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December 28, 2004

VIA UPS OVERNIGHT

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, Pennsylvania 17120

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DEC 28 2004

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Re: Proposed Rulemaking for the Revision of Chapters 1, 3 & 5 of Title 52 of the Pennsylvania Code Pertaining to Practice and Procedure Before the Commission – Docket No. L-00020156

Dear Secretary McNulty:

Enclosed herewith for filing with the Pennsylvania Public Utility Commission are an original and fifteen (15) copies of the Comments of Metropolitan Edison Company, Pennsylvania Electric Company and Pennsylvania Power Company in the above-referenced matter.

In accordance with the Order published in the Pennsylvania Bulletin, Volume 34, No. 44, October 30, 2004, we are also serving these Comments on W. Blair Hopkin at the Commission's Law Bureau, as evidenced by the enclosed Certificate of Service.

Very truly yours,

RYAN, RUSSELL, OGDEN & SELTZER LLP

Alan Michael Seltzer

Alan Michael Seltzer

Enclosures
AMS:flw

cc: As per Certificate of Service

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Proposed Rulemaking for Revision of :
Chapters 1, 3 and 5 of Title 52 of the : Docket No. L-00020156
Pennsylvania Code Pertaining to Practice :
and Procedure Before the Commission :

CERTIFICATE OF SERVICE

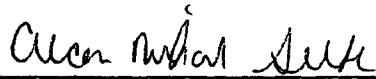
I hereby certify that I have this day served a true copy of the Comments of Metropolitan Edison Company, Pennsylvania Electric Company, and Pennsylvania Power Company upon the individuals listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

Service by UPS Overnight, postage prepaid, addressed as follows:

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

W. Blair Hopkin
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor, Law Bureau
Harrisburg, PA 17120

Dated: December 28, 2004



Alan Michael Seltzer
RYAN, RUSSELL, OGDEN & SELTZER LLP
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Attorneys for Metropolitan Edison Company,
Pennsylvania Electric Company, and
Pennsylvania Power Company

RECEIVED

BEFORE THE

DEC 28 2004

PENNSYLVANIA PUBLIC UTILITY COMMISSION ^{PA} PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Re: Proposed Rulemaking for Revision :
of Chapters 1, 3 and 5 of Title 52 of the : Docket No. L-00020156
Pennsylvania Code Pertaining to :
Practice and Procedure Before the :
Commission :

**COMMENTS OF METROPOLITAN EDISON COMPANY, PENNSYLVANIA
ELECTRIC COMPANY AND PENNSYLVANIA POWER COMPANY**

At its May 7, 2004 public meeting, the Pennsylvania Public Utility Commission ("Commission") adopted a Proposed Rulemaking Order revising and updating the Commission's rules of practice and procedure, Chapters 1, 3 and 5 of Title 52 ("Rulemaking Order"). The revisions proposed in the Rulemaking Order were based upon Comments submitted by various parties, including Metropolitan Edison Company ("Met-Ed"), Pennsylvania Electric Company ("Penelec") and Pennsylvania Power Company ("Penn Power"), referred to collectively as the "FirstEnergy Companies", to the Advance Notice of Proposed Rulemaking at the above-referenced docket.

The Rulemaking Order was published in the Pennsylvania Bulletin, Volume 34, No. 44, on October 30, 2004, inviting the public and interested parties to comment on the Commission's proposed revisions to its procedural regulations.

The FirstEnergy Companies appreciate the Commission's effort and commitment in undertaking the considerable task of reviewing the comments submitted by the various parties to this proceeding and revising its procedural regulations in order to address the concerns raised and the significant changes in the utility industry and the Commission's jurisdiction and scope of responsibilities since 1996 when the

Commission's procedural rules were last revised. While the FirstEnergy Companies are pleased that the Commission adopted some of the comments they filed on November 27, 2002, a number of the FirstEnergy Companies' comments were rejected with little or no explanation. Accordingly, the FirstEnergy Companies submit the following comments for further consideration by the Commission.¹

I. Specific Comments

1. Filing Fee for Complaints; Notarized Customer Statement

No person or entity currently desiring to file a formal complaint with the Commission is required to pay a fee to initiate that process. As a result, the FirstEnergy Companies and other utilities in the Commonwealth often find themselves incurring the time and expense to litigate numerous customer complaints which are of marginal interest to the customer, if not completely frivolous.

While the FirstEnergy Companies do not want to limit the ability of customers to file complaints and litigate matters before the Commission, it is in the best interest of all participants to minimize the time, expense and resources needed to participate in complaint proceedings. One reasonable way to mitigate the number of frivolous and related complaints is to impose a reasonable filing fee upon all who seek to initiate proceedings before the Commission.²

In the post-restructuring and increasingly competitive electricity market, Pennsylvania's jurisdictional utilities are more cognizant than ever of the need to minimize costs. One way to accomplish this goal is to eliminate the need for utilities,

¹ All proposed modifications to the Commission's regulations in these Comments are underlined. Proposed deletions are generally marked with a bracket.

² A variation of the filing fee proposal would be to refund the fee to any complainant prevailing on the merits of their complaint.

their employees, counsel and experts to participate in those types of complaint proceedings where the complainants are not serious in pursuing their complaints to completion.

Accordingly, the FirstEnergy Companies request that the Commission's regulations at 52 Pa. Code § 1.43 be modified to include a filing fee of \$25.00 for each complaint filed with the Commission. This fee is identical to the one currently being charged to file complaints in New Jersey. Accordingly, 52 Pa. Code § 1.43 should be modified as follows:

§ 1.43. Schedule of fees payable to the Commission.

(a) *Fees for services.* The fees for services rendered by the Commission are as follows:

<i>Description</i>	<i>Fee In Dollars</i>
Filing a complaint	\$25.00

* * *

Recent amendments to the Public Utility Code resulting from the passage of Senate Bill No, 677 provide another way for the Commission to control the number of unsupported and frivolous complaints filed against all jurisdictional utilities. Section 1410(1) of this new legislation requires that:

The Commission shall accept complaints only from customers who affirm that they have first contacted the public utility for the purpose of resolving the problem about which the customer wishes to file a complaint....

66. Pa. C. S. § 1410(1).

So, in lieu of the Companies' primary request that a nominal fee be established as a prerequisite to filing a customer complaint, the Companies suggest that

52 Pa. Code § 1.44 be added to the Commission's regulations to require that the affirmation, authorized by 66 Pa. C. S. § 1410(1), that the customer shall have first contacted the affected public utility, be in the form of a sworn statement signed before a notary as a requirement to the Commission Secretary's office accepting a customer complaint for filing.

§ 1.44. Prerequisites for the Receipt of Customer Complaints by the Commission

a. Neither the Commission nor any of its bureaus shall accept for filing any complaint from a customer that does not have appended to it a statement from the customer, signed and affirmed before a Notary Public, indicating that the customer contacted the affected public utility and attempted in good faith to resolve the customer's concerns, problems, and/or issues with that utility before the complaint was filed with the Commission.

2. A Complainant's Failure to Prosecute a Complaint Proceeding.

The FirstEnergy Companies have occasionally participated in cases in which the complainant has failed to appear and put on its case in chief. When this occurs, some of the Commission's Administrative Law Judges ("ALJs") request that the utility put its evidence on the record to provide a factual basis for the presiding officer to write a decision and to develop a record for the Commission. Since the FirstEnergy Companies filed their prior comments in this proceeding, several ALJs have acknowledged the legitimacy of the FirstEnergy Companies position by dismissing complaints, with prejudice, where the complainant fails to appear and present evidence. These decisions have been adopted by the Commission³.

³ Kathleen Spozio v. Pennsylvania Electric Company, Docket No. C-20028364, Initial Decision Issued January 29, 2003 (Final Order dated March 19, 2003); Randall Knode v. Pennsylvania Electric Company, Docket No. C-20028696, Initial Decision Issued May 7, 2003 (Final Order dated June 20, 2003); William A. Coburn v. Pennsylvania Power Company, Docket No. C-20043067, Initial Decision Issued October 13, 2004 (Final Order dated November 30, 2004).

The Commission's rules of practice should reflect its recent decisions and make it clear that it is neither necessary nor appropriate for a respondent in a complaint proceeding to introduce any evidence when the complainant has failed to meet its burden of proof – whether by failing to appear at the hearing or in the absence of probative evidence.

