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March 27, 2012

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Via Electronic Filing

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
P.O. Box 3265
Harrisburg, PA 17105-3265

In re: Revisions to Code of Conduct at 52 Pa. Code § 54.122

Dear Secretary Chiavetta:

Enclosed for filing are the Comments of the Independent Electric Generation Suppliers to Proposed Rulemaking Order entered August 25, 2011. The Independent EGSs are comprised of the following companies: Champion Energy Services, LLC; Hess Corporation; Just Energy; Mint Energy, LLC; Noble Americas Energy Solutions, LLC; and TriEagle Energy, L.P.

Should you have any questions, please do not hesitate to contact me.

Very truly yours,

THOMAS, LONG, NIESEN & KENNARD

By: Charles E. Thomas, III

Attachment

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Revisions to Code of Conduct at 52 Pa. Code § 54.122	:	**Docket No. L-2010-2160942**

COMMENTS OF THE INDEPENDENT ELECTRIC GENERATION SUPPLIERS TO PROPOSED RULEMAKING ORDER ENTERED AUGUST 25, 2011

I. INTRODUCTION

The Independent Electric Generation Suppliers ("Independent EGSs"),[1] an ad-hoc coalition of competitive electric generation suppliers ("EGSs") not affiliated with electric distribution companies ("EDCs"), submit these Comments in response to the Commission's Proposed Rulemaking Order issued on August 25, 2011 ("Order") in the above-referenced proceeding.[2] The Commission, through this rulemaking, seeks to strengthen its Code of Conduct regulations, codified at 52 Pa. Code § 52.122, applicable to EDCs and EGSs engaged in the retail electricity market within the Commonwealth of Pennsylvania.

Since the passage of the Electricity Generation Customer Choice and Competition Act in 1996,[3] Pennsylvania has emerged as a national benchmark for the progress of competitive electricity markets. Going forward, an essential benchmark for Pennsylvania's retail electric market is the development and enforcement of a strengthened Code of Conduct adaptable to and reflective of the evolution of increased choice and competition throughout the Commonwealth.

[1] The Independent EGSs are comprised of the following companies: Champion Energy Services, LLC; Hess Corporation; Just Energy; Mint Energy, LLC; Noble Americas Energy Solutions, LLC; and TriEagle Energy, L.P.

[2] *In re Revisions to Code of Conduct at 52 Pa. Code § 54.122*, Docket No. L-2010-2160942 (Proposed Rulemaking Order entered August 25, 2011).

[3] 66 Pa.C.S. § 2801 *et seq.*

The Commission's sharp focus on developing standards of conduct that enhance the ability of all EGSs – regardless of their corporate affiliations – to compete on a level playing field represents an important and critical step in the right direction. In support of this policy direction, the Independent EGSs make additional recommendations for strengthening the Code of Conduct as set forth in the Order. These recommendations are set forth in the following General Comments and Section-Specific Comments and a redlined version of Annex A of the Order attached to these Comments.

II. COMMENTS

A. General Comments

The Independent EGSs appreciate the Commission's focus on standards of conduct that further enhance the ability of all EGSs to compete fairly. With that in mind, we believe the Code of Conduct should be strengthened to prevent any competitive preference or advantage to any EGS, irrespective of affiliation. A workable competitive market requires a Code of Conduct that: (1) effectively recognizes inherent competitive advantages of an EDC-affiliated EGS in the absence of standards of conduct; and (2) implements strong mandatory, structural, behavioral, and financial remedies applicable to all EGSs that are designed to remove these advantages and ensure a fair and level competitive playing field.

The Independent EGSs also note that many of the proposed regulations are merely permissive as drafted and not mandatory. For a Code of Conduct to be effective, it must be comprised of a mandatory set of competitive safeguards with appropriate consequences for failure to adhere to the Code's requirements. The Independent EGSs, therefore, generally recommend that the final regulations implementing the revised Code of Conduct reflect this mandatory nature by having all of the permissive language contained in the proposed rules (*i.e.*,

"may," "will," "may not," "will not") replaced by mandatory language (*i.e.*, "shall," "must," "shall not," "must not").[4]

In addition, the Independent EGSs recommend the establishment of an ***anonymous*** enforcement hotline for Pennsylvania similar to the enforcement hotline established at the Federal Energy Regulatory Commission ("FERC"). Like the FERC's hotline, a Pennsylvania hotline would assist with the informal resolution of disputes in matters within the Commission's jurisdiction without resort to litigation or other formal, lengthy proceedings, if possible. An anonymous hotline would invite market participants, in-house individuals and the general public to call, email, or write to complain about or report market activities or transactions that may constitute market manipulation, abuse of an affiliate relationship, a tariff violation, or other possible violations or concerns.

