



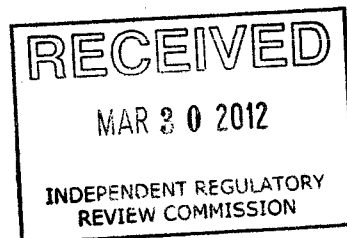
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Assistant General Counsel

March 27, 2012



VIA OVERNIGHT MAIL

Ms. Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building, 2nd Floor
400 North Street
Harrisburg, PA 17120

RECEIVED

MAR 27 2012

**PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU**

**Re: Revisions to Code of Conduct
At Pa. Code §54.122
Docket No. L-2010-2160942**

Dear Secretary Chiavetta:

Enclosed for filing are an original and 15 copies of the Comments of Duquesne Light Company in response to the Commission's proposed revisions to the Order in the above proceeding.

Sincerely yours,

Krycia M. Kubiak
Assistant General Counsel

Enclosure

cc: Aspasia Staevska, Assistant Counsel

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

RECEIVED

MAR 27 2012

PA PUBLIC UTILITY COMMISSIO
SECRETARY'S BUREAU

Revisions to Code of Conduct : Docket No. L-2010-2160942
At Pa. Code § 54.122 :

COMMENTS OF
DUQUESNE LIGHT COMPANY

RECEIVED
MAR 30 2012
INDEPENDENT REGULATORY
REVIEW COMMISSION

I. INTRODUCTION

The Pennsylvania Public Utility Commission ("Commission") issued an Order on August 25, 2011 with respect to Revisions to the Code of Conduct at 52 Pa. Code § 54.122 ("Order"), Docket No. L-2010-2160942. Pursuant to this Order, the Commission seeks comments on its proposed revisions to the Competitive Safeguards subchapter of its customer choice rules, 52 Pa. Code §§ 54.121-123. Order, p. 1. These proposed revisions are intended to reflect changes in the markets, technology and law subsequent to the initial passage of the Electricity Generation Customer Choice and Competition Act (the "Competition Act") in 1997. Order, p. 3.

Duquesne Light Holdings, Inc. is the parent company of Duquesne Light Company ("Duquesne"), an electric distribution company ("EDC"). Duquesne Light is affiliated with Duquesne Light Energy ("DLE"), a retail electric generation supplier ("EGS") licensed in Pennsylvania. Duquesne submits the following comments in response to the Order.

II. OVERVIEW

A. EXISTING CODE OF CONDUCT

Duquesne supports the Commission's desire to ensure that there are appropriate protections in place to facilitate competition. The existing Code of Conduct has historically served as an important tool to ensure that EDCs and EGSs function fairly and ethically and act in the best interests of Pennsylvania's electricity consumers. The success of the Commission's existing Code of Conduct is attributable to the extensive process used to develop the current rules and regulations.

The Commission's existing Code of Conduct regulations were adopted in 2000 following an extensive stakeholder process that resulted in parties providing the Commission with consensus principles for use in the *Competitive Safeguards regulations*.¹ Where consensus was not reached, the Commission evaluated the various positions through a formal rulemaking process culminating in the existing regulations, which require affiliated EGSs to use disclosure language and prevent improper sharing of marketing and other competitively sensitive information between EDCs and their affiliated EGSs.

In its 2000 Competitive Safeguards Order, the Commission addressed a number of the provisions proposed in the Commission's current proposed rulemaking including restricting the sharing of operational and managerial personnel, facilities, and information and to adopt cost allocation rules for common costs. Following the receipt of comments and reply comments, the Commission decided against adopting specific provisions on these matters and approved the existing Code of Conduct. In addition to addressing these issues in its 2000 Competitive

¹ Rulemaking Regarding the Establishment of Competitive Safeguards for the Pennsylvania Electric Industry, Docket No. L-00980132, Final Rulemaking Order entered February 13, 1998. ("*2000 Competitive Safeguards Order*").