A respondent in a complaint proceeding has the right to determine how and when it will defend itself as a matter of due process after hearing the complainant's case-in-chief in support of its burden of proof. When a complainant appears and presents testimony or other witnesses even if the utility/respondent has identified certain witnesses to be called at a hearing, it always has the right to put on no defense if, after hearing the complainant's testimony, the utility does not believe the complainant has satisfied its burden. Since the utility/respondent has no obligation to introduce evidence when the complainant puts on a case in chief, it should have no obligation to mount a defense when the complainant has failed to appear and satisfy its burden of proof. To require testimony in these circumstances would obligate the utility to guess what the complainant's case in chief would have been and respond accordingly. It is a violation of a utility/respondent's due process rights to be forced to put on evidence when it has no legal burden of proof and has no basis upon which to even produce responsive testimony.

Thus, to protect the integrity of a utility/respondent's due process rights and the time and resources of the Commission in cases where the complainant has not appeared and put on any evidence, the Commission's regulations should confirm that under these circumstances a utility is under no such obligation to introduce any evidence.

The FirstEnergy Companies recommend the following modification to 52

Pa. Code § 5.21(d):

§ 5.21. Formal complaints generally.

(d) The filing of a formal complaint entitles the complainant to a formal hearing before the Commission except that the Commission may dismiss any complaint with out a hearing if, in its opinion, a hearing is not necessary in the public interest. Motions may be filed in accordance with §§ 5.101 and 5.102 (referring to preliminary motion; and motions for summary judgment and judgment on the pleadings). The respondent in a complaint or other proceeding shall have no obligation to present any evidence or testimony when the party having the burden of proof fails to appear at the hearing and does not otherwise satisfy its burden of proof. In such circumstances and upon appropriate motion by the respondent, the presiding officer shall dismiss the complaint for failure to prosecute and satisfy the required burden of proof.

3. Withdrawal of Complaints

Over the past few years, the FirstEnergy Companies have increasingly encountered *pro se* complainants who file formal complaints with the Commission with little or no knowledge of the amount of time and effort required of them to pursue their complaint to completion. *Pro se* complainants are unaware that once a formal complaint has been filed, a litigation process has begun that can include responding to discovery, dispositive motions, testifying at a hearing etc. Indeed, numerous *pro se* complainants are not even aware of their responsibility to appear at a hearing and present testimony to meet their burden of proof as required by 66 Pa. C.S. § 332(a).

Many *pro se* complainants upon learning of this responsibility desire to withdraw their complaints, but do not agree that their complaints have been satisfied.

Under the Commission's current regulations, a withdrawal of a formal complaint must be signed by the complainant. 52 Pa. Code § 5.94. However, in many instances, it is difficult and time-consuming to either have the complainant file a withdrawal with the Commission or to obtain the complainant's signature on a withdrawal that is then filed by the respondent. Once the complainant decides to no longer pursue the formal complaint, they may not even be concerned about filing a withdrawal with the Commission and just fail to appear at the hearing. The respondent may waste substantial time and resources in either pursuing the withdrawal from the complainant or preparing for a hearing in which the *pro se* complainant will never appear⁴.

The FirstEnergy Companies believe the withdrawal process could be more efficient by allowing the respondent to file the withdrawal with the Commission in the same manner as a Certificate of Satisfaction. The FirstEnergy Companies suggest the following revision to 52 Pa. Code § 5.24:

§ 5.24. Withdrawal of formal complaints.

(a) If the respondent satisfies a formal complaint or the complainant decides to withdraw a formal complaint either before or after a hearing, a statement to that effect signed by the complainant shall be filed with the Commission setting forth that the complaint has been satisfied and/or that the complaint is withdrawn. Except as requested by the parties, the presiding officer will not be required to render a decision upon the satisfaction of a complaint.

(b) In lieu of the statement set forth in subsection (a), the respondent may certify to the Commission that it has satisfied the complaint and/or that the complainant has indicated to the respondent a desire to withdraw the formal complaint. In such case, the respondent shall serve a copy of its certification upon the complainant. Unless the complainant objects to the certification within 10 days of its filing, the complaint shall be withdrawn.

⁴ Indeed, failure of a *pro se* complainant to appear at a hearing also wastes the Commission's time and resources.

(c) Subsections (a) and (b) supersede 1 Pa. Code § 35.41 (relating to satisfaction of complaints).

4. Oral Argument Before the Commission

Subsequent to restructuring, the number and complexity of cases before the Commission have increased substantially. While traditional base rate proceedings may be on the decline as a result of the rate caps resulting from utility restructuring, the Commission is now confronted with proceedings involving utility mergers, market power, codes of conduct, new rate designs and products, pricing of provider of last resort and a host of other issues that were unheard of a few years ago. Although the ALJ's develop a detailed record – including extensive briefs and other pleadings from the participants - before issuing a decision, the Commissioners' specific policy and other questions may not have been asked or fully addressed. Thus, there is a need for more extensive use of oral argument as a way to resolve these controversial and complex cases dealing with substantial policy matters.

The FirstEnergy Companies recognize that the existing regulations at 52 Pa. Code § 5.538 permit the Commission to conduct oral argument upon a party's written request. However, participants rarely, if ever, request oral argument and the Commission rarely asks for it sua sponte.

Oral argument is an under-utilized tool available to the Commission to help resolve complex and controversial cases and ultimately render better decisions – ones that are less likely to be challenged or, if challenged, more frequently upheld on appeal.

One way to encourage more requests for oral argument is to make it easier for the Commission to grant it. Accordingly, the FirstEnergy Companies suggest that Section 5.538 of the Commission's rules be modified to indicate that any two commissioners have the authority to cause the Commission to grant oral argument:

§ 5.538 Oral Argument before the Commission

(d) The Commission shall grant oral argument in a pending case if, upon appropriate application made under these rules, any two sitting commissioners agree that such argument is warranted. If oral argument is ordered, it shall be limited, unless otherwise specified, to matters properly raised by the briefs.

5. Timely Adjudication of Petition Proceedings

One result of the deregulation of the utility industry in Pennsylvania over the last several years is the convergence between traditional utilities and other entrepreneurial business. All businesses – utilities or otherwise – today rely upon dependable information and timely decision making as the backbone of success. Without an ability to make prompt decisions and receive timely review by regulators, regulated utilities will not be able to compete efficiently and effectively in the marketplace and ultimately improve customer service and shareholder value.

Against this backdrop, it is critical that the utilities subject to this Commission's jurisdiction have the ability to obtain a thorough *and timely* review by the Commission of all matters brought before. It should not be acceptable for proceedings brought to the Commission for review to languish unresolved.

Unlike traditional base rate cases that are required by the Public Utility Code (“Code”) to be resolved by the Commission in seven months⁵ or complaints, which

⁵ See, Section 1308(d), 66 Pa. C. S. § 1308(d).

are required to be resolved by ALJ's within ninety days⁶, there is no statutory or other requirement imposed on the Commission to timely complete its adjudication of petitions.

Because many matters are brought to the Commission for review and approval through petitions filed under the Commission's regulations at 52 Pa. Code § 5.41, it is essential that the Commission establish some reasonable time period within which it will generally resolve petition-initiated proceedings.

The FirstEnergy Companies recognize that the variety of petitions filed with the Commission and relief sought may make it difficult to determine a precise time period for resolving these proceedings. Nonetheless, the guidance on this issue from the Code with respect to general rate increases (i.e., seven months) and complaints (i.e., ninety days) provide some insight into possible time periods for the resolution of petition-initiated proceedings.

Since the Code imposes a seven month time period to resolve general rate increase proceedings – which often involve a detailed analysis and evaluation of an entire utility's operations, rate design, revenues and expenses – a similar time period should be applicable to the resolution of petition-initiated proceedings. To afford the Commission the flexibility to address exigent circumstances and provide additional assistance to the affected parties in such situations, the FirstEnergy Companies believe that the Commission should be able to extend the seven-month period in appropriate circumstances.

Accordingly, the FirstEnergy Companies propose the addition of a new paragraph under 52 Pa. Code § 5.41, as follows:

⁶ See, Section 332(g), 66 Pa. C. S. § 332(g).

§ 5.41. Petitions generally.

(d) In all proceedings before the Commission initiated by a petition, the Commission shall render a decision on or before seven months after such petition has been filed with the Commission, unless the Commission for good cause by order grants itself an extension not to exceed ninety days.