All information and documents obtained through the hotline would be non-public. According to the FERC's website, past hotline calls have included complaints about:

- Market Manipulation;
- Bidding anomalies;
- Price spikes;
- Inappropriate use of financial instruments;
- Fluctuations in available capacity on electric transmission lines and natural gas pipelines;
- Interconnection discrimination;
- Possible Tariff violations; and
- Undue preferences to affiliates

The importance of this mechanism cannot be overstated. By way of example, recent use of the FERC's hotline prompted the FERC to recently launch an investigation into market manipulation after receiving two anonymous hotline calls. What started as two phone calls to its hotline, according to the FERC order approving the settlement in the investigation, resulted in a

[4] The Independent EGSs consistently note throughout these comments where the draft Code of Conduct used the verb "may" or "will," which these comments recommend be replaced with the more imperative "shall" or "must."

determination by the FERC's enforcement office that market manipulation occurred that "resulted in widespread economic losses to market participants who bought and sold energy" in the New York and New England wholesale markets.[5] Implementation of a similar hotline in Pennsylvania can be equally effective in ensuring the efficient and thorough investigation, identification, and fair settlement of anticompetitive conduct that, left unchecked, could erode the integrity of the Commonwealth's retail electric market.

B. Specific Comments to Proposed Regulations

In addition to the three general recommendations above, the Independent EGSs propose the following specific suggestions and modifications to the proposed Code of Conduct set forth in the Order. For convenience, a redline version of the Commission's Annex A reflecting these specific suggestions and modifications is attached hereto.

§ 54.122(1) Nondiscrimination Requirements.

§ 54.122(1)(i)

The words "may not" should be changed to "shall not" in the first sentence of the proposed regulation.

§ 54.122(1)(ii)

The Independent EGSs recommend adding the words "only to specific justifiable" before "customer privacy or confidentiality constraints," adding the words "as determined by the

[5] On March 9, 2012, at Docket No. IN12-7-000, FERC issued an order approving a stipulation and consent agreement whereby an EDC affiliate agreed to pay a civil penalty of $135,000,000 and disgorge unjust profits of $110,000,000, including interest. In addition, the EDC affiliate agreed to institute and continue to institute additional compliance measures such as: (1) regular monitoring of profit and loss concentrations in virtual transactions and physical schedules of electric energy; and (2) reviewing and documenting the purpose of virtual transactions. The order requires the EDC affiliate to monitor and preserve for no less than five years trader communications, including but not limited to Instant Messages (IMs), emails, and telephone calls. The company must also submit compliance monitoring reports. *See* 138 FERC ¶ 61, 618 (2012).

Commission" before "an electric distribution company," and changing the words "may not" to "shall not" in the first sentence of the proposed regulation. The sentence would read:

> (ii) Subject only to specific justifiable customer privacy or confidentiality constraints as determined by the Commission, an electric distribution company shall not give an electric generation supplier, including without limitation its affiliates or division, a preference or advantage in the dissemination or disclosure of customer information and dissemination or disclosure shall occur at the same time and in an equal and nondiscriminatory manner.

While there should be very few instances in which specific information must be handled in the aforementioned manner, it is critically important that the Commission be the neutral and impartial arbiter to determine if and when it is appropriate.

§ 54.122(1)(iii)

The words "may not" should be changed to "shall not" in the first sentence of the proposed regulation.

§ 54.122(1)(iv)

The words "may not" should be changed to "shall not" in the first sentence of the proposed regulation.

§ 54.122(2) Customer Requests for Information.