Safeguards Order, the Commission also considered and rejected similar provisions when reviewing and approving individual EDC restructuring plans.²

In rejecting these proposals, the Commission noted that its approved Competitive Safeguard Regulations and provisions of the Public Utility Code provided the Commission with adequate oversight if any of the issues addressed by the rejected provisions become an issue in Pennsylvania. Further, the Commission noted that parties' could file a complaint, pursuant to 66 Pa.C.S. § 2811(f), asking the Commission to remedy such behavior, insofar as it is within their power to do so. The Commission's authority over such matters has not changed since 2000. That is, if a market participant were to raise any of the issues sought to be addressed in the proposed rulemaking in the future, the Commission has sufficient authority to act.

The success of the Commission's existing Code of Conduct is substantiated by advanced competition and the positive impact to Pennsylvania's retail electric markets. Indeed, as explained in these Comments, Duquesne believes that one of the requirements set forth in the Proposed Regulations would have the ultimate effect of increasing costs to the customers and reducing the level of competition within the Commonwealth.

B. PROPOSED CODE OF CONDUCT

Duquesne does not object to many of the proposed revisions to the Commission's existing Code of Conduct. However, the proposed restrictions on affiliated EGSs with respect to sharing employees or certain services with a Pennsylvania EDC is a significant concern to Duquesne.

² See, Application of PECO Energy Company for the Approval of its Restructuring Plan Under Section 2806 of the Public Utility Code and Joint Petition for Partial Settlement, et al. Docket No. R-00974104 (Order entered May 29, 1998); and Application of Pennsylvania Power & Light Company for Approval of Restructuring Plan Under Section 2806 of the Public Utility Code, Docket No. R-00973954 (Order entered June 15, 1998).

III. COMMENTS ON PROPOSED REGULATIONS

Duquesne's concerns regarding the specific revisions are detailed below.

A. **PROPOSED SECTION 54.122 4(III): THE PROPOSED RESTRICTION ON PROHIBITING SHARING OF CERTAIN EMPLOYEES IS DISCRIMINATORY, INCREASES COSTS AND IS CONTRARY TO GUIDANCE BY THE FEDERAL ENERGY REGULATORY COMMISSION**

The Commission's proposed revisions to the Code of Conduct require that an EDC and an affiliated EGS "may not share employees or services, except for corporate support services, emergency support services, or tariff services offered to all electric generation suppliers on a non-discriminatory basis." Order, pp. 10-11. Services that do not qualify as "corporate support services," and may not be shared, include: "purchasing of electric transmission facilities, service and wholesale market products, hedging and arbitrage, transmission and distribution service operations, system operations, engineering, billing, collection, customer service, information systems, electronic data interchange, strategic management and planning, account management, regulatory services, legal services, lobbying, marketing or sales." Order, p. 11. This restriction is unnecessary, unduly restrictive, increases costs, and is contrary to guidance provided by the Federal Energy Regulatory Commission.

1. **The Proposed Revisions Are Unnecessary, Unduly Restrictive, And Will Increase Costs**

EDCs in Pennsylvania have had shared employees with affiliated companies for many years, subject to the arrangements approved by the Commission. In the situation of a holding company structure, such as with Duquesne Light Holdings, it is necessary and highly desirable to share services, and to some extent, employees. This may be accomplished through use of a service company or by housing the shared employees in the utility. Such services include, but are not limited to, accounting, financial, purchasing, computer and IT, human resources,

regulatory, and legal. The shared employees provide these services to affiliate companies at fully allocated cost, including overhead and benefits. This is the manner in which Duquesne Light Holdings operates, and has done so for years. Duquesne has an Amended and Restated Administrative Services Agreement dated July 19, 2004, which provides for the sharing of such corporate services with affiliated companies. The Agreement and arrangement has been approved by the Commission.³ Under this Agreement, certain employees of Duquesne Light provide support services to DLE (as well as other sister companies), such as Regulatory, Legal, IT and Human Resources. This model has worked well, and has not created any sort of undue preference to DLE. In fact, Duquesne has a very strict program in place to ensure that there is no preference to DLE over other EGSs, and also has a strong FERC Standards of Conduct program which furthers the independent functioning and functional separation. These proposed Commission regulations would have the immediate effect of requiring DLE to cease reliance upon the “shared” employees currently within the Duquesne Light Holdings structure.

