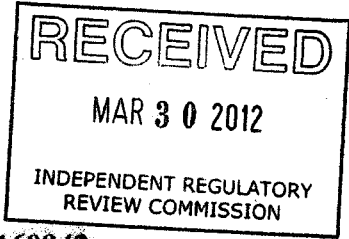


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COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION



Revisions to Code of Conduct at
52 Pa. Code § 54.122

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L-2010-2160942

**COMMENTS OF EXELON ENERGY AND
CONSTELLATION NEWENERGY, INC.**

In this proceeding the Pennsylvania Public Utility Commission's ("Commission") is reviewing the existing Competitive Safeguard provisions of the Electric Distribution Company Code of Conduct ("Code") codified at Section 54.122 of the Commission's regulations, 52 Pa. Code § 54.122, which became effective in July 2000. Exelon Energy and Constellation NewEnergy, Inc. ("Constellation Energy") (collectively, "Exelon"), by their undersigned counsel, hereby file these Comments on the Commission's *Proposed Rulemaking Order* ("*Proposed Rulemaking*"),¹ issued in the above-referenced proceeding on August 25, 2011, and published in the Pennsylvania Bulletin on February 11, 2012. In support of these Comments, Exelon states the following:

I. INTRODUCTION & DESCRIPTION OF EXELON

In the event that the Commission or its Staff prepares a service list for this proceeding or otherwise requires additional information regarding the positions presented herein, Exelon identifies the following individuals:

¹ *Proposed Rulemaking Order*, Issued on August 25, 2011 in Docket No. L-2010-2160942 ("*Proposed Rulemaking*").

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Exelon's attorney is authorized to accept service on behalf of Exelon in this proceeding. Exelon requests that the Commission and all parties of record serve copies of all discovery requests and answers, correspondence, Commission Orders and any other documents issued on both Exelon and its attorney. Particularly, Exelon respectfully requests that service (both electronic and paper) be made to its counsel of record, Divesh Gupta, while only electronic service be made to David I. Fein and Stephen Bennet.

Exelon Energy and CNE are indirect, wholly-owned subsidiaries of Exelon Corporation ("Exelon Corp."), a holding company, headquartered at 10 South Dearborn Street, Chicago, Illinois, with operations and business activities in 47 states, the District of Columbia and

Canada. Exelon Corp. owns Commonwealth Edison Company ("ComEd"), Baltimore Gas and Electric Company ("BGE") and PECO Energy Company ("PECO"). Together ComEd, BGE and PECO own electric transmission and electric and gas distribution systems that deliver electricity to approximately 6.6 million customers in central Maryland (BGE), Northern Illinois (ComEd) and southeastern Pennsylvania (PECO). PECO distributes natural gas to nearly 500,000 consumers in the suburban Philadelphia area. BGE distributes natural gas to over 600,000 customers in central Maryland and also operates a liquefied natural gas facility for the liquefaction and storage of natural gas as well as associated propane facilities.

Exelon Energy is a competitive subsidiary of Exelon. It is licensed to provide retail service to electricity customers in Illinois, Pennsylvania, Michigan, and Ohio and to provide retail service to natural gas customers in Michigan, Ohio, and Pennsylvania. Constellation Energy is authorized to provide electricity and energy-related services to retail customers in Pennsylvania and thirteen other states, the District of Columbia and two Canadian provinces. Constellation Energy is a licensed electric generation supplier ("EGS") in the Commonwealth, pursuant to 66 Pa.C.S. § 2809, serving residential, commercial and industrial customers, and is a registered Pennsylvania Conservation Service Provider.

II. BACKGROUND

Following the passage of the Electricity Generation Customer Choice and Competition Act² in 1996, the Commission established the Code to govern the relationships between electric distribution companies ("EDCs"), EGSs and retail electric customers. The Code was codified in 2000 with the intent to assure the provision of direct access on equal and nondiscriminatory

² 66 Pa. C.S. §§ 2801-2812.

terms, to prevent cross subsidization between EDCs and their affiliated suppliers, to prohibit unfair or deceptive practices by suppliers, and to establish and maintain an effective and vibrant competitive market in the purchase and sale of retail electric energy in Pennsylvania.

In 2010, the Commission initiated this proceeding by issuing an *Advance Notice of Proposed Rulemaking* ("ANOPR")³ to consider appropriate changes to the Competitive Safeguard regulations in view of the current state of market development and changes that had taken place in the decade since the regulations were first put in place.