6. Service of Documents

Section 1.55 of the regulations specifies that parties represented by an attorney in a Commission proceeding are provided service of documents by inclusion of one attorney's name and address on the service list. There is also a general duty placed on parties by Section 1.54 to serve documents filed in Commission proceedings on the "participants" in the proceeding. A customary practice has evolved in Commission cases that take into account the fact that active participation of more than one attorney per party as well as various expert witnesses is common in Commission proceedings. As a courtesy, (although the service of documents by Commission and ALJ staff is still limited to one attorney per party as now required by Section 1.55), parties serve multiple names and addresses per participant when they serve documents in the proceeding.

Today, in many cases before the Commission the representation of parties involves the active participation of inside and outside counsel, as well as consultant-experts that are based beyond the region where counsel is located. Limiting the Commission's service list to one name and address per party, while the parties use a different and more expansive service list adds to confusion and fails to recognize the common need for parties to be represented by multiple counsel and outside consultant-experts. The FirstEnergy Companies propose a regulation that permits up to three names and addresses for each party to be included on both the Commission's and the parties'

service list. Three entries on the service list would accommodate inside counsel, outside counsel as well as a consultant-expert.

In the time since the Commission last addressed this issue, great advances have been made in the electronic preparation and distribution of documents. For example, many documents are now served via email. Indeed, in its Proposed Rulemaking the Commission has suggested changes to its procedural rules to allow for filing and service of documents by electronic means. The addition of names to an email distribution list is a negligible expense. While cost issues in the past may have compelled the Commission to be conservative with the size of a service list, expense is not the significant factor it may have been in the past due to technological advances. The following proposed modifications to Sections 1.54 and 1.55 would appropriately update the issue of service in a manner that is not burdensome to the Commission or parties:

Subchapter F. Service of Documents

§ 1.54. Service by a participant.

(a) Pleadings, submittals, briefs and documents filed in proceedings pending before the Commission shall be served upon participants in the proceeding and the presiding officer, if one has been assigned. Each participant may designate up to three individuals for inclusion on the service list.

§ 1.55. Service on attorneys

(a) In a proceeding where an attorney has filed a pleading or submittal on behalf of a client or has entered an appearance under § 1.24(b) (relating to notice of appearance or withdrawal), a notice or other written communication required to be served upon or furnished to the client shall be served upon or furnished to the attorney – or [one] attorneys if the client is represented by more than one attorney – in the same manner as prescribed for his client.

(b) When a participant has appeared by attorney, service upon each of the participant's attorneys shall be deemed service upon

the participant and separate service on the participant may be omitted.

7. Non-Binding Arbitration of Disputes

By order, the Commission has created non-binding arbitration procedures for disputed issues in the telecommunications area. Specifically the Abbreviated Dispute Resolution Procedures (“ADRP”) first issued as part of the Global Order, Docket Nos. P-00991648, P-00991649 (and subsequently updated by Commission order of July 13, 2000), and the “OP 12” procedures have been adopted by order and are being used as a means to avoid formal litigation of disputes. These procedures appear to be intended to provide more than temporary options for dispute resolution. It is always advisable for such Commission processes to be supported by formally enacted regulations. It is also true that arbitration of disputes is increasingly sought by parties as a prudent and less expensive alternative to formal litigation.

The FirstEnergy Companies urge the Commission to adopt the following proposed regulation that provides a basic framework for a non-binding Commission arbitration process, available for disputes that arise in connection with all fixed-utility types – gas, electric telecommunication and water. The proposed regulation recognizes that the parameters of a non-binding arbitration process may need to be adjusted in the future as regulated industries and the nature of their disputes change. It is also important for the Commission to have the flexibility to specify what issues are appropriate for the arbitration process so that the scope of issues addressed is not too narrow or too broad. Accordingly, the following proposed regulation allows the Commission to prescribe the details of the non-binding arbitration process by order, within the general parameters of a regulation.

Subchapter F. Arbitration of Disputes

§ 3.392. Non-binding arbitration of disputes involving electric, gas, telecommunications and water utilities.

(a) The Commission shall maintain procedures for non-binding arbitration by the staff of the Commission for jurisdictional disputes involving electric, gas, telecommunications and water utilities.

(b) By order, the Commission shall specify non-binding arbitration procedures, including but not limited to:

- (1) Designation of the staff arbitrator.
- (2) The scope of subject matter that may be arbitrated.
- (3) The sequential steps of the non-binding arbitration process including discovery, presentation of issues and time frames for issuance of decisions.

(c) Participants in the non-binding arbitration process that do not accept the arbitration decision may file a formal complaint with the Commission or otherwise seek a formal binding resolution of the dispute under available Commission procedures. Arbitration process participants shall agree not to contest the participation of staff assigned to the non-binding arbitration process in any subsequent formal adjudication by the Commission of the same or similar issues raised in arbitration.

8. Confidentiality of Proposals to Resolve Discovery Disputes

In the Rulemaking Order, the Commission specifically attempted to address the FirstEnergy Companies' concern in Section 5.231 to protect proposals to settle discovery disputes from being exposed on the record. While the Commission adopted most of the language suggested by the FirstEnergy Companies, the Commission rejected, without providing a rationale, the last sentence proposed below. While the FirstEnergy Companies are pleased the Commission considered their concern, the FirstEnergy Companies urge the Commission to adopt their comment in its entirety as

proposed below in order to encourage flexibility in parties' discovery positions and to make it clear that offers to resolve discovery disputes may not be used against the offering party should efforts at compromise fail and the matter is submitted to an ALJ for resolution. .

Subchapter B. Hearings
Settlement and Stipulations

§ 5.231. Offers of settlement.

(a) It is the policy of the Commission to encourage settlements. Nothing contained in this Chapter or Chapter 1 or 3 (relating to rules of administrative practice and procedure; and special provisions) precludes a participant in a proceeding from submitting, at any time, offers of settlement or proposals of adjustment, or from requesting conferences for that purpose. Participants may request that the presiding officer participate in the settlement conferences or that an additional presiding officer or mediator be designated to participate in the settlement conferences. Proposals of settlement, of adjustment, or of procedure to be followed, and proposed stipulations not agreed to by every participant, including proposals intended to resolve discovery disputes, will not be admissible in evidence against a counsel or participant claiming the privilege. Proposals intended to resolve discovery disputes may not be made a matter of record in any adjudication of those disputes.

9. Non-Compliance with Prehearing Orders and Discovery Requests

The Commission's regulations do not currently allow for a continuance if a party is not prepared to proceed with a hearing as result of the other party's failure to comply with prehearing orders and/or outstanding discovery requests.

It has been the FirstEnergy Companies' experience that complainants often (i) fail to provide their hearing exhibits to the respondent/utility in derogation of the standard prehearing order issued in complaint proceedings and/or (ii) fail to provide

responses to discovery requests. Thus, a respondent/utility may find itself on the eve of a formal hearing without ever having received the exhibits and/or discovery responses from the complainant.

All parties in a Commission complaint proceeding should have the right to obtain and review all documents required by a prehearing order or appropriately filed discovery requests in sufficient time to prepare for the formal hearing. A party's due process rights are violated if it is required to participate in a hearing where it has not had an opportunity to receive and review such documents, especially where the utility/respondent has provided such information to the complainant. A utility/respondent should not be prejudiced and unfairly surprised by a complainant using documents in a formal hearing that were not previously shared with the utility/respondent.

In order to protect the integrity of the administrative process and the due process rights of all participants, the Commission's regulations should provide recourse to any party that has not been provided documents/exhibits requested in discovery or required to be submitted under a prehearing order. Under those circumstances, the adversely affected party should be permitted to request and receive, at a minimum, an automatic continuance of the hearing.

The FirstEnergy Companies recommend the addition of the following section to the Commission's regulations:

§ 5.246 Failure to comply with prehearing orders or discovery requests

- (a) In the event a participant fails to comply with any outstanding prehearing order or appropriate discovery request in a proceeding, upon request of the other participant(s), the presiding officer shall grant a

continuance of a scheduled hearing, in addition to any other relief that may be appropriate under the circumstances.

- (b) This provision shall in no event limit any other remedies that may be requested by a participant or granted by a presiding officer or the Commission.

