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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

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MAR 30 2012
INDEPENDENT REGULATORY
REVIEW COMMISSION

March 27, 2012

VIA FEDERAL EXPRESS

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

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

Dear Secretary Chiavetta:

Pursuant to the Pennsylvania Public Utility Commission's ("Commission") Order entered August 25, 2011, and published in the Pennsylvania Bulletin on February 11, 2012, enclosed are an unbound original and fifteen (15) copies the **Comments of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company on Proposed Amendments to the Commission's Code of Conduct for Electric Generation Suppliers and Electric Distribution Companies** ("Comments").

Pursuant to 52 Pa. Code § 1.11(a)(2), the enclosed Comments are deemed filed with the Commission on March 27, 2012, which is the date they were deposited with Federal Express, as shown on the Federal Express delivery receipt attached to envelope containing the documents. We are also enclosing an additional copy of the Comments, which we request that you date-stamp as of March 27, 2012, and return to us in the stamped, pre-addressed envelope we are providing for that purpose.

As indicated below, we are sending courtesy copies of the enclosed Comments to Commission's Bureau of Investigation and Enforcement, the Pennsylvania Office of Consumer Advocate and the Pennsylvania Office of Small Business Advocate.

Very truly yours,

Anthony C. DeCusatis

Anthony C. DeCusatis

ACD/tp
Enclosures
cc: Johnnie E. Simms, Director
Bureau of Investigation and Enforcement (w/encl)
Irwin A. Popowsky, Consumer Advocate (w/encl)
Steven Gray, Acting Small Business Advocate (w/encl)

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MAR 27 2012

PA PUBLIC UTILITY COMMISSIOI
SECRETARY'S BUREAU

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

REVISIONS TO CODE OF CONDUCT	:	
AT 52 PA. CODE § 54.122	:	**Docket No. L-2010-2160942**

COMMENTS OF METROPOLITAN EDISON COMPANY, PENNSYLVANIA ELECTRIC COMPANY, PENNSYLVANIA POWER COMPANY AND WEST PENN POWER COMPANY ON PROPOSED AMENDMENTS TO THE COMMISSION'S CODE OF CONDUCT FOR ELECTRIC GENERATION SUPPLIERS AND ELECTRIC DISTRIBUTION COMPANIES

I. INTRODUCTION

On August 25, 2011, the Pennsylvania Public Utility Commission (the "Commission") entered a Proposed Rulemaking Order at the above-referenced docket soliciting comments on proposed revisions to the Code of Conduct for electric distribution companies ("EDCs") and electric generation suppliers ("EGSs") at 52 Pa. Code § 54.122 (the "Proposed Rules"). The Proposed Rulemaking Order was published in the Pennsylvania Bulletin on February 11, 2012,[1] and interested parties were given 45 days to file comments. The history of this proceeding is set forth in the Proposed Rulemaking Order and, therefore, is not repeated here.

Metropolitan Edison Company ("Met-Ed"), Pennsylvania Electric Company ("Penelec"), Pennsylvania Power Company ("Penn Power'), and West Penn Power Company ("West Penn") (collectively, "the Companies")[2] respectfully submit the following comments, which focus on two aspects of the Proposed Rules. First, the Companies address sections of the Proposed Rules dealing with the functional and structural separation of affiliated EDCs and EGSs, specifically,

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[1] 42 Pa.B. 796 (February 11, 2012).

[2] *The comments contained herein are also made on behalf of FirstEnergy Corp. ("FirstEnergy"), the* Companies' corporate parent, because many of the proposed revisions to the Code of Conduct impact it as well as the Companies.

those that would: (1) require affiliated EDCs and EGSs to occupy "different buildings"; and (2) prohibit sharing by affiliated EDCs and EGSs of corporate support services that are competitively neutral and, for all practical purposes, cannot be provided except on a shared basis. Second, the Companies address the portion of the Proposed Rules that purports to abrogate a parent holding company's trademarked naming rights by prohibiting an EGS name "substantially similar" to that of its parent. For the reasons set forth below, the foregoing sections of the Proposed Rules are unlawful, are not needed to achieve the Commission's stated purpose "to foster the continued development of Pennsylvania's retail electricity competitive market" and, therefore, should be withdrawn.[3]

II. FUNCTIONAL AND STRUCTURAL SEPARATION

Sections 54.122(3) and (4) of the Proposed Rules, like the existing Code of Conduct, contain various behavioral restrictions designed to prevent EDCs and their affiliated EGSs from engaging in conduct the Commission deems anti-competitive, discriminatory to other competitors or likely to stifle "robust electric competition."[4] As the Commission acknowledged in the Proposed Rulemaking Order (p. 3), its authority extends only to the imposition of reasonable rules to restrict improper "conduct" ("Pennsylvania and other jurisdictions with retail choice laws typically included provisions prohibiting such *conduct*.") (Emphasis added.). Nonetheless, several provisions of the Proposed Rules do much more than restrict potentially

3 The Companies are also commenting on the requirement in Section 54.122(4)(ii)(A) to maintain and file a "log" of business transactions between an EDC and its affiliated EGS and the requirement in Section 54.122(4)(iii)(B) to furnish a "work history" for each employee that moves from an EDC to an affiliated EGS. The Companies do not oppose those requirements. Rather, their comments explain that the requirements are over-broad and, therefore, each section should be revised to include a reasonable limitation on the scope of the information to be reported.

4 For example, some provisions simply restate requirements imposed by Section 2101 of the Public Utility Code (*see, e.g.,* Sections 54.122(3)(i) and (ii) and 54.122(4)(i)), while others duplicate or modestly expand behavioral rules imposed by the existing Code of Conduct (*see, e.g.,* Section 53.122(3)(iv)).

anti-competitive conduct. Instead, they would mandate the complete functional and structural separation of affiliated companies, which the Commission has no authority to do. Thus, one new directive (Section 54.122(3)(ix)) would require affiliated EDCs and EGSs to occupy "different buildings," while another (Section 54.122(4)(iii)(A)) would prohibit affiliated EDCs and EGSs from sharing competitively neutral corporate services and, as such, virtually mandate divestiture by their common parent. These attempts to radically enlarge the scope of the existing Code of Conduct exceed the Commission's statutory authority; lack any evidentiary basis; would needlessly impose significant costs on customers; and are neither necessary nor even helpful in preventing "alleged anti-competitive practices."

A. The Commission Does Not Have Statutory Authority To Adopt Sections 54.122(3)(ix) and (4)(iii)(A) In Their Current Form

The PUC, as an administrative agency of the Commonwealth, is a creature of statute and has only those powers delegated to it by the legislature. *PECO Energy Co. v. Pa. P.U.C.*, 568 Pa. 39, 791 A.2d 1155 (2002) ("The power of the Commission is statutory, arising either from the express words contained in the enabling statutes or by a strong and necessary implication from those words, *Feingold v. Bell of Pennsylvania*, 477 Pa. 1, 383 A.2d 791 (Pa. 1977), and the legislative grant of power to act in any particular case must be clear."). Accordingly, the Commission cannot lawfully issue regulations that exceed the limits of its statutory authority. *Pa. Dept. of Public Welfare v. Forbes Health System*, 492 Pa. 77, 422 A.2d 480, 482 (Pa. 1980) (regulations "must be consistent with the statute under which they were promulgated."). *Accord Popowsky v. Pa. PubP.U.C.*, 589 Pa. 605, 629, 910 A.2d 38, 52-53 (2006); *see also Pa. Public Utility Comm'n v. Philadelphia Elec. Co.*, 460 A.2d 734, 737 (Pa. 1983) ("It is well established that, absent express legislative authority, the PUC is powerless to interfere with the general management decisions of public utility companies.").

Nothing in Chapter 28 or in any other applicable provision of the Public Utility Code empowers the Commission to mandate the complete functional and structural separation of EDCs and their affiliated EGSs attempted by the Proposed Rules and, in particular, the requirement that EGSs and their affiliated EDCs occupy "different buildings"[5] and the prohibition on EGSs and their affiliated EDCs sharing certain employees and services excluded from the proposed definition of "corporate support services."[6] Moreover, the Commission cannot claim a valid statutory basis for such intrusive regulation under its general supervisory powers over public utilities. Those provisions have never been used for such a purpose and, in any event, legislative intent and appellate precedent do not permit it.

The structural separation of affiliated entities that provide competitive services was addressed when the Commission implemented the alternative regulation of incumbent local exchange carriers under Chapter 30 of the Public Utility Code. *Bell Atlantic-Pennsylvania, Inc. v. Pa. P.U.C.*, 763 A.2d 440 (Pa. Cmwlth. 2000). In that case, the Commonwealth Court affirmed the Commission's decision to structurally separate Bell Atlantic's retail and competitive wholesale business functions because it found that the legislature, by enacting Chapter 30, had granted the Commission express statutory authority to impose structural separation as one element of the alternative regulatory regime for telecommunication services:

> With respect to its statutory authority to require the wholesale-retail separation, the PUC first cites, from the Public Utility Code, 66 Pa.C.S. § 501, the power and duty to carry out the various mandates of the Code, *Pennsylvania Public Utility Commission v. Philadelphia Electric Co.* 501 Pa. 153, 460 A.2d 734 (1983), including the Chapter 30 goal of promoting competition in telecommunications by a variety of providers on equal terms. 66 Pa.C.S. § 3001(7). Chapter 30 accordingly prohibits the use of revenues earned, or expenses incurred, in connection with

[5] Proposed Section 54.122(3)(ix).
[6] Proposed Section 54.122(4)(iii)(A).

> noncompetitive services to subsidize competitive services. 66 Pa.C.S. §§ 3005(b) and (g).
>
> Implementing those purposes, Section 3005(h) provides *specific statutory authority for ordering structural separation.* That subsection states:
>
> > (h) Subsidiary. -- For local exchange telecommunications companies serving over 1,000,000 access lines, the commission may require that a competitive service be provided through a subsidiary which is fully separated from the local exchange telecommunications company if the commission finds that there is a substantial possibility that the provision of the service on a nonseparated basis will result in unfair competition.

763 A.2d at 464.

Chapter 30 was enacted three years before the Electricity Generation Customer Choice and Competition Act, which added Chapter 28 to the Public Utility Code. As evidenced by Section 3005(h) of Chapter 30, the legislature knew perfectly well how to confer statutory authority on the PUC to mandate the complete functional and structural separation of utility and utility-affiliate business units. Nonetheless, when the legislature enacted Chapter 28, it did not grant the Commission similar authority to functionally or structurally separate EGSs and their affiliated EDCs. To the contrary, the legislature made clear that the Commission could **not** "require" any asset divesture or reorganization by an electric utility:

> The commission may permit, *but shall not require*, an electric utility to divest itself of facilities or to reorganize its corporate structure.

66 Pa.C.S. § 2804(5)(Emphasis added). As explained in Sections II.D. and E., below, the "different buildings" requirement and the prohibition on sharing various competitively-neutral corporate services would impose a wall of separation between EDCs and their affiliated EGSs so pervasive that it would be the functional equivalent of a forced reorganization or divestiture,

which the Public Utility Code does not permit. Those provisions of the Proposed Rules are beyond the Commission's authority to adopt and, therefore, should be withdrawn.