§ 54.122(2)(i)

Section 54.122(2)(i) of the proposed regulations requires EDCs, upon customer request, to provide the customer with the address of the Commission's retail choice website and offer to send the most current list of EGSs for the respective service territory, as compiled by the Commission. The Independent EGSs strongly support this requirement and the Commission's intention to compile the list in a competitively neutral and non-discriminatory manner.

The Independent EGSs further recommend that that the word "may" be changed to "shall" in the second and third sentences of the proposed regulation. In addition, we suggest that the word "will" be changed to "shall" or "must" in the fourth, fifth, and sixth sentences of the proposed regulation. Under the fifth sentence of Section 54.122(2)(i), the Commission is to regularly update the lists and provide updates to EDCs as soon as reasonably practicable. The Independent EGSs recommend the Commission provide clarification as to how "regularly" those lists will be updated and disseminated to EDCs. The Independent EGSs defer to the Commission to determine the precise timing associated therewith, but ask that it be no less frequently than twice a year.

§ 54.122(2)(ii)

Section 54.122(2)(ii) of the proposed regulations prohibits EDCs or an affiliated EGS from stating or implying that delivery services provided to an affiliate or an affiliate's customer are inherently superior, solely on the basis of affiliation, to those provided to other EGSs or customers, or that the EDC's delivery services are enhanced if supply services are procured from its affiliate EGS. The Independent EGSs ardently support this prohibition. To further strengthen this rule, the Independent EGSs suggest the Commission modify Section 54.122(2)(ii) to read as follows:

> (ii) An electric distribution company or its affiliate or division or any electric generation supplier shall not state or imply that delivery services provided by any electric generation supplier or its customer(s) are inherently superior to those provided by another electric generation supplier or customer or that the electric distribution company's delivery services are enhanced should supply services be procured from a specific electric generation supplier.

§ 54.122(3) Prohibited Transactions and Activities.

§ 54.122(3)(i)

The Independent EGSs fully support the Commission's proposal to prohibit the subsidization of any affiliated EGS by the EDC and bar the inclusion of costs, imputed or otherwise, as well as overhead related to competitive, unregulated activities of an affiliated EGS in the EDC's rates.

To further strengthen these prohibitions, the Independent EGSs recommend two modifications to the proposed language in Section 54.122(3)(i). First, the words "may not" should be changed to "shall not" in both sentences of the proposed regulation. Second, the reference to costs in the second paragraph should be revised to include ***all*** costs or overhead, whether imputed or otherwise, related to competitive activities of an affiliated electric generation supplier

§ 54.122(3)(ii)

Section 54.122(3)(ii) of the proposed regulations prohibits an EDC from selling, releasing, or transferring to an affiliated EGS assets, services, or commodities that have been included in regulated rates, at less than market value. The Independent EGSs believe that the proposed regulation, as currently drafted, is not strong enough because it still would enable an EDC to transact only with its affiliate EGS in the disposition of its assets, services, or commodities without offering the same to other EGSs, thereby amounting to a preference or providing a distinct financial and/or physical competitive advantage for the affiliate. Instead, all dispositions should be offered contemporaneously under the same terms and conditions to all EGSs in the competitive market and the value of the assets, services, or commodities should be subject to Commission oversight.

Therefore, the Independent EGSs recommend that Section 54.122(3)(ii) be modified as follows:

> (ii) An electric distribution company shall not sell, release or otherwise transfer to an affiliate electric generation supplier, at less than market value, assets, services or commodities that have been included in regulated rates unless offered contemporaneously and on the same terms to the retail electricity market through adequate public notice and process as determined by the Commission.

§ 54.122(3)(iii)

The words "may not" should be changed to "shall not" in Section 54.122(3)(iii). The Independent EGSs strongly support regulations prohibiting an affiliate EGS from securing credit through the use of the regulated assets in the rate base of the EDC or the pledge of money necessary for utility operations.

§ 54.122(3)(iv)

The words "may not" should be changed to "shall not" in Section 54.122(3)(iv). Any EGS, affiliated or otherwise, should be strictly prohibited from using an "EDC identifier" in connection with the sale, offering for sale, distribution or advertising of an EGS's goods or services.[6] However, an EDC's service territory must be identifiable to customers. The Independent EGSs suggest, therefore, the addition of the following new sentence to this section: "Identification of the EDC's physical service territory by the EGS for the sole purpose of identifying the service territory shall not be prohibited by this rule."