11. Identification of Intervening Associations

While the Commission did adopt revisions to its procedural rules requiring petitions to intervene filed by a group or association to identify the individuals and/or entities comprising the group, it did not adopt the list of items suggested by the FirstEnergy Companies. Since the Commission provided little or no explanation for only adopting a portion of the FirstEnergy Companies proposed revisions, it is hard to know why the Commission believed the other proposed requirements for the intervention of groups and associations were unnecessary.

Associations that petition to intervene in Commission proceedings frequently cause vexatious problems for the parties and the Commission due to their "representational nature", i.e., they purport to represent their members who are rarely if ever identified. Huge variations in the structure and governance of associations often make it difficult for parties and the presiding officer to understand the basis for the intervention and whether the organization's members have a real interest in the proceeding. For example, at one end of the spectrum are ad-hoc associations assembled solely for the purpose of intervening in a particular proceeding that have no governing body or independent purpose or existence separate from the proceeding. Such associations should be required to provide their membership lists so that the true interest of the organization can be determined prior to determining its request to intervene. At the other end of the spectrum are long-standing associations that exist independently of

the proceeding at issue and are governed by a small subset of the members according to established procedures and by-laws.

The FirstEnergy Companies have been involved in cases in which associations have refused to identify their members, when or why the association was formed, and which members the association claims to represent. It is difficult to know whether to oppose (or, in the case of the presiding officer, grant) the intervention request of associations that do not provide sufficient information about the organization and the interests of its members as part of its petition to intervene. Further, in the case of certain associations that refuse to provide membership lists, it is entirely possible that individual members of that association could file independent petitions to intervene in the same proceeding, effectively giving that member “two bites at the apple” in the proceeding.

In order to eliminate the problems associated with the intervention of associations in Commission proceedings described above, the Commission's intervention regulations should require more detailed information – as proposed by the FirstEnergy Companies - from associations so that the presiding officer and all potentially affected parties can make reasonable decisions about the status of the intervention request. Accordingly, the FirstEnergy Companies urges the Commission to adopt the following modification to 52 Pa. Code § 5.73 in its entirety:

§ 5.73. Form and content of petitions to intervene.

- (a) Petitions to Intervene shall set out clearly and concisely the facts from which the nature of the alleged right or interest of the petitioner can be determined, the grounds of the proposed intervention, and the position of the petitioner in the proceeding, so as fully and completely to advise the participants and the Commission as to the specific issues of fact or law to be raised or controverted.

(b) A petition filed by an association shall include the following:

1. The name of the association;
2. When the association was formed;
3. The purpose of the association;
4. The structure of the association;
5. The number of members of the association;
6. How the association is governed;
7. Whether the governing body of the association authorized intervention by resolution or otherwise, or in the case of associations with no independent governing structure, the list of members purportedly represented in the proceeding by the association;
8. The interest of the association in the subject matter of the proceeding; and
9. How the association is immediately, substantially and directly affected as a result of the proceeding or how each identified member of the association is immediately, substantially and directly affected as a result of the proceeding

12. Settlements of Commission Proceedings

In the Rulemaking Order, the Commission expressed appreciation to the FirstEnergy Companies for their detailed comments and proposed language to Section 5.232 and adopted subsection (b) below. While the FirstEnergy Companies are pleased that they could be of assistance to the Commission, the FirstEnergy Companies urge the Commission to adopt all of its revisions to this Section in order to *adequately* address the fundamental change in Commission practice whereby proceedings are increasingly resolved by settlements rather than by fully litigated proceedings. The FirstEnergy Companies believe the Commission's regulations need to be further updated and expanded to more precisely address the procedures for the review and consideration of settlements and the legal standards the Commission will impose on parties seeking approval of settlement stipulations.

The following is a proposed revision to the Commission's regulation at 52 Pa. Code § 5.232 that contains more specific standards for the Commission's review of settlements as well as the procedures expected to be followed in contested and unopposed settlements.

§ 5.232. Stipulations and settlement petitions.

(a) When the participants to a proceeding seek to settle the proceeding, but do not seek to have the underlying pleadings withdrawn, a stipulation or settlement petition shall be presented to the presiding officer, if one has been assigned. Otherwise, the stipulation or settlement petition shall be filed with the Secretary of the Commission. If the stipulation or petition is presented to the presiding officer, the Secretary shall also be served with three copies.

(b) A stipulation or settlement petition shall specifically identify the participants in the proceeding supporting the settlement, opposing or taking no position on the settlement, if known, and the other participants that were provided an opportunity to enter into the settlement.

(c) A copy of each stipulation or settlement petition shall be served upon each participant to the proceeding, and each participant shall specify in writing to the presiding officer by a date established by the presiding officer (or to the Secretary of the Commission by the deadline established by the Secretary if no presiding officer has been assigned to the proceeding), whether they support, oppose or have no position on the settlement. If all participants in the proceeding either support or have no position on the settlement, the presiding officer (or the Commission if no presiding officer has been assigned) shall promptly rule on the merits of the settlement based upon all materials filed with such pleading, the record of the proceeding and such further exhibits as the presiding officer (or Commission) may direct. If any participants in the proceeding oppose the settlement and request a hearing on the settlement, the presiding officer shall either promptly schedule and conduct a hearing to consider testimony and exhibits in support of and in opposition to the settlement, or promptly issue a ruling specifying the

reasons why a hearing is not necessary. If no presiding officer has been assigned to the proceeding the Commission may assign a presiding officer for purposes of holding such a hearing on the settlement.

(d) Regardless of the amount of support for or opposition to a settlement, every stipulation or settlement petition filed in a proceeding shall be reviewed by the presiding officer, if one has been assigned, and otherwise by the Commission. If the presiding officer rules on the settlement, the ruling will be made in the form of an initial or recommended decision, subject to § 5.537 (relating to rate case settlements).

(e) Upon agreement of the parties to waive the exception period, the presiding officer may present the recommended decision or initial decision directly to the Commission for review.

(f) If timely exceptions are filed, they will be considered in a ruling made on the settlement.

(g) In reviewing and ruling on a settlement, the presiding officer and the Commission shall consider:

(1) Whether the settlement is a product of serious bargaining among capable, knowledgeable and active parties to the proceeding.

(2) Whether the settlement as a whole benefits ratepayers and the public interest.

(3) Whether the settlement violates any important regulatory principle or practice.

(4) Whether the settlement is consistent with Pennsylvania law, including but not limited to the Public Utility Code.

(5) Whether substantial evidence of record supports the settlement, unless the settlement is of a nature or type that does not require such support.

13. Electronic posting of Orders

To formalize and facilitate access to the public and bar of the Commission's orders, the FirstEnergy Companies recommend the following new

regulation requiring the Commission to post all of its otherwise publicly available orders on its Internet web site or successor within one (1) business day of entry.

§ X.XX. Electronic Posting of Orders

The Commission shall post all of its otherwise publicly available orders on its Internet website or successor within one (1) business day of its entry.

14. Parties to be Served Documents

The Commission's procedural regulations contain various and scattered directives about the types of documents to be served on presiding officers, the Commission and other parties. This structure makes it difficult and time-consuming to determine the parties upon whom various documents in formal proceedings need to be served. To alleviate this problem and to centralize the references to service of documents, The FirstEnergy Companies suggest the following change to 52 Pa. Code § 1.54⁷:

§1.54 Service by a Participant


- (a) Pleadings, submittals, briefs and all other documents, filed in proceedings pending before the Commission shall be served upon participants in the proceeding.
- (b) Pleadings, submittals, briefs and all other documents, excluding written interrogatories to a party allowed under 52 Pa. Code § 5.341, answers to interrogatories under 52 Pa. Code § 5.342, notice of deposition by oral examination under 52 Pa. Code § 5.343, and written testimony under 52 Pa. Code § 5.412, shall be filed with and served upon the Commission.
- (c) When a presiding officer is assigned to a proceeding pending before the Commission, the following documents shall be served on the presiding officer: all pleadings after the assignment of the presiding officer, petitions for interlocutory appeal, objections to interrogatories, notices of depositions by oral examination, written testimony, briefs and all documents the presiding officer directs the participants to serve upon said officer.

⁷ In order to eliminate redundancy in the Commission's procedural regulations, FirstEnergy believes changes need to be made to the specific regulations described in (b) and (c) to exclude the language regarding the service requirements of those specific documents.

