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July 16, 2007

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INDEPENDENT REGULATORY  
REVIEW COMMISSION

**VIA ELECTRONIC & HAND DELIVERY**

Independent Regulatory Review Commission  
333 Market Street, 14<sup>th</sup> Floor  
Harrisburg, PA 17101

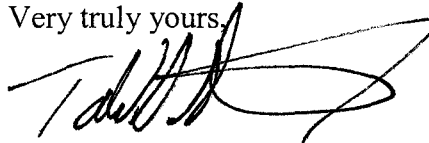
RE: Pennsylvania Public Utility Commission Rulemaking re: Electric Distribution Company's Obligation to Serve Retail Customers at the Conclusion of the Transition Period pursuant to 66 Pa.C.S. §2807(e)(2); Issued by the Pennsylvania Public Utility Commission May 10, 2007, at Docket No. L-00040169, and submitted to the IRRC on May 24, 2007; IRRC Item 2463, #57-237;  
**COMMENTS OF DOMINION RETAIL, INC.**

Dear Sir/Madam:

Enclosed is the Comments of Dominion Retail, Inc., to the above-captioned Rulemaking of the Pennsylvania Public Utility Commission currently scheduled for consideration by the IRRC at its July 19, 2007 public meeting.

If you have any questions concerning the enclosed Comments, please do not hesitate to contact the undersigned.

Very truly yours,



Todd S. Stewart  
Counsel for Dominion Retail, Inc.

TSS/bks

Enclosure

cc: James J. McNulty, Secretary

MAILING ADDRESS: P.O. BOX 1778 HARRISBURG, PA 17105

**BEFORE THE PENNSYLVANIA  
INDEPENDENT REGULATORY REVIEW COMMISSION**

Pennsylvania Public Utility Commission Rulemaking re: Electric Distribution Company's Obligation to Serve Retail Customers at the Conclusion of the Transition Period pursuant to 66 Pa.C.S. §2807(e)(2); Issued by the Pennsylvania Public Utility Commission May 10, 2007, at Docket No. L-00040169, and submitted to the IRRC on May 24, 2007.

IRRC Item 2463, #57-237

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**COMMENTS OF DOMINION  
RETAIL, INC.**

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**Introduction**

Dominion Retail, Inc. ("Dominion Retail") is an Electric Generation Supplier ("EGS") in Pennsylvania and serves approximately 100,000 primarily residential electricity customers in the Commonwealth. Dominion Retail has provided the Pennsylvania Public Utility Commission ("PUC") with Comments on this Rulemaking at each stage in the process, as a Proposed Rulemaking Order, as a Final Rulemaking Order and as an Advanced Notice of Final Rulemaking Order ("ANOFR"). Dominion Retail consistently supported the PUC's implementation of the statutory requirement of passing wholesale prices onto customers in real time so that customers would have significant and realistic opportunities to make choices at the retail level between competing offers, believing that if the PTC, or default service rate, were developed on a similar basis as the rates of EGS's real competition at the retail level could occur and bring customers real choices for their energy supply.

Dominion Retail was surprised and gravely concerned when PUC changed its position on the development of those retail rates in the ANOFR, and for the first time, rather than prohibiting

reconciliation of such rates,<sup>1</sup> as the PUC had done in both prior versions of the rules, the PUC instead proposed to permit, and indeed encouraged the use of reconciliation mechanisms for default service rates. Dominion Retail believes that the PUC's unjustified 180° policy change is unwise in that it will harm customers and competitors. Dominion Retail also believes that the proposal is illegal. Dominion Retail respectfully requests that the IRRC not grant approval to these proposed regulations, and instead return these proposed regulations to the PUC.<sup>2</sup>

### **The PUC's Policy Change.**

Dominion Retail's concern lies primarily with proposed Section 54.187(f), which now permits reconciliation of the PTC or default service rate. Prior to the change in the ANOFR, the proposed regulations provided, in Section 54.187(a)(2):

[T]he customer charge is a non-reconcilable, fixed charge, set on a per customer class basis, that includes all identifiable, reasonable costs associated with providing default service to an average member of that class. . .

After the ANOFR, the now revised Section 54.197(f) provides:

A DSP may use an automatic energy adjustment clause to recover reasonable non alternative energy default service costs. The use of an automatic adjustment clause shall be subject to audit and annual review, consistent with 66 Pa.C.S. §§1307(D)(E). . . a DSP may collect interest from retail customers on the recoveries of under collections of default service at the legal rate of interest. Refunds to customers for over recoveries shall be made with interest, at the legal rate of interest plus 2%.

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<sup>1</sup> There were comments from a number of parties, including Dominion Retail suggesting that reconciliation was unwise, and possibly illegal. In fact, the PUC was at the time defending an appeal where it had disapproved a reconciliation mechanism.

<sup>2</sup> As of the time these Comments are being submitted there is pending before the legislature, House Bill 1530, that will make dramatic changes to the proposed scheme for default service. If this Legislation is passed in its current form, it would be effective immediately. If HB 1530 becomes law prior to the IRRC meeting, that fact alone justifies rejection of the proposed regulations.