B. No Evidence Supports Either The "Different Buildings" Requirement Or The Prohibition On Sharing Certain Competitively Neutral Corporate Support Services.

Bell Atlantic-Pennsylvania, supra, is instructive in another important respect. In that case, the Commonwealth Court affirmed the Commission's decision because the PUC acted only after conducting a fully litigated adjudication, developing an extensive evidentiary record, and making specific findings that Bell Atlantic: (1) had "abused its market power by providing competitors with less than comparable access to its network"; and (2) had "engaged in discriminatory conduct that prevented its customers from switching to a competitor." 763 A. 2d at 466. As a consequence, the Court found that the Commission had substantial evidentiary support for its conclusion that, given factors specific to the telecommunications industry and, in particular, the Bell system, structural separation was the only way to prevent such abuses in the future:

> In the Global Opinion and Order, the PUC stated:
>
>> Indeed, the Commission finds on this record that absent structural separation of BA-PA's [Bell's] whole-sale and retail operations to prevent cross-subsidization and discriminatory access to other telecommunications carriers, we cannot fulfill our Section 501 duty to enforce, execute and carry out our mandate under Chapter 30 to promote and encourage the provision of competitive services on equal terms throughout the Commonwealth. *See* 66 Pa.C.S. §§ 3001(2), (3), (7) and (8). 60 (emphasis added).
>
> Accordingly, the PUC concluded rightly that the goal of promoting competition will not be achieved without structural separation of Bell's wholesale and retail operations. Here there is no lack of

> substantial evidence to support the findings of the PUC on matters such as this, within the PUC's field of expertise. *W.C. McQuaide, Inc. v. Pennsylvania Public Utility Commission*, 137 Pa. Commw. 282, 585 A.2d 1151, 1154 (Pa. Cmwlth.1991)
>
> Our conclusion is that the PUC's factual basis for its structural separation decision was, on this record, wholly adequate.

763 A.2d at 466-67.

Unlike *Bell Atlantic-Pennsylvania*, in this proceeding, no evidence would support the Commission's action. In that case, the PUC was forced to act based on evidence that Bell Atlantic was, in fact, "abusing . . . market power" and had "engaged in discriminatory conduct that prevented its customers from switching to a competitor." Nothing remotely like that evidence exists here. In short, the Commission is proposing radically intrusive regulations as a purported solution to a problem that does not exist.

Moreover, the Commission cannot find support for the proposed requirements for structural[7] and functional separation[8] in earlier phases of this proceeding because the harsh requirements it has included in those sections were not favored by any party. In fact, as the Commission conceded, the parties who filed comments in response to the Advanced Notice of Proposed Rulemaking at this docket "felt that the existing code of conduct was effective." Proposed Rulemaking Order, p. 3. In particular, the Office of Consumer Advocate stated in its Comments (p. 2) that it "has not identified, at this time, a need to revise or change the Code of Conduct to address specific EDS or EGS conduct." Notably, the National Energy Marketers Association ("NEMA"), which is a trade association for energy marketers intensely interested in promoting competitive retail electricity markets, submitted comments that expressed its members' "strong support" for the Commission's **existing** Code of Conduct (NEMA Comments,

[7] Proposed Section 54.122(3)(ix). and (4)(iii)(A)
[8] Proposed Section 54.122(4)(iii).

p. 1). NEMA never suggested that any restrictions more rigorous than those currently in effect are needed to prevent the "alleged anti-competitive practices" that the Commission vaguely alludes to in the Proposed Rulemaking Order but never specifies. In short, throughout the Advanced Notice of Proposed Rulemaking, parties actively engaged in the competitive electricity market never indicated that the Code of Conduct should be revised to incorporate the far-reaching changes the Commission is proposing in Sections 54.122(3)(ix) and (4)(iii)(A).

The absence of a valid basis for Sections 54.122(3)(ix) and (4)(iii)(A) is underscored by the Regulatory Analysis Form the Commission was required to submit to the Independent Regulatory Review Commission ("IRRC") in an attempt to explain why it seeks to revamp the existing Code of Conduct.[9] At page 3 of that Form, the Commission admitted that the Proposed Rules are not driven by the need to comply with any federal or state law, regulation or court order. Instead, it offered only the following conclusory assertions as the alleged justification for its action:

> The regulation is needed to foster the continued development of Pennsylvania's retail electricity competitive market, to prevent cross subsidization of services between electric distribution companies and their affiliated electric generation suppliers, to provide transparency in the provision of services in the retail electricity market, and to forbid deceptive practices that result in customer confusion. Most electricity consumers in the Commonwealth are likely to benefit from this regulation. The Pennsylvania Public Utility Commission will also benefit from the proposed enhancements in its oversight functions in the retail electricity market.

Nothing in the record of this proceeding supports either the foregoing conclusions or any of the other conclusions set forth in the Regulatory Analysis Form. In fact, the Commission's answers to the IRRC's specific questions concede that it has not conducted a credible analysis of

9 A copy of the Regulatory Analysis Form is attached as Exhibit A to these Comments.

the costs and purported "benefits" of the Proposed Rules. Thus, in Section 18 of the Regulatory Analysis Form (p. 6), the Commission responded to the IRRC's request for a cost-benefit analysis with the following:

> While the costs associated with the regulations are not fully known at the present time, there will be significant economic benefits to Pennsylvania electricity consumers resulting from the elimination of cross-subsidization of service between electric distribution companies and their affiliated electric generation suppliers.

There are several inaccuracies in the Commission's response, although the most obvious is that the Commission has made no findings in this proceeding or, to the Companies' knowledge, in any other proceeding, that any "cross-subsidization" is actually occurring. The Commission has a prodigious set of enforcement tools at its disposal to investigate and respond to credible evidence of "cross-subsidization" if any were occurring. Yet, it cannot point to any customer or EGS-initiated complaint proceeding or Commission-initiated enforcement action in which improper "cross-subsidization" has been alleged. Obviously, "significant economic benefits" cannot flow from eliminating "cross-subsidization" if there is no evidence that any "cross-subsidization" is actually occurring. And, in order for such purported "economic benefits" to be "significant," the breadth and magnitude of the alleged "cross-subsidization" would have to be equally "significant" – indeed, massive. Nonetheless, the Commission failed to explain how improper activity could be occurring at such a massive scale and not have provoked any regulatory action to address such obvious violations of existing laws and regulations.

Thus, while offering "benefits" to customers as the alleged basis for the Proposed Rules, the Commission neither identified those benefits nor pointed to any concrete evidence suggesting that, even if a specific "benefit" could be identified, it would actually materialize as a result of implementing the Proposed Rules. In the same vein, the Commission alluded to the need to stem "deceptive practices" without pointing to any evidence in this proceeding or findings in any other proceeding that such "deceptive practices" are occurring or that existing enforcement tools are inadequate to deal with them if they were to occur.

In like fashion, the Commission failed to consider the costs and burdens that Sections 54.122(3)(ix) and (4)(iii)(A) would impose. When asked in Section 14 of the Regulatory Analysis Form (p. 4) to estimate the increased costs that the Proposed Rules would impose on regulated companies, the Commission essentially dodged the question:

> The costs and savings are difficult to estimate at the present time because of the varying nature and degree of shared corporate services and offices between electric distribution companies and their affiliated electric generation companies. *The costs related to the proposed reporting requirements are not expected to be burdensome.* (Emphasis added.)

The Commission's answer attempted to deflect attention from the most significant compliance costs – the costs to implement the "different buildings" mandate and to disaggregate shared competitively-neutral corporate support services – by answering only in terms of "reporting requirements." While it is debatable whether the cost of complying with the "reporting requirements" will be "burdensome" or not, there is no question that the cost to implement Sections 54.122(3)(ix) and (4)(iii)(A) will be substantial. As more fully explained in Section II.E., *infra*, the increase in operating expenses associated with disaggregating competitively-neutral corporate support services for the Companies is conservatively estimated at between $26 million and $43 million per year and will require a significant capital investment, which could likely exceed $100 million. There is no indication that the Commission gave those costs any consideration, nor could it. The Commission did not have any estimates of likely compliance costs when it developed the Proposed Rules because the most onerous provisions of

Sections 54.122(3)(ix) and (4)(iii)(A) appeared for the first time in the Proposed Rules before any compliance cost estimates could be provided. Consequently, as the Commission tacitly concedes, it had no basis to make a rationale cost-benefit analysis before promulgating the Proposed Rules and, for that reason alone, Sections 54.122(3)(ix) and (4)(iii)(A) cannot possibly satisfy IRRC criteria for approval.

Because it failed to consider the costs that regulated companies would incur to comply with Sections 54.122(3)(ix) and (4)(iii)(A), the Commission's response to Section 12 of the Regulatory Analysis Form (p. 4), which should have discussed the Proposed Rules' impact on the public generally, is evasive and unsupported. In that response, the Commission stated:

> All electric distribution companies in the Commonwealth will need to follow new reporting requirements. While these additional reporting requirements will likely involve more work and time, we do not anticipate that they will be unduly burdensome.
>
> In order to compete more fairly in the retail electricity market and achieve needed transparency, electric distribution companies and their affiliated electric generation suppliers will need to disengage from sharing certain corporate services and physically separate their shared offices.
>
> *Pennsylvania electricity consumers are not expected to be adversely affected by the regulation.* (Emphasis added.)

Once again, the Commission chose to answer the IRRC's inquiry with specific reference to "reporting requirements" while ignoring the cost of the substantive mandates and prohibitions in Sections 54.122(3)(ix) and (4)(iii)(A). Those sections go far beyond requiring "physical" separation and directing EDCs and EGSs to "disengage from sharing certain corporate services," as the Commission contends. "Physical" separation already exists, and competitively-sensitive services and employees are already "disengaged" – as the Commission is well aware. Notable by its absence from the Commission's response is any indication of the far-reaching nature of the new requirements for "different buildings" and a prohibition on sharing competitively-neutral corporate support services (which cannot be furnished cost-effectively except on a shared basis, as explained in greater detail in Section II.E., *infra*). Imposing those requirements will cause a significant loss of economies of scale for EDCs. The lost economies will necessarily increase EDCs' cost of service, be reflected in EDCs' delivery rates and, therefore, cause Pennsylvania electricity consumers to be "adversely affected." These factors, which are an essential element of any rationale cost-benefit analysis of the Proposed Rules, were not considered by the Commission, as further evidenced by its response to Section 10 of the Regulatory Analysis Form (pp. 3-4), where it responded to the IRRC's request for the data that formed the basis for the proposed regulation. Inexplicably, the Commission simply contended that the question was "not applicable," thereby, acknowledging that it was acting without a sound empirical basis for the most intrusive provisions of the Proposed Rules.