This restriction on sharing of services is unnecessary. The Commission has established extensive rules and codes of conduct to prevent improper sharing of marketing and other competitively sensitive information between EDCs and their retail marketing affiliates.

The portion of the Proposed Rulemaking that excludes functions from the definition of “Corporate Services” that may be shared by an EDC and its affiliates is overly restrictive. Specifically, the exclusion of billing, collection, customer service, information systems, and legal services is overly broad. This exclusion would increase costs to both EDCs and EGSs thereby increasing costs to be recovered from customers.⁴ To reduce the risk of increased customer

³ Affiliated Interest Agreement Between Duquesne Light Company and Duquesne Light Holdings, Inc., Docket No. G-00041076, (Secretarial Letter dated October 5, 2004).

⁴ Further, several retail marketers from other states are active in the Pennsylvania market. These marketers are affiliates in major utility holding companies who also employ service companies. The proposed Commission rules

costs, EDCs and their affiliated EGSs should be permitted to share the billing, collection, customer service, information service, regulatory and legal service functions, since adequate safeguards are in place to preclude the employees of a competitive affiliate from gaining access to information in a manner that allows a means to transfer confidential information from a utility to an affiliate or to create an opportunity for preferential treatment or unfair competitive advantage

2. Prohibiting Duquesne Light and DLE from Sharing Certain Employees and Services Violates the Commerce Clause of the U.S. Constitution

The proposed restriction on shared services has broader implications. Indeed, several EGSs active in Pennsylvania's retail market are from other states and are affiliates in major utility holding companies that employ service companies and/or shared services. However, as proposed, the restriction on shared services does not apply to these entities but only to EGSs affiliated with Pennsylvania EDCs. Such a restriction violates the Commerce Clause of the U.S. Constitution. Specifically, if the Proposed Rulemaking is adopted, EGSs affiliated with Pennsylvania EDCs would be prohibited from sharing employees and services, while marketers affiliated with non-Pennsylvania EDCs of utilities would be free to do so. This prohibition would create an unfair and unreasonable competitive advantage for such marketers for purposes of marketing activities within the Commonwealth. Further, several EGSs affiliated with a Pennsylvania EDC do not necessarily limit their marketing activities to the Commonwealth. Indeed, many of these EGSs engage in marketing activities outside of the Commonwealth. Because the prohibition on shared offices, employees and services does not apply to out-of-state

do not appear to apply to these entities which would create an unfair and unreasonable competitive advantage for out-of-state marketers to the detriment of Pennsylvania-based organizations. It would have the perverse effect of encouraging out of state competitors at the expense of in-state entities.

marketers, the Proposed Rulemaking would put EGSs affiliated with a Pennsylvania EDC at a competitive disadvantage when conducting marketing activities outside of the Commonwealth.

The United States Supreme Court has interpreted the Commerce Clause to invalidate local laws that impose commercial barriers or discriminate against an article of commerce by reason of its origin or destination out of state, otherwise known as the dormant Commerce Clause. See C&A Carbone v. Town of Clarkstown, 511 U.S. 383, 390 (U.S. 1994) (citing Hughes v. Oklahoma, 441 U.S. 322 (1979)). The Pennsylvania Supreme Court has explained that the “Commerce Clause has a negative or dormant aspect which limits the power of the states to erect barriers against interstate trade where Congress has not affirmatively acted to either authorize or forbid the challenged state activity” Empire Sanitary Landfill v. Pennsylvania Department of Environmental Resources, 546 Pa. 315, 333, 684 A.2d 1047, 1055 (1996). The United States Supreme Court recently observed the “modern law of what has come to be called the dormant Commerce Clause is driven by concern about economic protectionism -- that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.” Dep’t of Revenue of Ky. v. Davis, 553 U.S. 328, 337-38 (2008) (internal quotation marks and citation omitted). The dormant Commerce Clause walks a narrow path leading courts to “rebuff[] attempts of states to advance their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state, while generally supporting their right to impose even burdensome regulations in the interest of local health and safety.” H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 535, (1949). Thus, economic harms or anticompetitive choices that unjustifiably burden interstate commerce, either into or out of the state, implicate the dormant Commerce Clause.