- (d) If documents are not served on the Commission or the presiding officer in compliance with subsections (b) and (c) above, the party issuing such documents shall file with the Commission and, upon the presiding officer if one has been appointed, a certificate of service evidencing service of the relevant documents upon the required party(ies).
- (e) Service may be in person, by available delivery service, by mail or as otherwise directed by the Commission. Service may also be by telecopier to those parties who have agreed to accept service in that manner.
- (f) Service by mail shall be made by delivering the requisite number of copies to each participant as provided in § 1.59 (relating to number of copies to be served), properly addressed with postage prepaid, and first class mail shall be utilized. Service by telecopier shall be followed by service of a hard copy either by mail, available delivery service or in person.
- (g) In a proceeding in which only some of the participants participate actively, the active participants, with the authorization of the presiding officer, may serve documents upon the other active participants and to inactive participants which state of record on the record or request in writing that they wish to be served.
- (h) Subsections (a), (e) and (f) supersedes 1 Pa. Code § 33.32 (relating to service by a participant).

Respectfully submitted,

Dated: December 28, 2004


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Pennsylvania Power Company

COMMONWEALTH OF PENNSYLVANIA

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Consumer Advocate
PUBLIC UTILITY COMMISSION

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December 29, 2004

James J. McNulty, Secretary
PA Public Utility Commission
Commonwealth Keystone Bldg.
400 North Street
Harrisburg, PA 17120

RECEIVED
2004 DEC 29 PM 3:49
SECRETARY'S BUREAU

Re: Notice of Proposed Rulemaking for Revision
of Chapters 1, 3 and 5 of Title 52 of the
Pennsylvania Code Pertaining to Practice and
Procedure Before the Commission
Docket No. L-00020156

Dear Secretary McNulty:

Enclosed please find for filing an original and fifteen (15) copies of the Office of
Consumer Advocate's Comments in the above-captioned proceeding.

Copies have been served upon all parties of record as shown on the attached
Certificate of Service.

Very truly yours,

Christine Maloni Hoover
Senior Assistant Consumer Advocate

Barrett C. Sheridan
Assistant Consumer Advocate

Enclosures

cc: Hon. Veronica Smith, Chief Administrative Law Judge
All parties of record

71870.wpd;1/CMH/smn

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Notice of Proposed Rulemaking :
for Revision of Chapters 1, 3 and 5 of :
Title 52 of the Pennsylvania Code : Docket No. L-00020156
Pertaining to Practice and Procedure :
Before the Commission :

Comments of the Office of Consumer Advocate

Christine Maloni Hoover
Senior Assistant Consumer Advocate

Barrett C. Sheridan
Assistant Consumer Advocate

For:
Irwin A. Popowsky
Consumer Advocate

Office of Attorney General
Office of Consumer Advocate
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(717) 783-5048

DATED: December 29, 2004

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Notice of Proposed Rulemaking	:	
for Revision of Chapters 1, 3, and 5 of Title	:	
52 of the Pennsylvania Code Pertaining to	:	Docket No. L-00020156
Practice and Procedure Before the Commission	:	

COMMENTS OF THE
OFFICE OF CONSUMER ADVOCATE

Pursuant to the Notice of Proposed Rulemaking (“NPRM”) published by the Pennsylvania Public Utility Commission (“PUC” or “Commission”) in the Pennsylvania Bulletin on October 30, 2004, the Office of Consumer Advocate (“OCA”) files these Comments concerning the Commission’s proposed changes to the Commission’s Rules of Practice and Procedure (“Rules”), 52 Pa. Code Ch. 1, 3, and 5. The OCA previously submitted Comments in response to the Commission’s 2002 Advance Notice of Proposed Rulemaking. (“OCA Initial Comments”). The OCA agrees that many of the Commission’s proposed changes would add clarity to the Commission’s regulations and procedures. The OCA also supports those changes proposed to accommodate electronic filing and service in the future. The OCA submits, however, that some of the proposed changes to the regulations would not advance the interest of fair and effective administrative process. In particular, the OCA is concerned that the proposed rules would decrease notice requirements in some instances and appear to impose an inappropriate deadline on the filing of notices of intervention by statutory intervenors. The OCA offers the following comments to address these matters.

Section 3.501 to 3.502. Water or wastewater utility proceedings

The Commission proposes significant modifications to Section 3.501 as to scope, notice, and service of copies. The OCA supports the proposed change to subpart (a), which describes the applicability of the section, as conforming with common practice. OCA Initial Comments at 6. The OCA objects, however, to the proposed changes that would eliminate direct notice to consumers who would be affected by the application for a certificate of public convenience and reduce the frequency of publication of notice. In the OCA Initial Comments, OCA noted with favor the existing notice requirements in Section 3.501(a)(4)(ii) which require a utility to provide notice of an application and proposed rates to existing customers. Id. OCA requested that the Commission revise the regulations to assure that potential customers of utilities in the formation phase also receive such notice of an application and proposed rates. Id.

Instead of extending the notice provisions of Section 3.501 as requested by the OCA, the Commission's proposed revisions would eliminate any direct notice to the consumers who will be affected by the application for a certificate for public convenience – whether existing consumers of a *de facto* utility or potential consumers of a utility that is in the formation process. Neither revised Section 3.501(d) "Notice" nor Section 3.501(e) "Copies" impose any requirement that the applicant provide direct notice or service of copies of the application to those consumers who would be directly affected by grant of the application. Further, the Commission proposes to substantially reduce the provision of notice by publication from a full two weeks of consecutive publication to "once a week for 2 consecutive weeks." PUC NPRM, Annex A, revised Section 3.501(d). The OCA submits that the lack of direct and timely notice requirement to those consumers who would be directly affected by the applications will not advance full participation

and fair review of such applications. OCA acknowledges that pursuant to proposed Section 5.14(b) "Applications requiring notice," the Secretary may require "additional publication or notification." However, no standards are provided for the Secretary's exercise of such discretion.

The OCA requests that the Commission's regulation explicitly require that applicants for a certificate of public convenience for water and wastewater service be required to provide direct notice to those consumers who will be affected by a decision on the application. Regulatory certainty will aid the applicant in timely and efficiently providing notice and will assure consistent and fair process for those consumers affected. More notice -- not less notice -- should be provided for in any revisions to Section 3.501 and Sections 3.502.

Section 5.11 to 5.14. Applications.

In the OCA Initial Comments, OCA requested that the Commission revise Section 5.12 to require service of applications on OCA. OCA Initial Comments at 6. As the OCA previously explained, direct service by applicants of the application would reduce the OCA's need to request copies of such documents from the Secretary's Bureau and facilitate the OCA's review of such filings sooner than would be possible otherwise. Id. As further noted, many utilities already serve applications on the OCA. Modification of the Commission's regulation at Section 5.12 to require that all applicants serve the OCA and OSBA would help bridge the communication gap when new utilities or counsel file applications with the Commission.

The Commission declined to make the revision as requested by the OCA because "new applications are posted on the Commission's web site. OCA can review them on-line, thus avoiding another step for applicants to follow when filing with this Commission." PUC Order at

11. The Commission's comments do not take into account that the content of applications and accompanying exhibits often cannot be reviewed on the Commission's website. Further, if the Commission's NPRM Order, as issued in May 2004, anticipated major improvements in the Commission's electronic filing system, OCA submits that any final revisions must take into account the current state of affairs, where the Commission is still pursuing full funding for the hoped-for information system improvements.

The OCA does utilize the Commission's website to identify new filings, including applications received by the Secretary's Bureau. It is the OCA's experience that the Commission's website generally provides notice that an application was filed on behalf of the named utility or applicant and a very brief description. The OCA does not believe that the full content of such applications including schedules and exhibits filed in support, are available to be reviewed electronically through the Commission's website. Given that the Commission does not, at present, require electronic filings of applications, the OCA does not agree with the Commission's assertion that the OCA can always review such filings on the PUC website. Instead, as explained in the OCA Initial Comments, when an application is filed with the PUC but not served directly on the OCA, the OCA is required to go to the Secretary's Bureau to request that Commission staff pull the file and copy the application.

The OCA recommends that the Commission modify Section 5.12 to require service of applications on the OCA. The OCA does not oppose the modifications to Section 5.12(a) as proposed in the Commission's NPRM Order. OCA proposes that the Commission further modify Section 5.12's title and subpart (b), as well as creating new subsection (c) as follows:

§ 5.12 Contents of applications and service of applications

* * *

(b) The applicant shall serve the Office of Consumer Advocate and the Office of Small Business Advocate.