Moreover, it is imperative that an EGS never be permitted to use an EDC name or identifier through the inclusion of a disclaimer or entry of a licensing agreement. The use of an EDC identifier should be prohibited under all circumstances. Therefore, the Independent EGSs

[6] Fines and penalties are discussed in these Comments with respect to § 54.122(6) of the proposed regulations.

recommend deleting all language in the latter half of Section 54.122(3)(iv) regarding a disclaimer and licensing agreement, through and including subsections (iv)(A) and (B).

§ 54.122(3)(v)

The words "may not" should be changed to "shall not" in Section 54.122(3)(v). The Independent EGSs strongly support a proposed regulation prohibiting any EGS from having the same or substantially the same name or fictitious name as an EDC or its corporate parent. Without such a prohibition, the potential simply is too great for customer confusion, abuse by an EGS, and/or an inherent competitive advantage. The Independent EGSs also support the proposed six-month time frame for an EGS to change its existing name in compliance with the regulation.

§ 54.122(3)(vi)

The words "may not" should be changed to "shall not" in Section 54.122(3)(vi).

§ 54.122(3)(vii)

The Independent EGSs support the Commission's proposed regulation to prohibit joint marketing, sales, or promotional activities between an EDC and its affiliate EGS unless all EGSs are given the same opportunity under similar terms and conditions.

To further strength this prohibition, the Independent EGSs suggest two modifications to the proposed language in Section 54.122(3)(vii). First, the words "may not" should be changed to "shall not" in the proposed regulation. Second, the language in the latter half of the proposed regulation should be modified to ensure competitive neutrality and nondiscrimination as follows: "...unless the joint marketing, sales or promotional activities are offered contemporaneously to all electric generation suppliers in the same manner under the same terms and conditions."

§ 54.122(3)(viii)

The words "may not" should be changed to "shall not" in Section 54.122(3)(viii).

§ 54.122(3)(ix)

Section 54.122(3)(ix) of the proposed regulations prohibits the sharing of office space by an EDC and an affiliated EGS and requires physical separation in different buildings. The Independent EGSs support the intent of the proposed regulation, but state that further modifications are required to ensure that all costs and associated benefits imputed or otherwise related to previously shared office space are accounted for and credited where necessary and that the prohibition applies to all EGSs, not just affiliates. In addition, further modifications are required to ensure that there is no circumvention by an EDC solely by virtue of entering into an "arrangement" with an EGS.

Accordingly, the Independent EGSs suggest the following modifications to Section 54.122(3)(ix):

> (ix) An electric distribution company and any electric generation supplier shall not share office space and shall be physically separated by occupying different buildings. All associated costs and associated benefits, imputed or otherwise, from previous shared office space must be identified, accounted for, and associated credit provided to all customers within 12 months. All accounting records related thereto shall be subject to annual audits conducted by the Commission's Bureau of Audits in accordance with the Commission's auditing standards. Such audits shall be open to public comment to all interested parties.

§ 54.122(4) Accounting and Training Requirements.

§ 54.122(4)(i)

Section 54.122(4)(i) of the proposed regulations requires an EDC and its affiliate EGS to maintain separate accounting records for their business activities. The Independent EGSs

support the proposed regulation, but submit that not only is further oversight required but that regular review of that data is also needed. Specifically, the proposed regulation should be expanded to require that the accounting records be audited by the Commission's Bureau of Audits not less than once per year in accordance with the Commission's auditing standards. Moreover, the audits should be open to public comment from all interested parties.

The Independent EGSs further recommend that EDCs and their affiliate EGSs should be subject to quarterly reporting requirements to be filed with the Commission in connection with the scope of this regulation. Without additional oversight, there would be no safeguard or guarantee that an EDC and its affiliate EGS maintain separate books of accounts in accordance with the proposed regulation.