There is a two step process to determine whether a state law or regulation violates the dormant Commerce Clause. First, the inquiry starts with whether the state law discriminates against interstate commerce. Unless discrimination is demonstrably justified by a factor unrelated to economic protectionism, a “discriminatory law is virtually *per se* invalid.” Davis, 553 U.S. at 338 (internal quotation marks and citation omitted); *see also* Yamaha Motor Corp., U.S.A. v. Jim's Motorcycle, Inc., 401 F.3d 560, 567 (4th Cir. 2005). If there is no discrimination, the second step requires the court to consider whether the state law or regulation “unjustifiably . . . burden[s] the interstate flow of articles of commerce.” Oregon Waste Sys., Inc. v. Dep't of Env'tl. Quality of Oregon, 511 U.S. 93, 98 (1994); *see also* Yamaha, 401 F.3d at 567. In addressing whether a state law unjustifiably burdens interstate commerce, the courts generally apply the so-called Pike test, under which the challenged law or regulation “will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.” Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

The Proposed Rulemaking’s prohibition on employees and services by an EGS affiliated with a Pennsylvania EDC, imposes a burden on interstate commerce. Specifically, an EGS affiliated with a Pennsylvania EDC would be at a competitive disadvantage with respect to marketing activities conducted outside the Commonwealth. Given the increase in costs, an EGS affiliated with a Pennsylvania EDC would not be able to effectively compete against out-of-state marketers offering the same or similar services in the interstate retail electric market. This is a significant burden on EGSs with an affiliated Pennsylvania EDC.

As the proposed prohibition on sharing employees and services will impose a burden on interstate commerce, it must be determined whether the burden is clearly excessive in relation to the local benefits. The stated benefits of the Commission’s proposed rulemaking are to increase

competition by providing retail electric customers with the option to obtain their generation service from an EGS, and to provide EGSs with direct access to the EDCs' transmission and distribution system on a nondiscriminatory basis at rates, terms, and conditions comparable to the EDC's own use of the system. The Commission concluded that there was a genuine concern that incumbent utilities would directly or indirectly favor affiliated EGSs, to the detriment of robust retail electric competition.

Clearly, the proposed rulemaking seeks to provide local benefits in the form of increased competition. However, Pennsylvania, and in particular Duquesne's service area, currently has a *robust competitive market with participation by both in-state and out-of-state marketers*. Importantly, there is no evidence that the sharing of employees and services by EGSs and their affiliated Pennsylvania EDCs, subject to the existing Code of Conduct, has negatively impacted competition in the retail electric market. There are many marketers without an affiliated EDC that actively participate in the Pennsylvania retail electric market.

The existing Code of Conduct provides adequate safeguards to prevent sharing of customer information and providing an unfair advantage to affiliates. In addition, it must be remembered that the Commission retains jurisdiction over affiliate interest agreements that pertain to sharing employees and services. To the extent that the Commission, or any other party for that matter, believes that there is an improper sharing of services or that an EDC has provided an unfair advantage to an affiliate EGS, the Commission may always undertake an investigation of the affiliates, either upon its own or through a third-party complaint.

If the proposed regulation is adopted, the proposed regulation could act as an economic bar to EGSs with an affiliated Pennsylvania EDC from entering the interstate retail electric market in those states. As a result, such EGSs would be required to choose between: (1)

participating in the Pennsylvania retail electric market, at a competitive disadvantage to out-of-state marketers not subject to the prohibition on sharing employees and services; or (2) abandoning their marketing activities in Pennsylvania and pursuing such activities in other states where they can continue to use shared employees and services to more effectively compete in the interstate market. This is a significant burden on EGSs with an affiliated Pennsylvania EDC and, moreover, it could have serious repercussions on competition by the loss of customers' ability to select an in-state EGS affiliated with an EDC over out-of-state marketers.

The safeguards of the existing Code of Conduct and affiliate interest agreements, and the competitive disadvantage to EGSs affiliated with a Pennsylvania EDC to effectively compete in the retail electric market, the proposed prohibition, if approved, imposes a burden that clearly is excessive in relation to the local benefits. For these reasons, the Proposed Rulemaking, if approved, would violate the dormant Commerce Clause protection of interstate commerce.