C. The Commission Cannot Rely On Regulations Adopted In Other Jurisdictions

In an effort to support the provisions of the Proposed Rules requiring functional and structural separation, the Commission appealed to authority exercised by regulatory agencies in other states. Thus, the Commission stated that in developing the proposed regulations it "considered" in particular the rules and regulations adopted in Illinois, New Jersey, and Texas. Proposed Rulemaking Order, p. 4. However, the "rules" the Commission claims to have "considered" were adopted by the respective regulatory commissions in those jurisdictions pursuant to express statutory authority – authority that the Commission does not have.[10] For example, the Illinois Electric Service Customer Choice and Rate Relief Act directed the Illinois

[10] Furthermore, as explained in Sections II.D. and E. even the regulatory agencies discussed above that were granted express authority for functional and structural separation did not adopt rules nearly as intrusive as those the Commission now seeks to impose in Sections 54.122(3)(ix) and (4)(iii)(A).

Commerce Commission ("ICC") to establish regulations for the "functional separation" of generation and distribution service and "competitive and non-competitive services":

> **Functional separation.** (a) Within 90 days after the effective date of this amendatory Act of 1997, the Commission shall open a rulemaking proceeding to establish standards of conduct for every electric utility described in subsection (b). To create efficient competition between suppliers of generating services and sellers of such services at retail and wholesale, the rules shall allow all customers of a public utility that distributes electric power and energy to purchase electric power and energy from the supplier of their choice in accordance with the provisions of Section 16-104 [220 ILCS 5/16-104]. In addition, *the rules shall address relations between providers of any 2 services described in subsection (b) to prevent undue discrimination and promote efficient competition.* Provided, however, that a proposed rule shall not be published prior to May 15, 1999.
>
> (b) *The Commission shall also have the authority to investigate the need for, and adopt rules requiring, functional separation between the generation services and the delivery services of those electric utilities* whose principal service area is in Illinois as necessary to meet the objective of creating efficient competition between suppliers of generating services and sellers of such services at retail and wholesale. After January 1, 2003, *the Commission shall also have the authority to investigate the need for, and adopt rules requiring, functional separation between an electric utility's competitive and non-competitive services.*

220 Ill. Comp. Stat. 16-119A. *See also* 220 Ill. Comp. Stat. 16-121 (authorizing the ICC to issue regulations "governing the relationship between the electric utility and its affiliates . . .").

Similarly, when New Jersey's Board of Public Utilities ("BPU") adopted rules and regulations for the functional separation of competitive service, it did so in order to implement **explicit** guidelines that had been enacted **by statute** (N.J. Stat. Ann. §48:3-55):

> h. An electric public utility shall not use regulated rates to subsidize its competitive services or competitive services offered by a related competitive business segment of the public utility holding company of which the electric public utility is an affiliate,

and expenses incurred in conjunction with its competitive services shall not be borne by its regulated rate customers. The regulated rates of an electric public utility shall be subject to the review and approval of the board to determine that there is no subsidization of its related competitive business segment. Each such public utility shall maintain books and records, and provide accounting entries of its regulated business to the board as may be required by the board, to show that there is *strict separation and allocation of the utility's revenues, costs, assets, risks and functions, between the electric public utility and its related competitive business segment.*

* * *

j. A public utility holding company may offer any competitive service, including, but not limited to, electric generation service, telecommunications service, and cable television service, to retail customers of an electric public utility that is owned by the holding company, *but only through a related competitive business segment of the holding company that is not an electric public utility or a related competitive business segment of the electric public utility.* Competitive services shall be offered in compliance with all rules and regulations promulgated by the board for carriers of such services, including, but not limited to, telecommunications and cable.

k. Notwithstanding any other provisions of this section, by no later than December 31, 2000, the board shall render a decision, after notice and hearing, on any *further restrictions required for any or all non-safety related competitive services offered by an electric public utility in addition to the provisions of this section, including whether an electric public utility offering non-safety related services shall establish and provide such services through a business unit which is functionally separated from the electric public utility business unit.*

> (1) Upon completion of the audit process required pursuant to paragraph (1) of subsection f. of section 8 of this act, the board shall commence a hearing process to examine the use of utility assets in providing retail competitive services as permitted in subsection f. of this section. *The board shall evaluate and balance the following factors: the prevention of cross-subsidization; the issues attendant to separation and relative to the board's affiliate relation and fair competition standards as provided in section 8 of this act; the effect on ratepayers of the use of utility assets in the provision*

> *of non-safety related competitive services; the effect on utility workers; and the effect of utility practices on the market for such services.*
>
> (2) The relationship between the electric public utility and its related competitive service business unit *shall be subject to affiliate relations standards to be promulgated by the board pursuant to subsection f. of section 8 of this act.*
>
> l. If a separate unit is established by the electric public utility as a related competitive business segment of *the electric public utility such that other than shared administration and overheads, employees of the competitive services business unit shall not also be involved in the provision of non-competitive utility and safety services . . .*

(Emphasis added).

Likewise, Texas has enacted a statutory framework mandating the separation of a utility's power generation, retail supply, and transmission and distribution service, with a "separation of personnel, information flow, functions and operations" in accordance with extensive statutory requirements. *See* V.T.C.A., Utilities Code § 39.051(d). The Texas legislature specifically directed that "a utility is a separate, independent entity from any competitive affiliates and . . . does not share employees, facilities, information, or other resources, other than permissible corporate support services, with those competitive affiliates unless the utility can prove to the commission that the sharing will not compromise the public interest." V.T.C.A. Utilities Code § 39.157(d)(7).

In summary, this Commission does not have the statutory authority to issue several of the key provisions of the Proposed Rules including Sections 54.122(3)(ix) and (4)(iii)(A) and, as explained in Section III, *infra*, the restriction on EGSs' use of their parents' name set forth in Section 54.122(3)(v). The Commission's lack of authority and the absence of evidentiary support for the Commission's action distinguish the provisions of the Proposed Rules challenged by the Companies from the structural and functional separation of Bell Atlantic's wholesale and retail business units and from regulations adopted by the ICC, BPU, the Texas commission and other state regulatory agencies that the Commission purportedly considered.

D. The "Different Buildings" Mandate of Section 54.122(3)(ix) Should Be Withdrawn

This section provides that an EDC and its affiliated EGS "may not share office space and shall be physically separated *by occupying different buildings*" (emphasis added). While the spatial segregation of a utility and its affiliated retail supplier has been imposed in other jurisdictions, the requirement that such entities "[occupy] different buildings" is unprecedented, unnecessary, and could prove prohibitively costly to implement.

The Commission contends that a limitation requiring electric generation suppliers and electric distribution companies to occupy different buildings is "common" in unspecified jurisdictions. Proposed Rulemaking Order, p. 8. However, in the three states – Illinois, New Jersey, and Texas – that the Commission specifically considered as models for the Proposed Rules there is no such requirement. New Jersey's regulations provide only that a utility may not "share office space" with a related competitive business segment, *see* N.J. Admin. Code tit. 14, § 14:4-3.5(e), and Illinois has no comparable provision at all. In Texas, a utility and its competitive affiliate must be physically separate, but physical separation within the same building is permitted if each entity's offices are on separate floors or have separate access. 25 Tex. Admin. Code § 25.272(d)(5).

In addition to the states that the Commission discussed in the Proposed Rulemaking Order (p. 8), the Companies have reviewed the regulations adopted by the eight other jurisdictions[11] the Commission mentioned in Section 22 of the Regulatory Analysis Form (p. 7) in response to the IRRC's request that it compare the Proposed Rules to comparable regulations

[11] The other eight states are Maryland, Ohio, Massachusetts, Michigan, Maine, Connecticut, New Hampshire and Oregon.

in other states. (The Companies have prepared a summary of the statutory authority and applicable regulations of all eleven jurisdictions, which is provided as Exhibit B to these Comments.) Of those eight jurisdictions, seven do not impose a "different building" requirement. Only the Maine Public Utility Commission's regulations provide that EDC employees "must be located in a separate building from the employees of the affiliated competitive provider." However, even Maine's regulations expressly provide that the Maine commission may approve exemptions from that requirement where an EDC shows that "shared" facilities are in the best interest of customers, would have minimal "anti-competitive" effect, and the costs of shared facilities can be fully and accurately allocated. Code Me. R. tit. 65-407, ch. 304 §§3(K) and 3(K)(1).

Requiring "different buildings" serves no purpose and is simply punitive. Such a requirement would disrupt existing operations and increase costs (including costs to EDC customers) by forcing an entire business unit to move to a new location even though there is no evidence that physical separation within an existing building is inadequate to achieve the Commission's purported goal of fostering a competitive retail market for electricity. Moreover, in *Bell Atlantic-Pennsylvania, supra*, even after finding abuses of "market power" and "discrimination," the Commission required only that employees of Bell Atlantic wholesale and retail operations "have offices that are physically separated" without requiring "different buildings." *See Re Nextlink Pennsylvania, Inc.*, 196 PUR4th 172, 322 (1999).

Although not mentioned by the Commission, the Federal Energy Regulatory Commission ("FERC") is another major regulatory agency that promulgated regulations dealing with the physical proximity of employees of electric utilities and their affiliates engaged in competitive services. The FERC's regulations provide that work areas of utility and affiliate employees should be physically separated but do not require those employees to be housed in entirely separate buildings. 18 C.F.R. § 35.39(c)(2)(i) ("[T]o the maximum extent practical, the employees of a market-regulated power sales affiliate must operate separately from the employees of any affiliated franchised public utility with captive customers."). In fact, the FERC has reviewed implementation plans that allow affiliated companies' employees to work in the same building, but on separate floors, and found that they fully comply with its Standards of Conduct for Transmission Providers. *See, e.g., New England Power Company, et al.*, 91 FERC ¶ *61,013 (2000).*[12]

Finally, in addition to lacking statutory authorization, this provision could not pass any reasonable cost-benefit test. It imposes significant costs for no discernible benefit, as evidenced by the example of other regulatory bodies that find physical separation short of "different buildings" to be perfectly adequate to prevent improper interaction between employees of a utility and it competitive affiliate. The costs to comply with the "different buildings" requirement include, but are not be limited to, those costs necessary to obtain additional real estate, secure permits, construct or adapt buildings, and make infrastructure-related improvements or changes, to name a few.

Therefore, for the reasons set forth above, Section 54.122(3)(ix) should be revised by deleting "and shall be physically separated by occupying different buildings."

[12] A number of implementation plans developed to comply with FERC's Standards of Conduct for Transmission Providers, which have been published and are publically accessible, allow employees of utilities and their affiliates that furnish competitive services to occupy the same building so long as their workspaces are physically separated. *E.g.*, Avista Corporation, http://www.oatioasis.com/avat/index.html; OGE Energy Corporation, http://oasis.oge.com/SOC/Order717.htm.

E. The Prohibition On Sharing Certain Corporate Support Services Set Forth In Section 54.122(4)(iii)(A) Should Be Withdrawn Or, At A Minimum, Substantially Revised

This section provides that an EDC and its affiliated EGS "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." Subsection (A) sets forth a list of services that are **not** "corporate support services" and, therefore, may not be "shared":

> "Corporate support services" do not 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.

