious consumer protection concerns.

Accordingly, IECPA urges the Independent Regulatory Review Commission to reject the Department's attempt to make retail customers responsible for indemnifying distribution companies for the use tax. If it is deemed appropriate for retail customers to bear this burden, the concerns set forth herein must be incorporated into the final regulations, consistent with the consumer protections inherent in the Competition Act.

Respectfully submitted,

McNEES, WALLACE & NURICK

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Counsel to the Industrial Energy Consumers
of Pennsylvania

Dated: October 18, 1999

Wolf, Block, Schorr and Solis-Cohen LLP

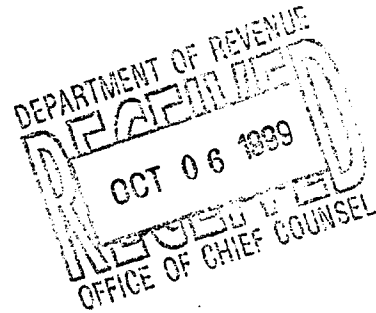
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October 4, 1999



Ms. Anita M. Doucette
Office of Chief Counsel
Department of Revenue
Department 281061
Harrisburg, PA 17128-1061

RE: Utilities Gross Receipts Tax, Proposed Regulations
§§ 160.21, 160.22, 160.23, 160.31, 160.41

Dear Ms. Doucette:

I suggest that Proposed Regulation § 160.23(c) be amended to read as follows

(c) The tax is imposed upon the taxpayer's gross receipts from sales of electric energy to retail electric customers in this Commonwealth. The tax is not imposed on (i) gross receipts from sales for resale, (ii) gross receipts from sales to an electricity pool marketplace or power exchange none of the members of which is a retail electric customer, (iii) gross receipts from sales to a person subject to the tax on gross receipts, or (iv) gross receipts from sales that are otherwise exempt under section 1101 of the TRC (72 P.S. sec. 8181). Retail sales of electric energy shall be deemed to occur at the meter of the retail consumer.

The principal purpose of the suggestion is to deal with multiple resales of electric generation (Electric generation is defined by the Pennsylvania Public Utility Commission as "production of electricity by a power plant." Common Electric Competition Terms, <http://puc.paonline.com/electric/competition/electerm.htm>.) A generates electricity and sells it to B who sells it to C who sells it to retail electric customers. The suggested clause (i) will make it clear that both the sales of generation from A to B and from B to C are excluded from tax, and that only the sale from C to a retail electric customer will be taxed as required by Section 2810(j) of the Public Utility Code.

The addition of clause (ii) will deal with sales to energy pools, which are always to sales intermediaries and never to retail consumers, *i.e.*, end-use customers.

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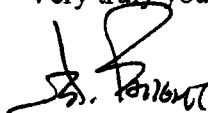
Ms. Anita M. Doucette
October 4, 1999
Page 2

The last sentence of Section 160.23(c) should use the term *electric energy*. *Generation* is not the only component of *electric energy* that may be sold to a retail customer.

The Department has already reached the general conclusion regarding resales as a matter of policy in a letter ruling dated July 15, 1998, a copy of which is attached. The published regulation should reflect the Department's prior interpretation and the applications suggested above.

Thank you.

Very truly yours,

A handwritten signature in black ink, appearing to read "J.C. Bright", written over a faint, larger signature.

Joseph C. Bright

For WOLF, BLOCK, SCHORR and SOLIS-COHEN LLP

JCB/emk
Enclosure



July 15, 1998

Re: Corporate Tax

Utilities Gross Receipts Tax

Dear :

The Department of Revenue, Office of Chief Counsel is issuing this letter in response to your July 6, 1998 letter concerning the above-referenced matter.

Please be advised that this letter ruling is limited to the specific factual information contained herein and applies to (XYZ Corporation) and ABC , its subsidiary exclusively. Please note that this letter states only the Department's opinion. It will not be binding on the Department as a private letter ruling pursuant to 61 Pa. Code §3.3 until reviewed by the Department of the Auditor General. To that end, a copy of this letter has been submitted to its Chief Counsel for conveyance.

ISSUE

Under the circumstances, whether ABC would be subject to utilities gross receipts tax on its sales of electric energy to purchasers other than business or residential consumers or end-users.

CONCLUSION

Under the circumstances, ABC would not be liable for utilities gross receipts tax on its sales to purchasers other than business or residential customers or end-users.

July 15, 1998

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FACTS

XYZ Corporation is a non-Pennsylvania corporation with principal offices located outside Pennsylvania and operations in the United States and overseas. XYZ Corporation is a subsidiary of a parent corporation, the stock of which is publicly traded on the New York Stock Exchange.

XYZ Corporation is in the business of developing, constructing, operating and acquiring electrical generation facilities worldwide. A subsidiary of XYZ Corporation, ABC, will submit a bid within ten (10) days of _____, for the purchase of certain coal-fired electrical generating facilities located in Pennsylvania. If ABC acquires the assets, it will not sell electricity to consumers or end-users of electricity, either business or residential. Rather it will sell electricity to one or more intermediaries. The intermediaries may in turn resell the electricity to other intermediaries which in turn will sell the electricity to consumers.

DISCUSSION

The Utilities Gross Receipts Tax, 72 P.S. §8101, states in pertinent part that;

Every ... person engaged in electric light and power business, water power business, and hydro-electric business in this Commonwealth, shall pay ... a tax ... a tax of forty-four mills upon each dollar of the gross receipts ... from:

(1) the sales of electric energy within this State, except gross receipts derived from the sales for resale of electric energy to persons ... subject to the tax imposed by this subsection upon gross receipts derived from such resale; and

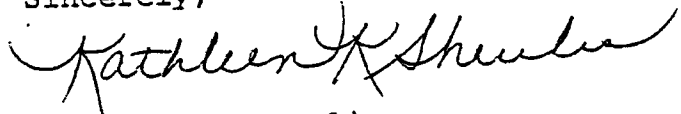
(2) ... [certain sales outside Pennsylvania]

Under the circumstances, if all of ABC sales of electrical energy are limited to intermediaries that will resell

July 15, 1998
Page Three

to others or that will resell to business or residential consumers or end-users, ABC will not be liable for utilities gross receipts tax on its sales of electric energy. Also, please note that the answer will not change when the gross receipts tax provided in 66 Pa.C.S. §2810(b) becomes operable for tax years beginning on or after January 1, 1999. This, of course, is predicated on the fact that all of ABC sales will qualify as sales for resale.

Sincerely,



Kathleen K. Shaulis
Senior Assistant Counsel

KKS:dmm (sp)

OFFICE OF CHIEF COUNSEL
DEPT. 281061
HARRISBURG, PA 17128-1061

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF REVENUE



PHONE: 717-787-1382
FAX: 717-772-1459

October 8, 1999

John R. McGinley, Jr.
Chairman
Independent Regulatory
Review Commission
14th Floor, Harristown 2
333 Market Street
Harrisburg, PA 17101

Re: Public Comment (15-410)
Joseph C. Bright, Esq.

Dear Chairman McGinley:

In accordance with section 5(c) of the Regulatory Review Act (71 P.S. §745.5(c)), please find enclosed a public comment received by the Department on October 6, 1999, relating to Regulation 15-410, utility gross receipts tax.

If you have any questions regarding this matter, please contact me at (717) 787-1382, extension 3065.

Sincerely,

A handwritten signature in cursive script that reads "Anita M. Doucette".

Anita M. Doucette
Regulatory Coordinator

Enclosure

AMD:tlch

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