3. The Proposed Revisions Are Contrary To Guidance Handed Down By the Federal Energy Regulatory Commission

The Federal Energy Regulatory Commission has extensively considered service companies and shared employee issues at the federal level and has approved the current structures employed by Pennsylvania EDCs as they relate to wholesale electricity markets. Adoption of the proposed Commission rules would be inconsistent with FERC practice and policy and would required Pennsylvania EDCs to implement conflicting and inconsistent rules for dealing with service company issues.

For example, the FERC Standards of Conduct address the independent functioning and functional separation of Transmission Function and Marketing Function employees. In fact,

FERC Orders 717 through 717-D⁵ have specifically addressed this issue, and held that employees may provide services to both the Transmission and Marketing Function. The employees must not be Transmission or Marketing Function employees, i.e. must not perform transmission or marketing functions on a day to day basis. Further, any employee who is likely to have access to non-public transmission information must abide by the No Conduit Rules, and is prohibited from transmitting transmission function information to marketing function employees. See FERC Order No. 717. Thus, for example, if an attorney is rendering legal advice, he or she may consult with both transmission function and marketing function employees. Likewise, a risk management employee may develop risk guidelines for both transmission function employees and marketing function employees. Order 717, p. 66. Adoption of the proposed Commission rules to limit shared services would be inconsistent with FERC practice and policy and would require Pennsylvania EDCs to implement rules in providing shared services.

Thus, the proposed revisions to the Code of Conduct as it applies to shared services or employees should not be adopted, as it conflicts with FERC guidance.

4. Section 2804(5) of the Public Utility Code

Section 2804(5) of the Public Utility Code provides that through its regulation of Pennsylvania's restructured electric utility industry, that the Commission shall not require an EDC to reorganize its corporate structure. 66 Pa.C.S. § 2804(5). If the currently proposed exclusion of shared services were applied to a Pennsylvania's EDC's parent corporation, the

⁵ *Standards of Conduct for Transmission Providers*, Order No. 717, FERC Stats. & Regs. ¶ 31,280 (2008), *order on reh'g*, Order No. 717-A, FERC Stats. & Regs. ¶ 31,297, *order on reh'g*, Order No. 717-B, 129 FERC ¶ 61,123 (2009), *order on reh'g*, Order No. 717-C, 131 FERC ¶ 61,045 (2010), *order on reh'g*, Order No. 717-D, 135 FERC ¶ 61,017.

restrictions would effectively mandate that Pennsylvania EDCs reorganize their existing corporate structure in violation of Section 2804(5).

Specifically, as proposed, the Commission excludes the provision of “strategic management and planning” as a permissible form of corporate support services. This exclusion, if applied to the parent company for Pennsylvania EDCs and their affiliated EGSs, may prohibit the corporate offices of parent company from overseeing the corporate operations of its EDC and affiliated EGS via “strategic management and planning” for these entities. A Commission ban that prohibits Pennsylvania EDCs and their affiliated EGS from having a common parent and common corporate officers would effectively mandate that Pennsylvania EDCs and their affiliates reorganize their existing corporate structure. This requirement directly conflicts with Section 2804(5) of the Public Utility Code.

5. Impermissible Regulation of Attorneys

The Commission’s Proposed Regulation, if adopted, would preclude a Pennsylvania EDC and its affiliated EGS from sharing “legal services”. This restriction improperly infringes upon the exclusive power of the Supreme Court of Pennsylvania to govern the conduct of attorneys practicing law within the Commonwealth. Lloyd v. Fishinger, 529 Pa. 513, 605 A.2d 1193, 1196 (1992).

This exclusive power is granted to the Court by Article V, Section 10(c) of the Pennsylvania Constitution, which provides in pertinent part that:

The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts. . . . All laws shall be suspended to the extent that they are inconsistent with rules prescribed under these provisions.

Pennsylvania Constitution, Article V, Section 10(c).