§ 54.122(4)(iii)

Section 54.122(4)(iii) of the proposed regulations prohibits an EDC and affiliated EGS or transmission supplier from sharing employees or services, except for "corporate support services, emergency support services, or tariff services offered to EGSs on a nondiscriminatory basis." Subsection (A) specifically states what types of services and activities the term "corporate support services" does *not* include. Subsection (B) provides a definition of "emergency support services." Subsection (C) mandates the filing of annual reports by an EDC documenting shared, temporarily assigned, or permanently assigned employees to the affiliated EGS and the new position with the affiliate.

The Independent EGSs believe several modifications to Section 54.122(4)(iii) are necessary to clarify the proposed regulation. First and foremost, the words "may not" should be changed to "shall not" in the first sentence of the proposed regulation. Second, temporary assignment of employees called "cycling," regardless of the type of services rendered, should not

be permitted under any circumstances. The potential for abuse is simply too great. Accordingly, a mandatory one-year stay out should be required of any employee leaving an EDC for an affiliated EGS or affiliated transmission supplier to prohibit the cycling of employees. Furthermore, an EDC, with adequate notice to the Commission, should be required to document clearly and define specifically what corporate support services, emergency support services, or tariff services it wishes to offer, including a disclosure of the market value, associated costs and imputed benefits to be identified and accounted for. All associated costs and imputed benefits where employees or services are shared (when permitted) should be allocated by entity and should be credited to ratepayers for those services.

Moreover, the Independent EGSs submit that this prohibition must apply to the EDC and *any* licensed EGS. Finally, Section 54.122(4)(iii) should specifically define only those services that can be offered and mandate that these services can only be offered contemporaneously under the same terms and conditions and on a nondiscriminatory basis to all licensed EGSs. These proposed changes would remove any incentive for an EDC to provide an advantage to one EGS over another EGS, while at the same time enabling the EDC to offer services it believes to be valuable to the marketplace and ensuring that those services are appropriately identified. The specific identification of individual services allows a fair (and auditable) market value to be established and encourages the reasonable and appropriate compensation of the ratepayer.

Consistent with the foregoing, the Independent EGSs propose that the Commission modify Section 54.122(4)(iii) to read as follows:

> (iii) An electric distribution company and affiliated electric generation supplier or transmission supplier shall not share employees or services, except for clearly defined corporate support services, emergency support services, or tariff services offered to all electric generation suppliers, on a contemporaneous and non-discriminatory basis under the same terms and conditions. Temporary assignments or cycling of employees from an electric distribution company to an

affiliated electric generation supplier or transmission supplier shall be expressly prohibited under all circumstances, regardless of the services rendered or offered. Any employee of an electric distribution company or an affiliated electric generation supplier or transmission supplier, or vice versa, who leaves shall be subjected to a one year stay out before being allowed to return to the EDC or its affiliated electric generation supplier or transmission supplier.

With respect to subsection (iii)(A), the Independent EGSs recommend modifying the definition of "corporate support services." The definition, as presently proposed, is insufficient as it does not list specifically what services may be shared between an EDC and any EGS. One could reasonably interpret the proposed regulation to allow the sharing of ***any*** task or activity as a "corporate support service" not specifically excluded. While the Independent EGSs concur with the merit in, and do not oppose, providing a list of services excluded from the definition, the regulation should provide a finite list of those services included within the term "corporate support services" that may be shared and a value attached to each service that is accounted for, auditable, and to which the ratepayer is appropriately compensated. The Commission should ensure that EDCs remain in compliance with these competitive safeguards with respect to the sharing of support services. Without concrete, definitive guidance, the marketplace is assigned the impossible task of trying to determine what is and what is not a corporate support service, and there is significant potential for abuse.

With respect to subsection (iii)(C), the Independent EGSs recommend that the EDCs should be subject to quarterly reporting requirements, in addition to the annual reporting requirement proposed in this subsection. In addition, the subsection should be expanded to require that these records be audited by the Commission's Bureau of Audits on an annual basis in accordance with the Commission's auditing standards and that such audits should be open to public comment from all interested parties.

§ 54.122(5) Dispute Resolution Procedures.

§ 54.122(5)(i)-(iv)

The Independent EGSs support the dispute resolution procedures proposed under Sections 54.122(5)(i) through (iv), and suggest the creation of an additional subparagraph (v) to protect a party's legal rights under other applicable law. Subsection (5)(v) would read as follows:

> (v) Nothing contained in this subsection (5) shall be construed to abrogate or limit the rights or remedies of any party otherwise conferred by applicable law.