This change represents a movement of tectonic proportions in the PUC's interpretation of *Electricity Generation Customer Choice and Competition Act* ("Choice Act"), 66 Pa.C.S. §§ 2801, *et seq.*, and its mandate to promote retail competition.

### **Reconciliation of Default Service Rates Isolates Customers from the Market.**

As discussed by Dominion Retail in its Comments to the ANOFR, allowing for reconciliation will have the deleterious effect of isolating retail customers from the actual prevailing market cost of the energy they consume. This disconnect happens when rates are reconciled, because the addition of a reconciliation factor to recover prior over or under-recovered amounts, removes the relationship between the rate the default service customer pays and the prevailing market price. Such distortion harms customers: 1) because it makes an apples to apples price comparison between a default service rate and an EGS offering nearly impossible; 2) because it removes necessary price cues that customers inherently use to make purchasing decisions; and 3) harms customers and suppliers because it can falsely make an EGS's offer appear to be non-competitive when in fact the EGS's offer is the better choice, particularly in a rising market where an Electric Distribution Company ("EDC") can re-adjust its rates after-the-fact so that the customer ultimately pays more.

### **Reconciliation will Harm Customers.**

Reconciliation switches pricing risk from EDCs to customers. This removal of risk is significant for customers because it allows EDCs to avoid the costs associated with managing the risk of future price fluctuations and instead pass those costs directly to unknowing customers through reconciliation. EGSs, on the other hand, must bear those costs or assume the risk.

Under a scheme of reconciled rates, customers get bad price information, while at the same time, they are being saddled with more risk. The unfortunate result is that customers may well be paying more than is necessary for their electricity, but they will be unable to know for sure until it is too late to do anything about it.

### **Reconciliation will Harm Competitors.**

As discussed above, reconciliation removes the risk to the EDC that is associated with making pricing and purchasing decisions, because the EDC is able to always collect what it spends on a dollar for dollar basis, after-the-fact, if it turns out to be incorrect, by increasing or decreasing its rates to reflect its actual costs. EGSs have no such luxury; in fact, the PUC's pricing regulations for EGSs would prohibit an EGS from going back to a customer, after-the-fact, and proposing to change its rate. 52 Pa. Code § 54.5(c)(1). When EGS's compete directly against the PTC or default service rate offered by the EDC make price proposals to customers, that price is set and cannot be changed without notifying the customer in advance. If reconciliation is allowed, those same EGSs will be in the position of competing against a rate that can change after-the-fact to reflect over or under-recovered costs, and which is subject to manipulation without risk.

### **Reconciliation will Hamper Conservation Efforts.**

Another problem caused by reconciliation is the negative impact on energy conservation efforts. The PUC has taken numerous actions to encourage demand side response ("DSR") which is the ability of customers to reduce their consumption in real time, in response to increased demand for electricity and/or the increase in the real-time price that almost always

accompanies an increase in electricity demand. At the same time the PUC is promoting DSR, it has proposed to allow reconciled default service rates that are the antithesis of DSR. If the PUC expects any customers conserve energy or ultimately to subscribe to a DSR program, making the default service rate a non-market based rate that occasionally fluctuates for reasons the customer may not understand, it makes that goal far less achievable. The disconnect caused by reconciliation will remove customers' ability and/or desire to control consumption, particularly in periods of increasing demand—such as an unusually hot summer—because the customer will not see the rate impact until months later, if the rate impact is apparent at all. If customers don't know the price of the commodity they are consuming, and don't know how reconciliation affects the default rate, customers will have little incentive or ability to respond to the actual market signals and conserve energy in periods of high prices. Not only does this harm customers but it harms society as a whole by potentially encouraging increased consumption when such consumption may be contraindicated by a short-term increase in price of the commodity.

### **The PUC Ignored Viable Alternatives for Allowing Full Recovery of Costs.**

The PUC appears to believe that the statutory mandate to allow EDCs to “recover fully all reasonable costs” requires the use of reconciliation and stated in the ANOFR that “reconciliation of default service costs may be necessary . . . to enable the DSP to recover fully all reasonable costs.” Dominion Retail's prior comments on this very subject made it clear that that reconciliation is not the only way or, even the best way, to ensure full recover of costs. In fact, the ANOFR is internally inconsistent on the point as well; stating at one place that regular adjustment of rates will allow those rates to track market prices, and then, in virtually the same

breath, allowing the reconciliation of costs that will distort any connection between market prices and retail rates.

Dominion Retail's comments pointed out that there are methods for ensuring full recovery of costs that do not involve reconciliation. In particular, by requiring that EDCs purchase a portfolio of assets, including long-term contracts (which present no reconciliation problem because the risks are all borne by the suppliers), and forward market purchases in the month-ahead markets, where the price is known prior to the month in which the service begins. When this procurement approach is coupled with monthly adjustment of the prices on a prospective basis, the rates charged to customers and the cost incurred by the utility to serve those customers will be matched without the need for reconciliation. Moreover, such a scheme would keep the rates customers pay more closely in line with prevailing market prices, and create incentives for demand side management. Such an approach would present *de minimis* risk to EDCs, and from Dominion Retail's perspective, would allow EGSs to compete against real market prices rather than some semi-regulated reconciled rate that has no basis in the prevailing market or elsewhere.