Notably, the Commission proposes to **prohibit** the sharing of many of the kinds of "corporate support services" that are expressly **permitted** under the Illinois, New Jersey, and Texas regulations. Thus, the ICC's regulation at Ill. Admin. Code tit. 83, § 450.110 provides that "electric utilities and their affiliated interests [that are] in competition with alternative retail electric suppliers shall not jointly employ or otherwise share the same employees," but carves out an exception for "corporate support," which may be shared and which it defines as follows:

> "Corporate support" means corporate oversight and governance involving administrative services (including travel administration, security, printing, graphics, custodial services, secretarial support, mail services, and records management), financial management services (including accounting, treasury, internal audit, tax, and financial reporting and planning), data processing, shareholder services, human resources, employee benefits, regulatory affairs, legal services, lobbying, and non-marketing research and development activities. Corporate support also includes strategic planning.

Ill. Admin. Code tit. 83, § 450.10.

In similar fashion, the BPU's regulations permit "shared services," which the BPU defines as follows:

> "Shared services" means administrative and support services that do not involve merchant functions, including by way of example: payroll, taxes, shareholder services, insurance, financial reporting, financial planning and analysis, corporate accounting, corporate security, human resources (compensation, benefits, employment policies), employee records, regulatory affairs, lobbying, legal, and pension management.

N.J. Admin. Code tit. 14, § 14:4-3.2.

In addition, the BPU's regulations permit access to computer and information systems "for purposes of sharing computer hardware and software" and authorize a utility and its affiliate providing competitive services to "share office space, office equipment, services and systems" subject to the requirement that "adequate system protections are in place to prevent the accessing of information or data between the utility and its affiliate(s), which would be in violation of this subchapter." N.J. Admin. Code tit. 14, § 14:4-3.5(e)(1).

Under Texas' regulations, utilities and competitive affiliates are expressly permitted to share common officers and directors, property, equipment, computer systems, information systems, and corporate support services. In order to do so, the utility is required to "implement[] safeguards that the commission determines are adequate to preclude employees of a competitive affiliate from gaining access to information in a manner that would allow or provide a means to transfer confidential information from a utility to an affiliate, create an opportunity for preferential treatment or unfair competitive advantage, lead to customer confusion, or create significant opportunities for cross-subsidization of affiliates." 25 Tex. Admin Code § 25.272(d)(3). In fact, Texas has an expansive definition of "corporate support services" that may be shared, which includes many of the services the Proposed Rules would not allow affiliates to share:

> **Corporate support services** -- Services shared by a utility, its parent holding company, or a separate affiliate created to perform corporate support services, with its affiliates of joint corporate oversight, governance, support systems, and personnel. Examples of services that may be shared . . . include human resources, procurement, information technology, regulatory services, administrative services, real estate services, legal services, accounting, environmental services, research and development unrelated to marketing activity and/or business development for the competitive affiliate regarding its services and products, internal audit, community relations, corporate communications, financial services, financial planning and management support, corporate services, corporate secretary, lobbying, and corporate planning. Examples of services that may not be shared include engineering, purchasing of electric transmission facilities and service, transmission and distribution system operations, and marketing, unless such services are provided by a utility, or a separate affiliate created to perform such services, exclusively to affiliated regulated utilities and only for provision of regulated utility services.

25 Tex. Admin. Code § 25.272(c)(4).

The Companies have also reviewed the regulations in the other eight jurisdictions the Commission mentioned in Section 22 of the Regulatory Analysis Form (p. 7) with respect to shared corporate support services and have provided a summary in Exhibit B to these Comments. All but two[13] of those jurisdictions adopted fairly expansive definitions of permissible corporate support service, which permit sharing of competitively neutral services. For example, Ohio permits shared employees and facilities if the employees of the affiliated EGS do not have access

[13] Maine and Massachusetts took a different approach. The commissions in those states adopted regulations that require EDCs to ask for, and obtain, exemptions in order to share employees or facilities with an affiliate engaged in providing competitive services. Each state allows sharing upon a showing that sharing employees or facilities would be in the best interest of the public; would have no anticompetitive effect; and the costs of any shared employees or facilities can be fully and accurately allocated between the distribution utility and the affiliated competitive provider. Code Me. R. tit. 65-407, ch. 304 § 3(K)(1); Mass. Regs. Code tit. 220, § 12.03(17). *See* Exhibit B.

to any information about the EDC's transmission or distribution systems (such as system operations, system capability, price, curtailments, or ancillary services) that is not available to other EGSs. Ohio Admin. Code § 4901:1-37-04(A)(4) and (D)(3). Similarly, Connecticut and New Hampshire have broad definitions of corporate support services that may permissibly be shared including, but not limited to, payroll, taxes, shareholder services, insurance, financial reporting, corporate financial planning and analysis, corporate accounting, corporate security, human resources (compensation, benefits, employment polices), employee records, regulatory affairs, lobbying, legal, and pension management. Conn. Agency Regs. § 16-244h-5(f)(3); N.H. Code Admin R. [PUC] § 2501.04(b), (c) and (e).

Although not mentioned in either the Proposed Rulemaking Order or the Regulatory Analysis Form, the FERC has also adopted restrictions on the interaction between affiliates. The FERC's rules require the functional separation of the employees of franchised public utilities and their affiliates engaged in power generation and wholesale power marketing at market-based rates. However, the FERC's rules specifically allow sharing of corporate support employees, field and maintenance employees, senior managers, and boards of directors provided that shared employees not participate in directing, organizing or executing generation or market functions. 18 C.F.R. 35.39(c)(ii). The FERC has also clarified its rules by explaining that such shared employees may not make generation economic dispatch decisions, determine the timing of scheduled generation outages, or engage in resource planning or fuel procurement. However, FERC may grant case-specific exceptions even to those limitations.

The Commission has not explained why it would bar the kinds of shared "corporate support services" that these other jurisdictions expressly permit. The services the Commission would prohibit do not adversely impact competitive interests because, as Illinois, New Jersey, Texas, various other states and the FERC have all determined, they are competitively-neutral and can be provided without exchanging competitively-sensitive information or data. In fact, all employees FirstEnergy-wide are required to participate in training on an annual basis to ensure that appropriate competitive safeguards are continually followed. Moreover, there are many services (e.g., legal and regulatory) that, as a practical matter, cannot be separated. For example, any number of regulatory and related filings, such as consolidated tax returns, periodic reports to the Securities and Exchange Commission, annual reports to stockholders, stock exchange submissions, reports to rating agencies, and submissions to the Federal Energy Regulatory Commission or to state commissions, to name a few, must be prepared on a consolidated basis by a single legal and regulatory team. As written, the Commission's Proposed Rules would make it impossible to perform such tasks, which must be completed in the ordinary course of business and do not implicate any competitive interests. This kind of functional and structural separation makes no sense and serves no useful purpose.

Even more troubling is the Commission's prohibition of shared services and employees related to "strategic management and planning." Although the proposed regulations do not define this term, it potentially could be interpreted to extend to the entire corporate management of an EDC's and EGS's common parent. It would be difficult, if not impossible, to maintain separate, independent management teams at the parent level for EDC and EGS functions. Indeed, the recommended prohibition on common "strategic management and planning" would make it difficult, if not impossible, for the parent company's board of directors to discharge its statutory and fiduciary obligations to oversee the affairs of the entire enterprise. The likely consequence of such a prohibition would be to force a parent holding company that wants to preserve an EGS subsidiary to divest its EDC subsidiaries in order to comply with the

Commission's regulations if both functions existed under a common parent. In that event, Section 54.122(4)(iii)(A) would swallow – and make irrelevant – all of the other provisions in the proposed regulations because EDCs and EGSs may not be able to coexist in the same holding company system.

The error in the Commission's approach is clear. There is nothing in the Public Utility Code that authorizes the Commission to pronounce a virtual death sentence on affiliated EDC and EGS business units. To the contrary, many such arrangements already exist and are functioning in Pennsylvania today with the Commission's knowledge and approval, as evidenced by the Commission's issuance of EGS licenses to EDC-affiliated EGSs. *See* 66 Pa.C.S. § 2809(a) and (b), requiring EGSs to obtain licenses.

Moreover, taking an indirect route, by embedding a hidden trap in the definition of "corporate support services," cannot confer authority that does not otherwise exist to interfere with a holding company's management decisions and, in that way, force the divestiture of an EDC or any other business unit. Holding companies are not public utilities and, therefore, are not subject to Commission jurisdiction. Furthermore, and as explained previously, the legislature explicitly withheld from the Commission any authority to order divesture. *See* 66 Pa.C.S. § 2804(5) (providing that the Commission "may permit, but shall not require an electric utility to divest itself of facilities or to reorganize its corporate structure").

The proposed regulations' apparent prohibition of shared "strategic management and planning" also contrasts sharply with the regulations adopted by other jurisdictions. For example, the BPU's regulations properly recognize the business reality that any prohibition of shared employees and services must permit managers and directors of an EDC's and EGS's ultimate parent to do their jobs. Accordingly, the BPU's regulations provide as follows:

> (i) An electric and/or gas public utility, its public utility holding company and related competitive business segments, or separate business segments of the public utility holding company created solely to perform corporate support services, *may share joint corporate oversight, governance, support systems and personnel.* Any shared support shall be priced, reported and conducted in accordance with N.J.A.C. 14:4-3.4 and this section, as well as other applicable Board pricing and reporting rules.

N.J. Admin. Code tit. 14, § 14:4-3.5(i) (Emphasis added). As previously explained, the ICC regulations permit a wide range of "corporate support" services, including "strategic planning," and Texas' regulations provide for the sharing of common officers and directors. Similarly, Connecticut and New Hampshire expressly authorize shared corporate and strategic planning. *See* Exhibit B. Consequently, these states' regulations expressly authorize what the Commission's proposed regulations inexplicably would prohibit.

Additionally, contrary to the Commission's expectation that Pennsylvania consumers would not be adversely affected by this regulatory change, the cost of "carving out" an EDC (assuming it could be done at all and still comply with the Proposed Rules) as well as subsequent increases in costs to operate the EDCs on a stand-alone basis would be substantial. It is difficult, at this stage, to identify all of the ways in which disaggregating shared services will cause the loss of economies of scale and, thereby, increase costs. Exhibit C to these Comments shows the results of the Companies' preliminary analysis, which identifies major categories of shared services and their associated costs based on how those services are being performed today. Based on a sound industry benchmarking study of the economies of scale that can be attained from employing shared services, the loss of economies likely to result from complying with the prohibition in proposed Section 5.122(4)(A)(iii) would range from 15% to 25% of the shared services costs. Accordingly, as shown in Exhibit C, it is conservatively estimated that the loss of economies attributable to the prohibition on shared services would increase Companies' operating expenses by $26 to $43 million **per year** and, in all likelihood, much more. Additionally, in order to comply with proposed Section 5.122(4)(A)(iii), the Companies would have to relinquish their use of shared enterprise software and migrate to a totally segregated system. Doing so would require a significant capital investment, which would likely exceed $100 million.