(bc) Subsection (a) superseded 1 Pa.Code § 35.2 (relating to contents of applications).

Section 5.21 to 5.31. Formal complaints

In the OCA Initial Comments, OCA requested that the Commission modify Section 5.31 to provide for service of a staff-initiated complaint on OCA and Office of Small Business Advocate ("OSBA"). OCA Initial Comments at 7. OCA suggested that language be added to 5.31(a) as follows: "A complaint filed under this section will be served on the Office of Consumer Advocate and the Office of Small Business Advocate." The Commission has not made the requested change, nor commented on the OCA request. The OCA again requests that the Commission revise Section 5.31(a) to require service of staff-initiated complaints. Absent such a requirement, the OCA may not become aware of staff complaints that could significantly impact consumers. If Commission staff is required to serve the OCA directly, arrangements for electronic service on the OCA may be possible. Adoption of the OCA's proposed revision to Section 5.31(a) will improve the administrative efficiency of both the Commission and OCA.

Section 5.43. Petitions for issuance, amendment, waiver or repeal of regulations.

In the OCA Initial Comments, OCA requested that the Commission revise Section 5.43 to require service of petitions for issuance, amendment, waiver or repeal of regulations on the OCA,

Office of Trial Staff ("OTS"), OSBA, and other persons directly affected, to be consistent with Sections 5.41 and 5.42. OCA Initial Comments at 7. At present, Section 5.41 sets forth the general standards for petitions for relief, other than petitions covered by Section 5.42 "Petitions for declaratory order," Section 5.43 "Petitions for issuance, amendment, waiver or repeal of regulations," and Section 5.44 "Petitions for appeal from actions of the staff." Sections 5.41(b) and 5.42(b) expressly require that general petitions for relief and petitions for declaratory order be served on the OCA, OTS, and OSBA, as well as persons directly affected. The OCA submits that the same service requirement should apply to petitions for issuance, amendment, waiver or repeal of regulations filed pursuant to Section 5.43. The Commission's NPRM Order offers no reason why such service requirement should not be added to Section 5.43.

OCA requests that the Commission modify Section 5.43 to include the following language:

A copy of the petition shall be served on the Office of Consumer Advocate, Office of Trial Staff, and Office of Small Business Advocate and all persons directly affected and on other parties whom petitioner believes will be affected by the petition. The service shall be evidenced with a certificate of service filed with the petition.

Adoption of this language will reduce the administrative burden on the Secretary's Bureau where OCA would otherwise have to request a copy of the petition. Timely receipt of petitions by the OCA and other statutory parties will also assure that a timely review of the matter can be conducted to determine whether intervention is appropriate.

Section 5.61. Answers to complaints, petitions, motions and preliminary objections

The OCA notes that the Commission's revised Section 5.61(d) includes a cross-reference to new proposed Section 5.32 "Rate complaints". The cross-reference in revised Section 5.61(d) implies that Section 5.32 states a deadline for the filing of answers to formal complaints against Commission-instituted rate proceedings. See PUC NPRM, Annex A, revised Section 5.61(d) ("For complaints which are docketed with Commission-instituted rate proceedings, an answer may be filed within the time specified in § 5.32 (relating to rate proceedings)...."). The OCA does not find in the new Section 5.32 identification of a deadline for the filing of such answers. Given that revised Section 5.61(c) and (d) make the filing of an answer to a complaint which is docketed with a Commission-instituted rate proceeding permissive, the answer period set forth in Section 5.61(a)(1) of 20 days or as otherwise ordered by the PUC should apply.

Section 5.74. Filing of petitions to intervene

The Commission's NPRM Order states that Section 5.74 is revised to set "a default deadline for filing a petition to intervene in order to have a clear limit on the time for intervention and the subsections are set up to notify the ALJ of the appropriate standard to use in considering a request for intervention." PUC NPRM Order at 13. The current rule, in pertinent part, reads as follows:

§ 5.74 Filing of petitions to intervene

(a) Petitions to intervene and notice of intervention may be filed following the filing of an application, petition, complaint or other document seeking Commission action, but no later than the date fixed for the filing of petitions to intervene in an order or notice with respect to the proceedings or, except for good cause shown, the date fixed for filing protests as published in the *Pennsylvania*

Bulletin. Intervention will not be permitted once an evidentiary hearing has concluded absent extraordinary circumstances.

In other words, under the current rules, a time limitation on notices of intervention only occurs when a presiding officer has ordered such a limitation or in the event of publication in the *Pennsylvania Bulletin*, as is the case with applications.

The proposed revised rule would read in part as follows:

(a) Petitions to intervene and notices of intervention may be filed following the filing of an application, petition, complaint or other document seeking Commission action.

(b) Petitions to intervene *and notices of intervention shall* be filed:

(1) No later than the date fixed for the filing of responsive pleadings in an order or notice with respect to the proceedings.

(2) No later than the date fixed for filing protests as published in the *Pennsylvania Bulletin*, except for good cause shown.

(3) In accordance with the provisions set forth in § 5.53 (relating to time of filing of protests) if no deadline is set in an order or notice with respect to the proceedings.

(Emphasis added). See PUC NPRM Order, Annex A, revised Section 5.74(b).

To the extent this subsection (b)(1) above creates a “default” deadline of twenty (20) days of the date of service (the usual time for respondents to file a responsive pleading pursuant to 52 Pa. Code § 5.61) for statutory notices of intervention in consumer complaint cases, it would be a dramatic departure from current practice and would work to the disadvantage of the OCA and the consumers in need of assistance. In a consumer complaint case, only the Respondent company receives notice of the complaint and is therefore in a position to file a responsive pleading within

the twenty (20) day time period. The OCA, on the other hand, may not learn of the complaint until much later in the process. Currently, consumers in need of assistance locate the OCA in various ways: our website, referrals from other agencies, from legislators and administrative law judges. The OCA also reviews the Commission's Case Management System Daily Action Reports to evaluate recently-filed Formal Complaints; however, those Reports often reflect Formal Complaints filed weeks before. In many cases, the OCA learns of a consumer needing assistance or raising issues that would warrant OCA intervention well after the expiration of the answer period.

The OCA opposes the portion of the proposed revisions to Section 5.74 which would appear to require that the OCA file its notices of intervention no later than the deadline for responsive pleadings as set forth in new subpart (b)(1). First, under current procedures, the OCA is not made aware of the deadline for responsive pleadings, because the Commission serves the formal complaints only on respondents with notice that they must answer within twenty (20) days of service. Moreover, even if the OCA were made aware of the deadline, such a short deadline would not allow the Consumer Advocate sufficient time to investigate and discern the nature and substantiality of consumer interests in many cases, so as to knowledgeably decide whether an intervention would be warranted. See 71 P.S. § 309-4. In addition to opposing the apparent imposition of a deadline on statutory notices of intervention, the OCA would also note that the phrase "for good cause shown" should apply to create an exception to any deadline for intervention, as is the case for protests filed under Sections 3.318(c)(1)(ii) and 3.502(d).

The OCA urges the Commission to consider that the OCA's interventions have benefitted many consumers in instances where the notice of intervention was filed far longer than 20 days

after service of the initial consumer complaint. For example, formal complaints filed by utility consumers such as Ms. Susan Balla and other Redstone Water Company customers were filed in January 1999. Balla, et al. v. Redstone Water Co., Docket No. C-00992270, *et al.*, Order of February 8, 2001. The OCA learned of the cases through a legislative contact and did not file its notice of intervention in the consolidated cases until June 1999. The OCA was still able to provide substantial assistance to the water utility consumers in their pursuit of safe and adequate water service. In the case of Vincent Golden v. Bell of Pennsylvania, Docket No. C-00981878, Order of January 26, 2001, the Commission ordered extended area service to three new exchanges for the customers of Portage, Pa., sustaining a complaint filed in November 1998. Again, the OCA did not learn of the pending case until December 1999, such that the OCA intervention was filed over one year after the proceeding was initiated. These are two of many examples of consumer complaint cases where interventions after the responsive pleading deadline have enabled OCA to offer assistance to complainants, many of whom are daunted by the complexity of the regulatory process.