A number of entities submitted comments on the ANOPR, and on August 25, 2011, the Commission issued its *Proposed Rulemaking* through which it identified additional safeguards which it believes should be included in the Code to ensure for a properly functioning competitive market. In the *Proposed Rulemaking*, the Commission proposes to divide the rules into six subject matter categories: (1) non-discrimination requirements; (2) customer requests for information; (3) prohibited transactions and activities; (4) accounting and training requirements; (5) dispute resolution procedures; and (6) penalties. In addition to the reordering of concepts, the Commission proposes a number of substantive changes to the rules.

Exelon herein provides comments regarding the proposed revisions to (1) Subsection 54.122.(4)(iii) which prohibits EDCs and affiliated EGSs from sharing employees or services, except for corporate support services, emergency services, or tariff services, and (2) Subsection 54.122.(3)(v) which prohibits affiliated and non-affiliated EGSs from having the same or substantially similar name or fictitious name as an EDC or its corporate parent.

³ *Advance Notice of Proposed Rulemaking Order*, Issued on March 18, 2010, in Docket No. L-2010-2160942. ("ANOPR")

III. COMMENTS

A. The Rule Should Not Prohibit the Sharing of Traditionally Shared Services Under a "Shared Service Model"

Section 54.122(4)(iii) provides that an "electric distribution company and affiliated [EGS] or transmission supplier may not share employees or services, except for corporate support services, emergency support services, or tariff services offered to all [EGSs] on a non-discriminatory basis...." Corporate support services, which are permitted to be shared, are not defined in the proposed regulations. Rather, Section 54.122(4)(iii)(A) identifies the following specific functions that are *excluded* from corporate support services: "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."

The proposed regulation too broadly excludes certain functions from the definition of those "corporate support services" that are permitted to be shared between an EGS and EDC, with no explanation regarding or evidence supporting why such exclusions are necessary to achieve the rule's intended goal. "Legal services" and "information systems," for example, are functions traditionally provided in a shared service model in corporations with a common holding company system in order to reduce staffing redundancies and achieve significant cost savings. These functions, as part of a shared model, need not be directly part of either the EDC or EGS operations and need not involve competitively sensitive information as a day to day matter. To the extent that employees providing these traditionally shared services become aware

of market sensitive information, they are already expressly prohibited from sharing that information in a discriminatory matter by other sections of the rule.

Also of concern is the exclusion of "strategic management and planning" services because they are not defined and could be interpreted to include officers and directors of a parent corporation that are not involved in the day-to-day operations of either the EDC or affiliated EGS, but have other legal responsibilities for oversight of all of the corporation's companies. There is no conceivable harm for allowing senior management to continue to have oversight responsibility for both an EDC and affiliated EGS. Functionally separating those roles, as well as the traditionally shared services like legal and IT, would be impractical, costly, and likely have other legal implications that would need to be addressed.

Accordingly, Exelon respectfully requests that the rule be revised to remove the exclusion of "legal services," "information systems," and "strategic management and planning" from the definition of "corporate support services," such that such functions are permitted to be shared.

B. EGS's Use of a Corporate Parent's Name Should Be More Appropriately Regulated

Exelon has limited concerns about Section(3)(v) which prohibits an EGS's use of an EDC's name or its corporate parent under any circumstances.⁴ This proposal has significant impacts on an EGS's existing and/or potential branding strategy and could undo the benefits gained from years of targeted marketing practices. For instance, no evidence has been provided to explain, and indeed Exelon fails to see, the competitive advantage gained by an EGS using the

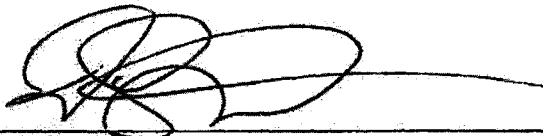
⁴ It should be noted that the federal Lanham Act specifically establishes the regulation of trade names and trademarks as an area of exclusive federal jurisdiction. Additionally, as limitations/prohibitions on the use of an existing trade name may interfere with commercial speech as well as potentially result in a taking of property without just compensation, such limitations/prohibitions may raise substantial federal and state constitutional questions.

name or a name similar to that of a corporate parent, particularly when that name is not shared by or similar to an EDC's name. Changing a company name, informing the public of that change, and rebuilding branding recognition are complicated and costly activities; such actions should not be required unless, at the very least, substantial evidence exists to support the notion that an undue advantage is afforded to an affiliated EGS. Accordingly, Exelon suggests that subsection (v) be clarified to require only that certain appropriate disclosures be used by such affiliated EGSs in order to clearly explain to potential consumers an EGS's affiliation.

IV. CONCLUSION

WHEREFORE, for all the foregoing reasons, Exelon Energy and Constellation NewEnergy, Inc. respectfully request that the Commission accept their comments and consider them in its review of the *Proposed Rulemaking*.

Respectfully submitted,



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Dated: March 27, 2012