Because the increases in annual operating expenses and capital investment identified by the Companies would be driven by government mandates, they would be an integral part of each Company's cost of service and, as such, would be borne by distribution customers in the Company's respective distribution rates. As previously explained, the Commission has not offered any rational basis for imposing costs of that magnitude on customers for no discernible benefit.

In addition to estimating the cost of complying with Section 54.122(4)(iii)(A), the Companies have projected the time it would take to accomplish the comprehensive disaggregation of shared services that the Proposed Rules would require. This is yet another factor the Commission simply did not consider. Given the number and complexity of the systems that would have to be separated, the Companies estimate that it would take 24 to 36 months to effect the kind of separation of the EDCs that the Proposed Rules would require.[14] Obviously, the work-hours by specialized, highly-trained personnel that would be expended to effect the system separation could be better spent in many other ways including setting up the new system enhancements that will be needed if the Commission approves the Companies' proposals in their pending default service program proceedings to initiate a Customer Referral

[14] As best the Companies can determine at this time, there are between 170 and 220 systems that would have to be separated to achieve the level of disaggregation of shared services required to comply with Section 54.122(4)(iii)(A).

Program and a retail Opt-In Aggregation Program to enhance customer choice in the Companies' service territories.

For all of the foregoing reasons, proposed Section 54.122(4)(iii)(A) should be withdrawn. However, if the Commission nonetheless decides that it should proscribe certain forms of sharing of employees and services between EDCs and EGSs, it should limit the scope of any such restriction by defining acceptable "corporate support services" to include all of the functions delineated in the ICC's definition of "corporate support" (Ill. Admin. Code tit. 83, § 450.10), the BPU's definition of "shared services" (N.J. Admin. Code tit. 14, § 14:4-3.2), and Texas' definition of "corporate support services" (Tex. Admin. Code § 25.272(c)(4)). Additionally, the Commission should add a provision similar to that adopted by the BPU in N.J. Admin. Code tit. 14, § 14:4-3.5(i) stating that shared services consisting of corporate management, oversight, governance, strategic planning, support systems, as well as the sharing of personnel that perform such functions, are permitted.

III. THE COMMISSION CANNOT PROHIBIT A NON-JURISDICTIONAL HOLDING COMPANY AND ITS SUBSIDIARY EGS FROM DOING BUSINESS UNDER SIMILAR NAMES

Section 54.122(3)(v) of the Proposed Rules provides, in relevant part, as follows:

> An electric generation supplier may not have the same or substantially similar name or fictitious name as the electric distribution company *or its corporate parent.* (Emphasis added.)

The Companies are affiliated with FirstEnergy Solutions Corp. ("FES") through their parent, FirstEnergy Corp. FES is an EGS operating in six states, including Pennsylvania, where it has done business under its current name since 2001. Because FES does not share the same or a substantially similar name with any of the Companies, the first branch of the prohibition imposed by Section 54.122(3)(v) is not implicated. However, FirstEnergy has exercised its right to incorporate FES and authorize it to do business under a trade name similar to its own. As written, Section 54.122(3)(v) would prohibit FirstEnergy – a holding company that is not subject to the PUC's jurisdiction – from using a trademarked name in that fashion.

If the Commission's intent in proposing Section 54.122(3)(v) is to dissuade customers from associating an EGS with an affiliated EDC, then the proposed regulation is both excessive in scope and misdirected. In so far as FirstEnergy and the Companies are concerned, there is no reason to abrogate FirstEnergy's naming rights in order to implement the Commission's intent. FES is doing business under a brand that is not the same or similar to the long-established and well-recognized names under which the Companies do business and are known to their customers, namely, Metropolitan Edison, Pennsylvania Electric, Pennsylvania Power and West Penn Power.

Additionally, as written, the proposed regulation would appear to apply to any EGS operating in Pennsylvania that shares the same or a substantially similar name with a parent that also owns an EDC, whether or not that EDC provides service in Pennsylvania. Thus, the regulation could capture EGSs that operate in Pennsylvania but are not affiliated with any Pennsylvania "incumbent." As such, the impacts of this regulation extend far beyond those which would be experienced by FirstEnergy. Other similarly-affected entities would include PPL Energy Plus, Exelon Energy, Con Edison Solutions, Dominion Retail, and their respective corporate parents. Conceivably, the Commission could contend that the context and stated purpose of the Proposed Rules justify inferring that the proposed regulation would only apply to the names of EGSs and their parents that are affiliated with EDCs with territory in Pennsylvania. Even if such an inference were appropriate, it would raise problems of its own that highlight the irrationality of the proposed restriction and the discriminatory treatment that it would result in.

At least one large and successful EGS operating in Pennsylvania (Dominion Retail) is not currently affiliated with an incumbent utility. However, it had such an affiliation in the recent past with a large, well-known gas distribution company, with which it shared a common parent and a common name. Moreover, although Dominion Retail's parent divested its Pennsylvania utility, it continues to own utilities in bordering states that share the Dominion name and occupy the same media markets as parts of Pennsylvania. The potential for an EGS to leverage the perception of incumbency in such cases is, if anything, greater than where – as with FES – an EGS does not share a name with any utility in Pennsylvania or anywhere else.[15]

In an effort to justify its unprecedented intrusion on the rights of holding companies and EGSs, the Commission has asserted that "this requirement varies in different jurisdictions" (Proposed Rulemaking Order, p. 7), thereby implying that similar restrictions have been imposed in other states. However, the Commission could not cite the regulations of any other jurisdiction that impose a comparable prohibition. To the contrary, the public utility regulations adopted in the states the Commission purportedly focused upon as models for its proposed Code of Conduct revisions either have no such restriction or expressly **permit** an EGS to do business under the name of an affiliated utility or a common parent:

- The Illinois public utility code imposes restrictions on joint marketing by utilities and affiliated generation suppliers but expressly provides that nothing therein "shall be construed as prohibiting an affiliated interest in competition with [an EGS] from using the corporate name or logo of an electric utility or electric utility holding company." 83 Ill. C.S. § 450.25.

15 The Companies are not suggesting that the proposed regulation would be justified if drafted to capture Dominion Retail. To the contrary, they believe that the Commission's interference with Dominion's naming rights would be just as egregious as its attempted interference with the naming rights of FirstEnergy and FES. Rather, the example provided above shows why the actual effect of the proposed regulation would bear no reasonable relationship to the Commission's purported reasons for adopting it.

- New Jersey allows shared corporate names so long as there is a disclaimer that the EGS is not the utility and is not regulated by the BPU and customers do not have to buy products from the EGS to continue to receive distribution service. 14 N.J.A.C. § 14:4-3.5(k).
- Texas allows competitive affiliates of a utility to use the utility's name. 16 Tex. Admin. Code § 25.272(h).

Moreover, there is complete unanimity among the other eight states mentioned in Section 22 of the Regulatory Analysis Form. None of those states prohibit an EGS sharing all or some part of the name of its parent. *See* Exhibit B to these Comments. In fact, none of those states prohibit an EGS sharing the same or similar name as their affiliated EDC, although some provide that, in those cases, there must be an appropriate "disclaimer." Clearly, no other public utility commission sees the need to impose a restriction on parent company and EGS naming rights in order to create and maintain a robust competitive electricity market.

Moreover, and as discussed in detail, *infra*, any attempt to impose such a restriction would unlawfully impinge on the speech rights of parent companies and their EGS affiliates that are protected under the First and Fourteenth Amendments to the United States Constitution and corresponding provisions of Pennsylvania's Constitution. Additionally, state action to force an EGS to relinquish its name, under which it has done business for many years, is a serious impingement on rights protected under federal trademark law and would take valuable private property interests without just compensation in contravention of the Fifth and Fourteenth Amendments to the United States Constitution and corresponding provisions of Pennsylvania's Constitution. However, at the most fundamental level, the proposed regulation is unlawful because the Pennsylvania Public Utility Code does not authorize the Commission to force a non-jurisdictional holding company to abandon its naming rights or an EGS to relinquish its trade name as a condition precedent to doing business in Pennsylvania's unregulated retail market for competitive electric services. The Commission, therefore, should strike Section 54.122(11)(3)(v) from its Proposed Rules.

A. The Public Utility Code Does Not Authorize The Restriction On Naming Rights That The Proposed Rules Would Impose

The Proposed Rules are not the first time the Commission considered how competitive affiliates of EDCs may do business in Pennsylvania and promote their products and services. When presented directly with the issue of demarcating the lawful scope of its regulatory authority over competitive suppliers, the Commission held that "[a]ny utility or supplier is free to *promote themselves and their products as they deem fit, using their own funds.*"[16]

The Proposed Rules are a complete reversal of the Commission's earlier position, which acknowledged the absence of legal authority to intrude – as the Commission is now attempting – on EGSs' right to do business in the unregulated market for competitive electricity services. Remarkably, the Proposed Rulemaking Order does not mention the Commission's prior precedent nor does it explain where the Commission discovered the alleged authority which, until now, it had conceded it did not possess. The Commission's reluctance to deal with this fundamental issue is understandable because there is no authority in the Public Utility Code for the Commission's proposed restriction on parent company and EGS naming rights.

The Commission will likely try to frame the proposed regulation as a restriction on EGSs. In reality, the proposed regulation is an attempt to control the naming rights – and the managerial

[16] *Application of PECO Energy Company for Approval of its Restructuring Plan under Section 2806 of the Public Utility Code*, Docket No. R-00973953 (Order on Revised Compliance Filing entered February 26, 1998), p. 27 (hereafter, "*PECO Compliance Order*"). In that case, PECO Energy challenged elements of the Commission's Customer Education Program that PECO Energy contended would require it to carry a message that did not, or may not, reflect its views. In responding to PECO Energy, the Commission drew a distinction between the "objective" consumer education messages that are funded by customer rates, the content of which was within its jurisdiction, and all other forms of utility and EGS speech, including marketing and promotional messages, which the Commission held it did *not* have authority to control.

discretion – of parent holding companies. While the Commission may contend that it has some regulatory authority over EGSs – which it is clearly overstepping in any event, as explained below – it has no jurisdiction over parent holding companies that are neither EGSs nor public utilities under Pennsylvania law. By purporting to restrict EGSs from doing business under a name they share with their parent, the Commission is, in effect, trying to dictate to non-jurisdictional parent corporations how they may exercise their corporate authority – and, by extension, their fiduciary responsibility to their shareholders – to create, name and operate subsidiary companies doing business in the unregulated market for competitive electricity services. In short, the Proposed Rules would reach far beyond the limits of the Commission's jurisdiction and, therefore, are unlawful on that basis alone.

It is equally unavailing for the Commission to contend that the proposed regulation is a lawful exercise of its regulatory authority over EGSs. As previously explained, the Commission rejected that position in the *PECO Compliance Order* when it held that "[a]ny utility or supplier is free to promote themselves and their products as they deem fit." Indeed, there is no basis within the four corners of the Public Utility Code for the Commission to impose the naming restrictions set forth in Section 54.122(3)(v).