To avoid this problem, the OCA proposes that the Commission limit the language of new subpart (b) as applying only to *petitions* to intervene, deleting the reference to notices of intervention. Notices of Intervention are filed by parties such as OCA who have a statutory right to intervene in matters pending before the Commission. 71 P.S. § 309-1, *et seq.* In addition, the clause “for good cause shown” should apply to all intervention scenarios, as follows:

§ 5.74 Filing of petitions to intervene

(a) Petitions to intervene and notices of intervention may be filed following the filing of an application, petition, complaint or other document seeking Commission action.

(b) Except for good cause shown, petitions to intervene shall be filed no later than the date fixed for the filing of responsive pleadings in an order or notice with respect to the proceedings.

(c) Except for good cause shown, petitions to intervene and notices of intervention shall be filed (1) no later than the date fixed for filing protests as published in the *Pennsylvania Bulletin*, or (2) in accordance with the provisions set forth in § 5.53 (relating to time of filing of protests), if no deadline is set in an order or notice with respect to the proceedings.

* * *

The OCA would also note that Section 5.53, in turn, refers to two other provisions, Section 3.381(d)(relating to protests in applications for transportation of property and persons) and §3.502(d)(relating to protests in application of certificates of public convenience as a water or wastewater supplier). The OCA notes that the Section 5.53 reference in Section 3.381(d) is in error, where it is subpart (c)(1)(ii) which sets forth the deadline. This typographical error should be corrected. In the interest of clarity and ease of use, the final subsection of Section 5.74 could simply refer to the two other specific subsections which set a time for the filing of certain protests in the event one is not published.

Section 5.101 to 5.103. Motions.

The Commission has proposed to revise Section 5.101 and related sections "to change the term 'preliminary motion' to 'preliminary objection,' to utilize the name recognized by

practitioners elsewhere." PUC NPRM Order at 14. The Commission has also proposed to modify Section 5.61 to cover both answers to motions and answers to preliminary objections as separate categories of pleadings. PUC NPRM, Annex A, revised Section 5.61. Although revised Section 5.101(b) proposes that "Preliminary objections shall be filed together within the time period prescribed by § 5.61...", the Commission has not revised Section 5.61 to state that preliminary objections, as well as other documents mentioned, must be filed in twenty (20) days. Section 5.61 should include preliminary objections as subject to the twenty (20) day filing deadline.

The OCA does support those proposed revisions to Section 5.101(f)(1) and (2) which clarify what courses of action are open when a preliminary objection is either granted or denied. These changes appear consistent with the OCA's Initial Comments at pages 7 to 8.

Section 5.241 to 5.245 Hearings.

In the OCA's Initial Comments, OCA recommended that Section 5.242(a) be revised to read as follows:

5.242. Order of procedure.

(a) In a proceeding, the complainant, petitioner or other participant having the burden of proof, shall open and close unless otherwise directed by the presiding officer. In a hearing on investigations and in proceedings which have been consolidated for hearing, the presiding officer may direct who shall open and close. Oral rejoinder, if proposed by the party with the burden of proof, shall be completed before any cross-examination of the witness is conducted.

OCA Initial Comments at 8. As explained in the OCA Initial Comments, the modification would "make it clear that oral rejoinder is the opportunity to respond to surrebuttal of other parties and

thus present the last direct testimony on matters. Thus, it should be provided before cross-examination is conducted on the witness." Id.

The Commission's NPRM Order did not make the recommended change or otherwise take note of the OCA's recommendation. Issues surrounding the appropriate time for oral rejoinder still arise fairly often in rate cases and adding this rule will promote efficiency in the hearing process. The OCA thus still supports this modification of Section 5.242(a).

Section 5.253. Transcript Corrections.

In the OCA Initial Comments, OCA proposed changes to Section 5.253(c) to shorten the deadlines for filing transcript corrections and objections or other comments, to reflect the shorter litigation schedules in many cases before the Commission. OCA Initial Comments at 8-9. The Commission's NPRM proposes minor changes to Section 5.253, but not those recommended by the OCA. PUC NPRM, Annex A, revised Section 5.253. The OCA recommends that the Commission further revise Section 5.253 to shorten the deadline for transcript corrections to 10 days, then 10 days for objections or comments, and a ruling by the presiding officer within 15 days. Alternatively, these periods could be shortened by the agreement of the parties, subject to the approval of the presiding officer.

Section 5.341 to 5.351. Types of Discovery

In the OCA Initial Comments, OCA requested that Rule 5.341(d) be revised to eliminate the prohibition against multi-part interrogatories. OCA Initial Comments at 9. As explained, this provision is often disregarded in routine practice, with no apparent prejudice to any party. The

OCA notes that the Commission's NPRM proposes to revise Section 5.342(a) concerning the form of answers to interrogatories so that answers shall "(5) Restate the interrogatory which is being answered or be inserted in the spaces provided in the interrogatories." PUC NPRM Order, Annex A, revised Section 5.5342(a)(5). OCA submits that as interrogatories are often served in electronic format, by agreement and for the convenience of parties, responding to multi-part interrogatories is no more burdensome than responding to interrogatories that are separately numbered.

Section 5.401. Admissibility of evidence.

The OCA does not oppose the following revisions to Section 5.401, but would simply note that the word "By" in subpart (b)(2)(iii) should be deleted.

- (a) Relevant and material evidence is admissible subject to objections on other grounds[.,].
- (b) [but there shall be excluded e]Evidence shall be excluded if [that]:
 - (1) It is repetitious or cumulative[.,].
 - (2) [or evidence that is not of the kind which would affect reasonable and fair-minded persons in the conduct of their daily affairs.]Its probative value is outweighed by:
 - (i) The danger of unfair prejudice.
 - (ii) Confusion of the issues.
 - (iii) By considerations of undue delay or waste of time.
- ([b]c) Subsections (a) and (b) supersede[s] 1 Pa. Code § 35.161 (relating to form and admissibility of evidence).

Section 5.592. Compliance with orders prescribing rates.

In the OCA Initial Comments, OCA recommended that the Commission modify Section 5.592(d). OCA Initial Comments at 10-12. As Section 5.592 currently provides, when the

Commission enters an order in a Section 1307 or 1308 case, the public utility shall file, within 20 days of entry of the final order, a tariff revision consistent with the Commission's decision, along with a proof of revenues and supporting calculations. Exceptions may be filed within 10 days of the date of service. The utility making the compliance filing may respond to exceptions within 5 days. Subsection (d) permits, upon further Commission order, the rates to go into effect, notwithstanding the filing of an exception.

The Commission's NPRM Order proposes minor changes to Section 5.592(a),(b), and (c), but does not change the scheme of Section 5.592. PUC NPRM Order, Annex A, revised Section 5.592. The OCA submits that Subsection (d) should also be modified so that a compliance tariff, against which an exception has been filed, cannot go into effect. Rather, the Commission should review the exceptions and replies and make a determination whether the compliance filing is consistent with its final order. Once it makes that determination, it should enter an order rejecting, modifying, or accepting the compliance filing. This procedure would avoid the problem of having rates go into effect while there is an issue about whether the compliance filing is consistent with the Commission's order. Thus, the Commission avoids the problem that rates might need to be decreased once it issues an order on the merits of the exceptions. The OCA proposes the following addition to the end of Subsection (c) and revisions to Subsection (d), as additions to those revisions to Section 5.592 proposed by the PUC:

- (c) Exceptions to a tariff revision under this section may be filed by a [participant] party to the proceeding within 10 days of the date of service of the compliance filing, and shall be strictly limited in scope to the factual issue of alleged deviation from requirements of the Commission order. The utility making the compliance filing may respond to exceptions within 5 days. No further pleadings will be permitted, unless the Commission requests additional information from the parties.

- (d) No rates contained in a tariff revision filed in compliance with a Commission order, and to which exceptions have been filed may be imposed prior to entry of a subsequent order by the Commission, approving the compliance filing. The Commission may accept, modify or reject the compliance filing. ~~Notwithstanding the filing of an exception, the Commission may allow the compliance rates to become effective.~~

In the alternative, OCA recommends that Section 5.592 be modified to explicitly require that any rates that go into effect, while an exception is filed against the compliance filing, would be subject to refund.

Conclusion

The OCA commends the Commission for reexamining its Rules of Practice and Procedure. However, as noted above, the OCA has found some proposed changes as unduly restrictive or likely to impede, rather than advance, fair and efficient administrative process. The OCA requests that the Commission adopt the changes recommended in these comments, to better enable all participants to fully and fairly participate in proceedings before the Commission.