§ 54.122(6) Penalties.

§ 54.122(6)

Section 54.122(6) of the proposed regulations subjects EDCs and EGSs to civil penalties under Section 3301 of the Public Utility Code, 66 Pa.C.S. § 3301, for failure to comply with the Code of Conduct. Under Section 3301, the Commission is authorized to impose a civil penalty of up to $1,000 per day, per offense. The Independent EGSs strongly support the imposition of civil penalties on market participants for violations of the Commission's Code of Conduct rules, but believe that additional remedies, including the imposition of greater civil penalties, is warranted.

The Commission should have broad discretion in determining an appropriate remedy or combination of remedies for any violation(s) of the Code of Conduct or any Commission order(s) related thereto. In this respect, the Independent EGSs believe that the remedies at the disposal of the FERC, as well as the State of Texas, provide useful guidance and ask that the Commission revise the proposed regulations to include the following additional penalties:

1. Disgorgement of Unjust Profits. Clearly, the Commission should be able to order the disgorgement of any profits earned or received by an EDC or EGS in

connection with a Code of Conduct violation. The competitive retail electricity market demands a level, equal playing field, and any EDC or EGS that, intentionally or unintentionally, disregards or otherwise fails to comply with the competitive safeguards established to foster the competitive market should not be entitled to retain profits or otherwise be unjustly rewarded financially for such behavior.

2. Maximize Civil Penalties. Section 3301 of the Public Utility Code limits civil penalties to a maximum of $1,000 per day per violation. While it is possible for civil penalties to accumulate for "continuing offenses," the Independent EGSs have substantial concerns that any civil penalties imposed under the proposed regulations, as drafted, would be trivial, would lack teeth, and would not be significant enough to deter future Code of Conduct violations. Given the size and financial fitness of the EDCs and EGSs participating in the retail market, the imposition of a civil penalty of a few thousand dollars, would not deter nor penalize for bad behavior of an EDC or EGS.[7] It must be recognized that a Code of Conduct violation might very likely provide the violating company with substantial profits as well as other competitive and/or financial advantages.[8]

3. Compliance Reports and Plans. The Commission should also order a violating party to submit sworn compliance reports on a periodic basis following entry of a Commission order finding the party in violation of the Code of Conduct. At the FERC, these reports typically are filed semi-annually for 1 to 3 years and consist of a description of company measures adopted to end the practices that led to the violations and a list of any additional violations. Frequent violators may also be required to engage an independent consultant to establish a comprehensive compliance program. These reporting requirements would increase the likelihood of prompt self-reporting of rules infractions by companies.

These penalties would not be mutually exclusive, and the Commission should have the ability to order any single remedy from the above the list or any combination thereof depending on the specific facts and circumstances. Penalties would be determined on a case-by-case basis, and the Commission should consider, among other things, the offense's severity, egregiousness, repetitiveness, and duration and its impact on the public interest. In light of the Commission's interest in opening the market even further, and to the extent the Commission does not think it

[7] In Texas, an affiliated power generation company paid, by settlement, an administrative penalty of $15,000,000 to resolve allegations of market manipulation and violation of Public Utility Commission of Texas ("PUCT") rules. *See* PUCT Docket No. 34061 (Order issued December 22, 2008).

[8] Also in Texas, an affiliated EGS agreed, by settlement, to a fine of $530,000 for alleged violation of PUCT rules. *See* PUCT Docket No. 30198 (Order issued December 20, 2004).

has sufficient authority regarding any of the aforementioned remedies, we ask the Commission to take the appropriate steps to ensure this Code of Conduct has ***meaningful financial ramifications*** to remove market crippling behavior.

III. CONCLUSION

The Independent EGSs appreciate the opportunity to comment on the Proposed Rulemaking Order. For the reasons set forth above, the Independent EGSs respectfully request that the Commission adopt the recommendations for additional competitive safeguards set forth herein. We look forward to working with the Commission and other stakeholders to ensure the continued development and functioning of Commonwealth's retail electricity market through fair and strengthened Code of Conduct regulations.

Respectfully submitted,

By _____

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