Section 2809(b) of the Public Utility Code, 66 Pa.C.S. § 2809(b), which is the principal source of the Commission's authority over EGSs, is extremely narrow, as one would expect given that EGSs are fundamentally non-regulated entities offering products and services in a competitive market. Specifically, Section 2809(b) provides that the Commission shall issue an EGS license to any qualified applicant upon a finding that the applicant is "fit, willing, and able" to properly perform the proposed service and conform with the Public Utility Code and the

Commission's regulations and orders, and that the proposed service is consistent with the public interest and the policies of the Competition Act.

The narrow scope of the Commission's authority under Section 2809(b) is reinforced by the Declaration of Policy for the Electricity Generation Customer Choice and Competition Act, 66 Pa.C.S. § 2802, which expresses the Commission's limited authority solely in terms of licensing and financial responsibility requirements and consumer protection safeguards such as "billing practices." When the Pennsylvania Supreme Court was called upon to interpret the provisions of the Public Utility Code defining the Commission's authority over EGSs, it held that the Commission's authority extends no further than the requirements specifically delineated in Section 2809(e) of the Public Utility Code, 66 Pa.C.S § 2809(e), namely, " those requirements necessary to ensure that the present quality of service provided by electric utilities does not deteriorate, including assuring that adequate reserve margins are maintained and assuring that 52 Pa. Code Ch. 56 (relating to standards and billing practices for residential utility service) are maintained." *Delmarva Power & Light Co. v. Cmwlth. of Pa. et al.*, 582 Pa. 338, 355, 870 A.2d 901, 911 (2005). None of those requirements empower the Commission to impose the kind of naming restrictions embodied in the Proposed Rules. In short, the plain language of applicable provisions of the Public Utility Code, as interpreted by the Pennsylvania Supreme Court, do not permit the Commission to wield the kind of pervasive regulatory power over EGSs attempted in Section 5.122(3)(v).

In its response to Section 8 of the Regulatory Analysis Form (p. 2), the Commission also cites Section 2811(a), 66 Pa.C.S. § 2811(a), as purported authority for the Proposed Rules. However, Section 2811 does not provide authority for the Commission to adopt any regulations, let alone a regulation that prohibits sharing of a name by an EGS and its parent. Section 2811(a) only authorizes the Commission to "*monitor* the market for supply and distribution of electricity to retail customers" and to "take steps *as set forth in this section* to prevent anticompetitive or discriminatory conduct and the unlawful exercise of market power" (emphasis added). Succeeding subsections (b) through (d) of Section 2811[17] make it clear that the **only** authority granted to the Commission is to "conduct an investigation," "refer its findings to the Attorney General, the United States Department of Justice, the Securities and Exchange Commission or the Federal Energy Regulatory Commission," disclose information obtained in its investigation to the referral agency, and intervene in any proceeding initiated by the referral agency. Nothing in Section 2811 furnishes authority for the Commission to adopt Section 5.122(3)(v).

Additionally, the Commission has not established that the "disclaimers" required from affiliated EGSs and EDCs under the current Section 54.122(2)(ii) are inadequate to impress on consumers the fact that an EGS is different from its affiliated EDC. In the case of FirstEnergy Corp., that is a non-issue because, as previously explained, FES's name is not the same or similar to the Companies' names. Thus, in addition to a total lack of authority for the proposed regulation, the Commission's failure to provide any evidentiary basis to establish – or even suggest – that its name-change requirement is the **only** way to promote robust competition renders the regulation arbitrary and capricious. This point is addressed in greater depth in Section B., below, which explains that the proposed regulation is more extensive than necessary to address the governmental interest the Commission is allegedly promoting.

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[17] Section 2811(e) clearly does not provide authority for the proposed regulation because it applies only to "proposed mergers, consolidations, acquisitions or dispositions." And, even in those instances, Section 2811(e) does not confer affirmative authority on the Commission to do anything except "consider" competitive effects in exercising authority granted elsewhere in the Public Utility Code to approve "mergers, consolidations, acquisitions or dispositions." Section 2811(e), like the rest of Section 2811, says nothing that could be construed to authorize the Commission to adopt regulations controlling EGSs' commercial speech.

B. Use Of A Corporate Name Is Protected By The First Amendment to the United States Constitution

As evidenced by the Commission's holding in the *PECO Compliance Order*, *supra*, the constitutional protection of free speech as well the lack of authority under state law limits the Commission's ability to restrict how alternative energy suppliers may market and promote their products and services. Unfortunately, the Commission ignored those constitutional limitations on state action in crafting Section 54.122(3)(v). Applying long-standing United States Supreme Court authority, it is clear that a parent company's right to name its subsidiary EGS, and the EGS's right to do business under a name similar to its parent's, is protected commercial speech.

The First Amendment to the United States Constitution as applied to the states through the Fourteenth Amendment "protects commercial speech from unwarranted governmental regulation." *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561 (1980) ("*Central Hudson*"). *Central Hudson* dealt specifically with the limitations that constitutional free speech protection imposed on a state utility commission's ability to control commercial speech. Therefore, *Central Hudson's* holding is directly applicable here.

In *Central Hudson*, the United States Supreme Court established a four-part test to ascertain the legality of a restriction on commercial speech. First, to merit protection under the First Amendment, the speech in question should "at least . . . concern lawful activity and not be misleading." Second, an attempted restriction on commercial speech must be in furtherance of a legitimate, substantial governmental interest to have any claim of validity. If the speech is otherwise subject to First Amendment protection and the governmental interest allegedly promoted by the proposed restriction is "legitimate" and "substantial," then two further lines of inquiry must be pursued. Specifically, the third and fourth steps of the *Central Hudson* test determine whether the attempted speech restriction "directly advances the substantial governmental interest asserted" as the basis for that regulation and "whether [the regulation] is not more extensive than necessary to serve [that] interest." 447 U.S. at 566.

Finally, in applying *Central Hudson*, the Supreme Court held that government must provide substantial evidentiary support – not "mere speculation or conjecture" – for state action that seeks to control commercial speech:

> It is well established that "[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it. . . ." This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms *it recites are real and that its restriction will in fact alleviate them* to a material degree.

Edenfield v. Fane, 507 U.S. 761, 770-71 (1993) (internal citations omitted).

The proposed ban on EGSs and parent companies sharing names does not satisfy the *Central Hudson* test. Applying the first step of that test, there is no question that the naming rights the Proposed Rules would abrogate are protected speech because the United States Supreme Court has held that a corporation's trade name is a form of commercial speech entitled to First Amendment protection. *See Friedman v. Rogers*, 440 U.S. 1 (1979). The second step of the *Central Hudson* test assesses the legitimacy and substantiality of the governmental interest that is asserted as the basis for restricting commercial speech. The Commission's proposed revisions to the Code of Conduct fail this test because there is no evidentiary basis for its alleged "genuine concern . . . that incumbent utilities would directly or indirectly favor affiliated EGSs"[18] and certainly no evidence that such a "concern" would qualify as a "substantial" government interest for purposes of *Central Hudson*. Additionally, the Commission cannot satisfy the third leg of the *Central Hudson* test because it did not establish by substantial (or any)

18 *See* Proposed Rulemaking Order, pp. 2-3.

evidence that the proposed restriction on naming rights would advance its asserted interest or that there is, in fact, any nexus between the asserted interest (i.e., a "concern" that EDCs would show "favoritism" to affiliated EGSs) and the proposed ban on EGSs and their parent companies having similar names. Finally, the fourth part of the *Central Hudson* test also invalidates the Commission's attempted intrusion on protected speech rights because the Commission has not demonstrated that such a restriction will advance its interest in a manner that "is not more extensive than necessary to serve [that] interest." In fact, the existing Code of Conduct (which the Proposed Rules would strengthen or augment) already directly targets, in an effective but much less extensive manner, the specific EDC behavior that allegedly raised the Commission's "concerns" about EDC favoritism by prescribing a host of "disclaimers" and prohibitions against: selective dissemination or disclosure of customer information; false or deceptive advertising; tying the provision of distribution service to the purchase of competitive products or services; implying that delivery service will be of higher quality if generation is purchased from the EDC's affiliate; EDC subsidization of an affiliated EGS; and sharing of employees.

As previously explained, there is no basis for the Commission's claim that regulations promulgated by utility commissions in other jurisdictions support its proposed ban on sharing EGS and parent names. Proposed Rulemaking Order, p. 7. The Commission cited not a single jurisdiction that has imposed a similar prohibition. And, more significantly, all of the states the Commission purportedly relied upon as models for the Proposed Rules either impose no restriction (Illinois) or expressly permit shared names (New Jersey and Texas). *See* Exhibit B.

Finally, the Commission appears to suggest that its ban on sharing EGS and parent company names is somehow justified because it had "identified additional safeguards for a properly functioning competitive market to be included in this rulemaking in a second Motion adopted at the February 24, 2011 Public Meeting." Proposed Rulemaking Order, p. 1.[19] The attempted justification would "bootstrap" the Commission's decision to investigate the subject into a prejudgment of what that investigation might show. Such reasoning is circular and fallacious. The referenced Motion only called for "an examination of whether the Commission should require EDC-affiliated EGSs to change their trade names so as to be dissimilar from both the EDC affiliate and corporate parent." Clearly, neither that Motion nor the order entered pursuant to it provides a valid basis for the restriction on protected commercial speech embodied in the Proposed Rules.

For all of the reasons set forth above, the proposed ban on EGSs and parent companies sharing names cannot satisfy the *Central Hudson* test for permissible regulation of commercial speech, is an unlawful intrusion on rights protected under the First Amendment to the United States Constitution and, therefore, should be withdrawn.

C. Forcing A Parent Company And Its EGS Subsidiary To Relinquish, Without Compensation, The Goodwill Created By Their Shared Name Is An Unlawful Taking

The "takings clause" of the Fifth Amendment to the United States Constitution provides that private property may not be taken for public use without "just compensation." The "takings clause" applies to action of the states (including state agencies) through the Fourteenth Amendment to the United States Constitution. *Lingle v. Chevron*, U.S.A., 544 U.S. 528, 336 (2005). For purposes of the "takings clause," property may be tangible or intangible. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984). The proposed requirement that an

19 The "Motion" to which the Commission referred was made in connection with the Commission's deliberations in *Joint Application of West Penn Power Company d/b/a Allegheny Power, Trans-Allegheny Interstate Line Company and FirstEnergy Corp. for a Certificate of Public Convenience under Section 1102(a)(3) of the Public Utility Code approving a change of control of West Penn Power Company and Trans-Allegheny Interstate Line Company*, Docket Nos. A-2010-2176520, A-2010-2176732 (Order entered March 8, 2011).

EGS change its name in furtherance of the Commission's alleged public goal of enhancing the state-wide retail electric market, if adopted, would effect a taking of property without compensation. The name shared by an EGS and its parent embodies the value of goodwill created by years of doing business in the Commonwealth and, as such, is a property interest for purposes of Fifth Amendment takings analysis. *See Huntleigh USA Corp. v. United States*, 525 F.3d 1370, 1377-78 (Fed. Cir. 2008) (finding an "undisputed" property interest in business goodwill).