Respectfully submitted,



Christine Maloni Hoover
Senior Assistant Consumer Advocate

Barrett C. Sheridan
Assistant Consumer Advocate

Counsel for:
Irwin A. Popowsky
Consumer Advocate

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Dated: December 29, 2004
00082322.wpd

CERTIFICATE OF SERVICE

**Re: Notice of Proposed Rulemaking for Revision of Chapters 1, 3 and 5 of Title 52 of the Pennsylvania Code Pertaining to Practice and Procedure Before the Commission
Docket No. L-00020156**

I hereby certify that I have this day served a true copy of the foregoing document, Comments of the Office of Consumer Advocate, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 29th day of December, 2004.

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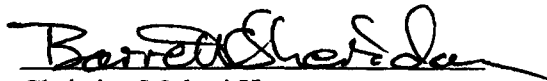
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December 28, 2004

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7:00 PM DEC 28 2004
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717-787-2814

Office of the Secretary

The Honorable James J. McNulty
Secretary
Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

COPY

L-00020156

Dear Secretary McNulty:

The Department of Environmental Protection (Department or DEP) has enjoyed a long-standing cooperative relationship with the Pennsylvania Public Utility Commission (Commission or PUC) regarding the two agencies' overlapping jurisdiction over water and wastewater utilities. For example, the PUC and DEP entered into a Memorandum of Understanding in 1993 with the goal of fully cooperating to achieve improvement in small water system viability. This goal has been expanded by practice to include small wastewater system viability. Both agencies' staffs exchange information on a regular basis through participation in the PUC-sponsored interagency Small Water Company Task Force and through other informal avenues of communication. Coordination between the agencies serves to foster both the two agencies' ability to carry out their statutory mandates in harmony without conflicts and also their ability to better serve the public and business by harmonizing the regulatory requirements for jointly regulated public utilities. DEP wishes to acknowledge that history of cooperation with the PUC and offers the following comments in the spirit of continuing its cooperative relationship with the PUC. The Department would be glad to meet with the PUC to discuss its comments.

The Department has three main comments concerning the Commission's proposed revisions to 52 Pa. Code Section 3.501.

1. The PUC indicates in its Executive Summary that to afford it greater flexibility, the Commission proposes that the *substantive* requirements in Section 3.501 for an application for a water supplier or wastewater provider be iterated in *forms* as opposed to the regulation. The Department objects to the deletion of the express regulatory language that establishes "binding norm" requirements that an applicant for a certificate for public convenience (CPC) documents how it will satisfy several DEP requirements as part of its application for a CPC. DEP is particularly concerned with the following proposed deletions: Section 3.501(a) – provide PUC with DEP mandated business plan; Section 3.501(a)(2)(v) – provide map showing DEP permitted productive or treatment capacity of sources or treatment facility; Section 3.501(a)(6) – provide proof of compliance with applicable . . . standards of DEP, including copies of permits and compliance history information; and Section 3.501(a)(9) – demonstrate compliance with DEP's drinking water regulations or Sewage Facility Act requirements.

While the Commission has indicated that it intends to retain these current regulatory items on its application forms, the Department believes that this approach is not appropriate for several reasons. First, a regulatory requirement has the force and effect of law and the regulatory presumption of validity. It is easier to defend as a "binding norm" a requirement that is in the regulations. Without a regulatory requirement, an agency may not establish a "binding norm" requirement by policy, permit condition or application form under Pennsylvania case law. Second, application forms may also be changed or ignored without notice.

The existing regulatory requirements that reference compliance with DEP regulations and requirements are important, and they should retain their status as "binding norm" regulatory requirements. By retaining the existing "automatic" coordinating mechanisms contained in the PUC's regulations, the regulations will be more business-friendly as they can help an applicant through the government maze. If such requirements are not disclosed, it makes it harder for business to know about and therefore comply with the requirements of both agencies. However, if the application process is spelled out to encourage agency coordination and highlight the dual requirements, then the process fosters the laudable goal of a one-government, one-stop shopping approach.

2. The Department objects to the proposed change to Section 3.501(a) which purport to codify the Commission's view that the existing language in Section 3.501 is only applicable to those few applications for "new" or initial CPC authority and not to more numerous applications seeking additional CPC authority. The proposed regulation states that Section 3.501 would only be applicable to an applicant that seeks "a certificate of public convenience as a new water supplier, wastewater collection treatment or disposal provider." (Emphasis added). Under this view, once an applicant has a certificate anywhere in the Commonwealth, the Commission's application process for any additional or expanded service would not require any information concerning compliance with DEP requirements from existing certificated water suppliers or wastewater providers. This view is shortsighted, and the reasons that support the requirements to consider compliance with DEP's environmental requirements for applications for initial service are equally applicable to applications by existing certificated suppliers or providers seeking certificates for additional or expanded PUC authorized service territories. If, as proposed, Section 3.501 only applies to "new" service providers, then there is no PUC regulation that applies to existing providers seeking to expand service. Having no regulation that identifies the substantive requirements applicable to already-certificated applicants leaves the public and the regulated community at a loss as to what requirements will be imposed on such applicants for expanding water or wastewater service.

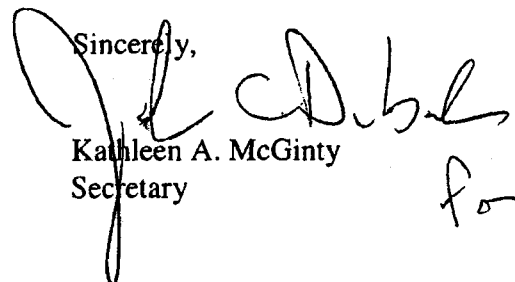
The Department has sufficient interest in this issue that it recently intervened in a matter before the Commission concerning the applicability of Section 3.501. (Application of Utilities, Inc. of Pennsylvania, No. A-230013F00003). The Department believes that it should both receive notice of applications by utilities seeking a certificate as a new water supplier or wastewater provider and those already certificated utilities seeking a certificate for additional or expanded service territories, and that the Commission should also consider compliance with

DEP's applicable environmental requirements before it issues a certificate for additional or expanded service territories. The Commission's regulations should be modified to clearly include these requirements.

3. The Department is concerned that the practical effect of the Commission's proposed regulatory revisions and its current interpretation of its existing regulations will allow or encourage unplanned development or sprawl which conflicts with the legislative directions of the General Assembly to agencies, to coordinate agency permitting decisions with local zoning and planning and to promote Smart Growth. The General Assembly provided this direction in its enactment of the amendments to the Municipal Planning Code in 2000. 53 P.S. § 10101 *et seq.* as amended by Act 67, 68 and 127 of 2000. The amendments require that agencies "shall consider and may rely upon" local zoning and planning decisions when permitting infrastructure and facilities. The Commission's proposed revisions fail to recognize that the Commission has the authority to better coordinate its decision-making procedures with those of the Department and any interested local government unit in which additional or expanded service territories are proposed. Rather than continuing the current process that allows the Commission's decisions concerning additional or expanded service territories to occur without explicit consideration of DEP's applicable environmental requirements and local government's applicable zoning and planning requirements, the Commission should use the revision of these regulations as the opportunity to properly integrate its CPC decision-making procedures with these other necessary and important considerations.

The Commission should not issue a CPC for an initial, expanded or additional service territory without first determining that the proposed service territory is consistent with DEP's environmental requirements and local zoning and planning requirements. The General Assembly has directed that the state agencies, such as the Department and the Commission, better coordinate their permitting programs with local zoning and planning to encourage Smart Growth and discourage sprawl. The proposed regulations, which limit the Commission's consideration of DEP's environmental requirements and local government's zoning and planning requirements, conflict with this legislative direction. The PUC has participated for the past year in an interagency committee that is finalizing a letter of understanding among state agencies, including DEP and the PUC, on implementation of Acts 67 and 68. The letter of understanding is contradicted by the proposed regulation because the letter of understanding would have PUC consider local zoning and planning before making a CPC decision. A CPC for an initial, expanded or additional territory that conflicts with local zoning and planning requirements which support Smart Growth, will promote sprawl. The Commission should evaluate these issues before it issues the CPC so that its decision is also supportive of Smart Growth, and its regulations should require that evaluation.

Sincerely,



Kathleen A. McGinty
Secretary

for

cc: Wendell F. Holland