Any legislative enactment encroaching upon the Court's exclusive power to regulate attorney conduct is unconstitutional. Lloyd, 605 A.2d at 1196. The legislature is precluded from "exercising powers entrusted to the judiciary." Commonwealth v. Stern, 549 Pa. 505, 701 A.2d 568, 571 (Pa. 1997) (citation omitted).⁶ The prohibition against sharing legal services between an EDC and its affiliated EGS expands the rules prescribed for attorney conduct prescribed by the Pennsylvania Supreme Court and is therefore impermissible. Attorneys are governed solely by the rules of professional conduct as adopted by the Supreme Court of Pennsylvania.

IV. CONCLUSION

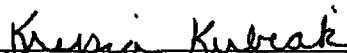
Duquesne recognizes and supports the robust functioning of retail choice in Pennsylvania, which includes safeguards for the prevention of affiliate preferences or unfair advantages in the marketplace. Duquesne commends the Commission for developing adequate protections to prevent undue preference or strategic advantage to licensed generation suppliers affiliated with regulated utilities.

⁶ See, e.g., Shaulis v. Pennsylvania State Ethics Comm'n., 574 Pa. 680, 833 A.2d 123, 132 (Pa. 2003) (65 Pa.C.S. § 1103(g) of the Public Official and Employee Ethics Act [barring attorney from practicing before former government employer for one year after he leaves employment] is unconstitutional to the extent that it regulates the conduct of former government employees who are also attorneys); Gmerek v. State Ethics Comm'n., 751 A.2d 1241, 1260 (Pa. Cmwlth. 2000), aff'd, 569 Pa. 579, 807 A.2d 812 (2002) (Lobbying Disclosure Act, 65 Pa.C.S. § 1303-1311 invalid and unconstitutional insofar as it applied to the conduct of lawyers engaged in lobbying activities, since lobbying activities were "the practice of law"); Commonwealth v. Stern, 549 Pa. 505, 701 A.2d 568, 571-73 (1997) (18 Pa.C.S. § 4117(b)(1) which criminalized conduct of an attorney for compensating non-lawyer for client referrals held unconstitutional as violative of separation of powers doctrine; Supreme Court promulgated Pa.R.P.C. 7.2(c) which governs this conduct); Snyder v. Unemployment Comp. Bd. of Review, 509 Pa. 438, 502 A.2d 1232, 1233-34 (1985) (Section 410 of the Ethics Act (65 P.S. § 410) permits court employees to participate in partisan political activity is unconstitutional as applied to any person affected by the Courts directive forbidding partisan political activity as violative of Pa. Const. Art. V, § 10(c)); Wajert v. State Ethics Comm'n., 491 Pa. 255, 420 A.2d 439, 442 (1980) (65 P.S. § 403(e), providing that no former official or public employee could represent a person on any matter before the governmental body with which the employee or official was previously associated, is an unconstitutional encroachment upon the exclusive power of the Court to regulate the practice of law); In re 42 Pa. C.S. § 1703, 482 Pa. 522, 394 A.2d 444, 446-47 (1978) (42 Pa.C.S. § 1703, Open Meeting Law, as applied to the judiciary, is a violation of separation of powers doctrine); Pennsylvania Co. for Insurances on Lives and Granting Annuities v. Scott, 346 Pa. 13, 29 A.2d 328, 329-30 (1942) (pursuant to separation of powers doctrine, the legislature cannot interfere with a judgment or decree of the judicial branch); In re Splane, 123 Pa. 527, 16 A. 481 (1889) (law attempting to regulate admission to the bar was unconstitutional because admission to the bar is a judicial, not a ministerial act, solidifying the Court's position as the governmental branch with control over the legal profession).

However, Duquesne objects to the proposed revision to the extent stated above. Duquesne objects to the Code of Conduct revisions which restrict sharing certain employees and services as it believes this is discriminatory, increases costs to both entities and ratepayers, hinders competition, and is contrary to the guidance provided by the Federal Energy Regulatory Commission. This is a subject for which there are no real substantial problems today in Duquesne's view.

Duquesne Light appreciates that it was given the opportunity to comment on this matter, and requests that the Commission consider its concerns with respect to several of the proposed revisions to the Code of Conduct.

Respectfully Submitted,



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Dated: March 27, 2012