Whether regulatory action effects a "taking" for which compensation is due depends upon "the economic impact of the regulation on the claimant" and the "character of the governmental action." *Lingle*, 544 U.S. at 538-39 (citing *Penn. Central Transp. Co. v. New York City*, 438 U.S. 104 (1978)). In other words, is the "economic impact" of the state's action so far beyond the regulation of conduct, as generally understood, as to appropriate an interest in private property? And, is the "character of the governmental action" such that the appropriation is for a public use?

Requiring an established EGS to change its name in order to continue to do business in the Commonwealth is likely to have an enormous adverse economic impact upon, and would significantly interfere with, an EGS's "distinct investment-backed expectations." *See Ruckelshaus v. Monsanto Co., supra.* EGSs and their parent companies have made substantial investments in reasonable reliance upon existing regulations, which do not interfere with such companies' rights to adopt names that accurately reflect their corporate relationship. FES, for example, has operated in the Commonwealth for more than ten years, employs hundreds of people and deploys significant investment by its parent, FirstEnergy, which was used to build its brand in Pennsylvania. The proposed regulation, if adopted, would require EGSs to start over to build goodwill under an entirely different name. Consequently, the economic impact of the proposed regulation has constitutional significance. *See Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989).

Moreover, although government action may further a legitimate government interest or "public purpose,"[20] that alone does not relieve the legal necessity to furnish just compensation. *Cienega Gardens v. United States*, 331 F.3d 1319, 1340 (Fed. Cir. 2003) ("Congress' purpose in enacting the statutes may have been entirely legitimate but the government has not shown that the actions Congress took . . . were within its powers to exercise without also granting compensation."). Inasmuch as the Commission has not provided for any compensation (let alone "just compensation") to companies affected by the proposed ban on sharing a name, the proposed regulation would violate the "takings clause" and should be withdrawn.

D. Requiring An EGS To Change Its Corporate Name Creates An Irreconcilable Conflict With Federal Trademark Law

One of the expressly stated purposes of Federal trademark law (the "Lanham Act") is "to protect registered marks used in [] commerce from interference by State, or territorial legislation . . . ." *See* 15 U.S.C. § 1127. Consistent with that purpose, in 1982, Section 1121(b) was added to the Lanham Act to protect holders of registered trademarks from state laws requiring them to alter their trademarks. Section 1121(b), 15 U.S.C. § 1121(b), provides that "[n]o State or other jurisdiction of the United States or any political subdivision or any agency thereof may require alteration of a registered mark ...". This provision was applied in *Beatrice Foods Co. v. State of Wisconsin*, 1983 U.S. Dist. LEXIS 11771 (Nov. 11, 1983), where the Court enjoined a state from applying its advertising laws to ban the sale of the plaintiff's product under

[20] *See Lingle* at 543.

a federally registered trademark.[21] Like the state law enjoined in *Beatrice Foods*, the Commission's proposed rule would require any EGSs that have registered trademarks for their names to alter or effectively relinquish their federally registered trademarks in order to participate in the competitive retail electricity market in Pennsylvania. Accordingly, Section 54.122(3)(v) would impermissibly require the alteration of an EGS's federally registered service mark in direct conflict with the federal protection afforded under Section 1121(b) the Lanham Act. That conflict cannot be resolved except by withdrawing the proposed regulation.

IV. ACCOUNTING AND TRAINING REQUIREMENTS

The Companies' comments in this area focus on certain reporting requirements that are expressed in overly broad terms and, as a consequence, would needlessly impose costs and burdens to obtain information that does not promote the stated goals and purposes of the Proposed Rules.

A. The Requirement To Maintain A Log Of Business Transactions Between An EDC And Affiliated EGS (Section 54.122(4)(ii)(A))

Section 54.122(4)(ii)(A) of the Proposed Rules requires an EDC to "document" its "business relationship" through a "cost allocation manual" that includes, among other things, "a log of business transactions between the [EDC] and [EGS]." The requirement to maintain such a "log" is excessively broad. As written, this requirement could be interpreted to capture

21 In *Lisa's Party City, Inc. v. Town of Henrietta*, 185 F.3d 12, 14-16 (2d Cir. 1999), the Second Circuit declined to apply Section 1121(b) to bar state action that a trademark holder claimed would interfere with its use of a registered mark. However, in so doing, the Court underscored the broad and pervasive reach of Section 1121(b). In refusing to enjoin the zoning ordinance in question, which minimally restricted the color of signs in a designated geographic area, the Court held that the unique factual scenario and the "carefully delimited circumstances" of the zoning ordinance did not conflict with the interests protected by Section 1121(b) because the trademark holder was free to use its mark and trade dress "in every manifestation other than the exterior sign at the covered location – on letterhead, leaflets, billboards, magazines, newspapers, television and Internet advertising, point-of-sale displays inside the store, and external signs at other locations." *Id.* at 15-16. Unlike the zoning ordinance upheld in *Lisa's Party City, Inc. v. Town of Henrietta, supra,* the Commission's proposed regulation would preclude an EGS with a registered trademark from any use of its mark throughout the entire Commonwealth of Pennsylvania.

transactions that are governed by the Companies' respective Supplier Tariffs and, therefore, necessitate reporting every Electronic Data Interchange ("EDI") transaction between the Companies and FES. The Commission could not have intended to require EDCs to report all such transactions because doing so is burdensome, costly, and would serve no valid purpose – certainly not any of the purposes expressed in the Commission's Proposed Rulemaking Order. Additionally, reporting all such transactions could implicate valid concerns about maintaining the confidentiality of proprietary information. Moreover, EDI transactions are subject to audit by the Commission. Accordingly, Section 54.122(4)(ii)(A) should be revised to expressly provide that "business transactions" to be recorded in compliance with the "log" requirement do not include any transactions that are engaged in pursuant to an EDC's Supplier Tariff.

B. The Requirement That An EDC Report The "Work History" Of Employees Shared With, Temporarily Assigned To, Or Permanently Transferred To An Affiliated EGS (Section 54.122(4)(iii)(C))

Section 54.122(4)(iii)(C) of the Proposed Rules requires an EDC to report to the Commission each year the "work history" of each employee it "shared" with, "temporarily assigned" to or "permanently transferred" to an affiliated EGS during the previous calendar year as well as the employee's "new position with the affiliate." The directive to provide a "work history" is not reasonably defined and, therefore, could be interpreted to require an EDC to furnish a summary of the duties and responsibilities in each of many different positions held by an employee over a career spanning 20 or 25 years (or longer).

The need to assemble and accurately report such extensive information for many years prior to the date of an employee's move would be burdensome (if it could be done at all) and would not advance any of the purposes expressed in the Commission's Proposed Rulemaking Order. The reporting requirement is clearly intended to facilitate reasonable oversight of shared, temporarily assigned or transferred employees to prevent competitively-sensitive information making its way from an EDC to its affiliated EGS through the knowledge such employees might retain. However, the potential to improperly transfer competitive information in this way arises from the position(s) held by employees in the relatively recent past. Such competitively-sensitive information, by its nature, has a limited lifespan. Consequently, requiring EDCs to report extensive work histories covering many prior years of an employee's career is not necessary to allay the concerns that Section 54.122(4)(iii)(C) is designed to address. Accordingly, Section 54.122(4)(iii)(C) should be revised to provide that EDCs must furnish a reported employee's "work history" for not more than twelve months prior to the date that sharing began or the date that the assignment/transfer first occurred, and that "work history" should be defined as a listing of the employee's job titles during that period.

V. CONCLUSION

Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company request that the Commission:

1. Withdraw the "different buildings" requirement in Section 54.122(3)(ix) and withdraw Section 54.122(4)(iii)(A) or, at a minimum, substantially revise it to define permissibly shared corporate support services to include all of the functions delineated in the Illinois Commerce Commission's definition of "corporate support" (Ill. Admin. Code tit. 83, § 450.10), the New Jersey Board of Public Utilities' definition of "shared services" (N.J. Admin. Code tit. 14, §14:4-3.2), and the Texas commission's definition of "corporate support services" (Tex. Admin. Code § 25.272(c)(4)). As explained in Section II of these Comments:

    - The Commission does not have statutory authority to impose either the "different buildings" requirement or the proposed prohibition on shared corporate support services (Section II.A.);

    - The necessary evidentiary basis for imposing the proposed restrictions does not exist (Section II.B.);

    - Contrary to the Commission's contentions, the regulations adopted in the other jurisdictions that it considered as models for the proposed regulations do not impose any similar restrictions (Section II.C.);

    - The cost to comply with the proposed regulations could be substantial (estimated at $26 million to $43 million per year in operating expenses and a significant capital investment likely to exceed $100 million), and compliance efforts would require 24-36 months of intense work to disaggregate the hundreds of systems that would be affected by the shared services prohibition as set forth in the proposed regulations. All of the attendant costs, incurred to implement a government mandate, would be recoverable as legitimate increases to the Companies' cost of service and, therefore, would increase customers' rates for distribution service (Section II.E.);

    - The Commission has failed to provide any credible evidence that the substantial costs of compliance would yield any benefits to customers. In fact, the proposed regulations cannot survive any reasonable quantitative assessment of costs and benefits (Section II.E.)

2. Withdraw the prohibition in Section 54.122(3)(v) on an EGS sharing a name that is the same or similar to the name of its parent. As explained in Section III of these Comments:

- The Commission does not have authority to impose the proposed limitation on EGS naming rights. The Pennsylvania Supreme Court has expressly held that the Commission's authority over EGSs derives solely from Section 2809(e) of the Public Utility Code, 66 Pa.C.S §2809(e), which limits the Commission to imposing only " those requirements necessary to ensure that the present quality of service provided by electric utilities does not deteriorate, including assuring that adequate reserve margins are maintained and assuring that 52 Pa. Code Ch. 56 (relating to standards and billing practices for residential utility service) are maintained." *Delmarva Power & Light Co. v. Cmwlth. of Pa. et al.*, 582 Pa. 338, 355, 870 A.2d 901, 911 (2005) (Section III.A.);

- The Commission has previously found that it does not have authority to interfere with an EGS's marketing efforts in the way it now proposed to do. *PECO Compliance Order*, Docket No. R-00973953 (Order on Revised Compliance Filing entered February 26, 1998), p. 27 ("[a]ny utility or supplier is free to promote themselves and their products as they deem fit, using their own funds.")(Section III.A.)