**Reconciliation of Default Service Rates is Illegal.**

For the reasons discussed above, it should be obvious that proposed Section 54.197(f) represents a bad public policy choice. The proposed section also goes far beyond the statutory authority of the PUC and is thus illegal as well. In particular, the PUC's proposed regulation would require the payment of interest by customers on EDC under-recoveries and the payment of interest by the EDC to customers for over recoveries. The Legislature, through the *Choice Act*, neither contemplated, nor permitted interest to be charged to customers as a cost associated with

the provision of default service. Moreover, the ability to collect interest on under-recoveries provides further incentive for EDCs to delay the impacts of wholesale price increases and spread them out over time—customers will eventually pay every dime, with interest! Not only does the PUC’s proposal for interest go far beyond the authorization in the *Choice Act*, so does the threshold proposal to allow for reconciliation. Dominion Retail’s Comments before the PUC have made this point clear, and the ANOFR conveniently ignores this basic consideration.

The *Choice Act* does authorize the reconciliation of certain costs. In particular, Section 2808(f), 66 Pa.C.S. § 2808(f), provides for an annual review consistent with Section 1307(e) and provides for reconciliation of stranded costs with an annual adjustment of rates. No such mechanism was provided-for in Section 2807(e), 66 Pa.C.S. § 2807(e). The Legislature apparently knows how to authorize reconciliation when it intends to do so, as evidenced by Section 2808. Conversely, it is equally clear that the Legislature did not intend to authorize reconciliation in Section 2807. In fact, there is a well respected provision of statutory construction that makes the PUC’s proposal untenable. The principle known as *expressio unius est exclusio alterius* requires the mention of a specific thing in a statute implies the exclusion of things not mentioned.<sup>3</sup> Pennsylvania courts have previously applied this principle to cases in which the PUC applied, by implication, the authority specifically mentioned in one part of the Public Utility Code, as a basis for exercising the same authority in a different context (where the

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<sup>3</sup> *Commowalth v. Spotzs*, 716 A.2d 580, 590 (Pa. 1998) (“[T]he mention of one thing in a statute implies the exclusion of others not expressed . . . Similarly, the court may not supply omissions in the statute when it appears that the matter may have been intentionally omitted.”); *Slivo v. City of Pittsburgh Municipal Pension Fund*, 882 A.2d 24, 29 (Pa. Cmwlth. 2005)(“The maxim *expressio unius est exclusio alterius* teaches that where certain things are specified in a law, omissions should be understood as excluded.”).



specific authority was not mentioned) and rejected the PUC's attempts to extend its authority.<sup>4</sup>

This same analysis applies in this case to the PUC's proposed allowance of reconciliation as well as to the provision for the collection of interest on over and under-recoveries.

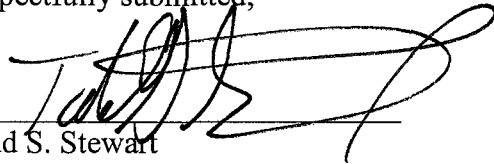
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<sup>4</sup> See, e.g., *Susquehanna Area Reg'l Airport Auth. v. Pa. Pub. Util. Comm'n*, 911 A.2d 612 (Pa. Cmwlth. 2006). There, this Court stated that the PUC's position did violence to the principle *expressio unius est exclusio alterius*. The particular contract at issue was excluded from regulation under Section 508 of the Public Utility Code – the only provision authorizing the PUC's review of a public utility's contract – and therefore the contract had been excluded from any review by the PUC. *Id.* at 623. This Court, noting the absence of express PUC power, found it to be “a leap, breathtaking in scope, for the PUC to contend that it has the implicit power . . . to reach the same result.” *Id.* See also *Popowsky v. Pa. Pub. Util. Comm'n*, 869 A.2d 1144 (Pa. Cmwlth. 2005). There, the PUC allowed a wastewater charge under 1307(g), reasoning in part that, even though the utility was a wastewater utility and not a water utility, the broad language of Section 1307(a) permitted such charge. This Court disagreed, finding that the PUC was violating the principle *expressio unius est exclusio alterius* by expanding the reach of Section 1307(g) of the Public Utility Code. *Id.* at 1159. Noting that Section 1307(g), by its terms, was limited in scope and that the Legislature could have set forth a more expansive list of projects had it wanted to do so. *Id.* This Court stated, “We must find that the legislature intended to limit the use of the surcharge. It did not intend that all utilities could fund capital improvements by a surcharge.” *Id.*

**The IRRC Should Reject the Regulations.**

Accordingly, for the foregoing reasons, Dominion Retail urges the IRRC to not grant approval to the final form regulation submitted to it by the Pennsylvania Public Utility Commission.

Respectfully submitted,



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Dated: July 16, 2007