- The proposed prohibition on EGS naming rights would be an unlawful intrusion on constitutionally protected commercial speech in direct contravention of the United States Supreme Court's holding in *Central Hudson, supra* (Section III.B.);

- The proposed prohibition on EGS naming rights would be an unlawful "taking" without just compensation (Section III.C.);

- The proposed prohibition on EGS naming rights would violate the protection afforded a Federal trademark under the Federal Lanham Act which expressly protects "registered marks used in [] commerce from interference by State, or territorial legislation . . ." 15 U.S.C. § 1121(b) (Section III.D.);

3. Revise Section 5.122(4)(ii)(A) to provide that the "log" of business transactions between and EDC and its affiliated EGS does not need to include transactions engaged in pursuant to an EDC's Supplier Tariff (Section IV.A.);

4. Revise Section 5.122(4)(iii)(B) to provide that the "work history" to be reported for employees shared, temporarily assigned or permanently transferred need not extend more than twelve months prior to the date that sharing began or the assignment/transfer first occurred and that "work history" is defined as a listing of the employee's job titles during that period (Section IV.B.).

The Companies appreciate the opportunity the Commission has provided to submit comments on the proposed revisions to the Code of Conduct and request that the Commission reflect all of the Companies' Comments in developing any final regulations that might be adopted at this docket.

Respectfully submitted,

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West Penn Power Company

Date: March 27, 2012

EXHIBIT A

REGULATORY ANALYSIS FORM
SUBMITTED BY THE COMMISSION TO THE IRRC

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Regulatory Analysis Form

(Completed by Promulgating Agency)

(All Comments submitted on this regulation will appear on IRRC's website)

INDEPENDENT REGULATORY REVIEW COMMISSION

2012 JAN 27 P 12:02

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IRRC Number: 2929

(1) Agency:
Pennsylvania Public Utility Commission

(2) Agency Number: L-2010-2160942

Identification Number: 57-287

(3) PA Code Cite: 52 Pa. Code § 54.122

(4) Short Title: Proposed Rulemaking for Revision of 52 Pa. Code Chapter 54 Pertaining to Code of Conduct, § 54.122

(5) Agency Contacts (List Telephone Number and Email Address):

Primary Contact: Aspassia V. Staevska, Assistant Counsel, Pennsylvania Public Utility Commission, Law Bureau, Commonwealth Keystone Building, P.O. Box 3265, Harrisburg, PA 17105; Phone: 717.425.7403; Fax: 717.783.3458; Email: astaevska@pa.gov

Secondary Contact: Robert F. Young, Deputy Chief Counsel, Pennsylvania Public Utility Commission, Law Bureau, Commonwealth Keystone Building, P.O. Box 3265, Harrisburg, PA 17105; Phone: 717.787.5000; Fax: 717.783.3458; Email: rfyoung@pa.gov

(6) Type of Rulemaking (check applicable box):

- ☒ Proposed Regulation
- ☐ Final Regulation
- ☐ Final Omitted Regulation
- ☐ Emergency Certification Regulation;
  - ☐ Certification by the Governor
  - ☐ Certification by the Attorney General

(7) Briefly explain the regulation in clear and nontechnical language. (100 words or less)

The Electricity Generation Customer Choice and Competition Act (the "Act") provides retail electric customers subject to the Commission's jurisdiction with the option to obtain their generation service from an electric generation supplier, as opposed to the incumbent electric distribution company. 66 Pa.C.S. § 2801, *et seq*. The Commission has adopted customer choice regulations necessary to the performance of its duties under the Act. 52 Pa. Code § 54.1, *et seq*. The proposed revisions to the Code of Conduct regulations are designed to prevent cross subsidization between electric distribution companies and their affiliated electric generation suppliers, to minimize customer confusion resulting from the use of similar names, symbols, and marks, and to add additional transparency to shared corporate services between the electric distribution companies and their affiliated electric generation suppliers.

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(8) State the statutory authority for the regulation. Include specific statutory citation.

66 Pa.C.S. § 501 (b) Administrative authority and regulations.--The commission shall have general administrative power and authority to supervise and regulate all public utilities doing business within this Commonwealth. The commission may make such regulations, not inconsistent with law, as may be necessary or proper in the exercise of its powers or for the performance of its duties.

66 Pa.C.S. § 504. Reports by public utilities
The commission may require any public utility to file periodical reports, at such times, and in such form, and of such content, as the commission may prescribe, and special reports concerning any matter whatsoever about which the commission is authorized to inquire, or to keep itself informed, or which it is required to enforce. The commission may require any public utility to file with it a copy of any report filed by such public utility with any Federal department or regulatory body. All reports shall be under oath or affirmation when required by the commission.

66 Pa.C.S. § 505. Duty to furnish information to commission; cooperation in valuing property
Every public utility shall furnish to the commission, from time to time, and as the commission may require, all accounts, inventories, appraisals, valuations, maps, profiles, reports of engineers, books, papers, records, and other documents or memoranda, or copies of any and all of them, in aid of any inspection, examination, inquiry, investigation, or hearing, or in aid of any determination of the value of its property, or any portion thereof, and shall cooperate with the commission in the work of the valuation of its property, or any portion thereof, and shall furnish any and all other information to the commission, as the commission may require, in any inspection, examination, inquiry, investigation, hearing, or determination of such value of its property, or any portion thereof.

66 Pa.C.S. § 506. Inspection of facilities and records

66 Pa.C.S. § 508. Power of the commission to vary, reform and revise contracts

66 Pa.C.S. § 701. Complaints

66 Pa.C.S. § 1301. Rates to be just and reasonable

66 Pa.C.S. § 1304. Discrimination in rates

66 Pa.C.S. § 1502. Discrimination in service

66 Pa.C.S. §1505. Proper service and facilities established on complaint

66 Pa.C.S. §§ 1701-1705. Accounting and budgetary matters

66 Pa.C.S. §§ 2101-2107. Relations with affiliated interests

66 Pa.C.S. § 2804. Standards for restructuring of electric industry
The following interdependent standards shall govern the commission's assessment and approval of each public utility's restructuring plan, oversight of the transition process and regulation of the restructured electric utility industry:

(3) The commission shall require the unbundling of electric utility services, tariffs and customer bills to separate the charges for generation, transmission and distribution. The commission may require the unbundling of other services.

66 Pa.C.S. § 2807

(d) Consumer protections and customer service.--The electric distribution company shall continue to provide customer service functions consistent with the regulations of the commission, including meter reading, complaint resolution and collections. Customer services shall, at a minimum, be maintained at the same level of quality under retail competition.

(1) The commission shall establish regulations to ensure that an electric distribution company does not change a customer's electricity supplier without direct oral confirmation from the customer of record or written evidence of the customer's consent to a change of supplier.

(2) The commission shall establish regulations to require each electric distribution company, electricity supplier, marketer, aggregator and broker to provide adequate and accurate customer information to enable customers to make informed choices regarding the purchase of all electricity services offered by that provider. Information shall be provided to consumers in an understandable format that enables consumers to compare prices and services on a uniform basis.

66 Pa.C.S. § 2809. Requirements for electric generation suppliers

66 Pa.C.S. § 2811

(a) Monitoring competitive conditions.--The commission shall monitor the market for the supply and distribution of electricity to retail customers and take steps as set forth in this section to prevent anticompetitive or discriminatory conduct and the unlawful exercise of market power.

(9) Is the regulation mandated by any federal or state law or court order, or federal regulation? Are there any relevant state or federal court decisions? If yes, cite the specific law, case or regulation as well as, any deadlines for action.

No.

(10) State why the regulation is needed. Explain the compelling public interest that justifies the regulation. Describe who will benefit from the regulation. Quantify the benefits as completely as possible and approximate the number of people who will benefit.

The regulation is needed to foster the continued development of Pennsylvania's retail electricity competitive market, to prevent cross subsidization of services between electric distribution companies and their affiliated electric generation suppliers, to provide transparency in the provision of services in the retail electricity market, and to forbid deceptive practices that result in customer confusion. Most electricity consumers in the Commonwealth are likely to benefit from this regulation. The Pennsylvania Public Utility Commission will also benefit from the proposed enhancements in its oversight functions in the retail electricity market.

(11) If data is the basis for this regulation, please provide a description of the data, explain in detail how the data was obtained, and how it meets the acceptability standard for empirical, replicable and testable data that is supported by documentation, statistics, reports, studies or research. Please submit data or supporting materials with the regulatory package. If the material exceeds 50 pages, please provide it in a searchable electronic format or provide a list of citations and internet links that, where possible, can be accessed in a searchable format in lieu of the actual material. If other data was considered but not used, please explain why that data was determined not to be acceptable.

N/A

(12) Describe who and how many people will be adversely affected by the regulation. How are they affected?

All electric distribution companies in the Commonwealth will need to follow new reporting requirements. While these additional reporting requirements will likely involve more work and time, we do not anticipate that they will be unduly burdensome.

In order to compete more fairly in the retail electricity market and achieve needed transparency, electric distribution companies and their affiliated electric generation suppliers will need to disengage from sharing certain corporate services and physically separate their shared offices.

Pennsylvania electricity consumers are not expected to be adversely affected by the regulation.

(13) List the persons, groups or entities that will be required to comply with the regulation. Approximate the number of people who will be required to comply.

Electric distribution companies and electric generation suppliers providing services in the Commonwealth will be required to comply with the regulation.

(14) Provide a specific estimate of the costs and/or savings to the **regulated community** associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

The costs and savings are difficult to estimate at the present time because of the varying nature and degree of shared corporate services and offices between electric distribution companies and their affiliated electric generation suppliers. The costs related to the proposed reporting requirements are not expected to be burdensome.

(15) Provide a specific estimate of the costs and/or savings to **local governments** associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

No undue costs and/or savings are anticipated.
(16) Provide a specific estimate of the costs and/or savings to **state government** associated with the implementation of the regulation, including any legal, accounting, or consulting procedures which may be required. Explain how the dollar estimates were derived. No undue costs and/or savings are anticipated.
(17) In the table below, provide an estimate of the fiscal savings and costs associated with implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years. N/A

	Current FY Year	FY +1 Year	FY +2 Year	FY +3 Year	FY +4 Year	FY +5 Year
SAVINGS:	$	$	$	$	$	$
Regulated Community						
Local Government						
State Government						
Total Savings						
COSTS:						
Regulated Community						
Local Government						
State Government						
Total Costs						
REVENUE LOSSES:						
Regulated Community						
Local Government						
State Government						
Total Revenue Losses						

(17a) Provide the past three year expenditure history for programs affected by the regulation. N/A

Program	FY -3	FY -2	FY -1	Current FY

(18) Explain how the benefits of the regulation outweigh any cost and adverse effects.

While the costs associated with the regulation are not fully known at the present time, there will be significant economic benefits to Pennsylvania electricity consumers resulting from the elimination of cross subsidization of service between electric distribution companies and their affiliated electric generation suppliers. The regulation promotes additional market transparency mechanisms aimed at fostering a competitive retail electricity market, as well as measures that guard against deceptive practices resulting in customer confusion.

(19) Describe the communications with and input from the public and any advisory council/group in the development and drafting of the regulation. List the specific persons and/or groups who were involved.

On March 18, 2010, the Commission issued an Advance Notice of Proposed Rulemaking (ANOPR) seeking input from the regulated community, statutory advocates, and interested parties. The following parties provided comments in response to the ANOPR: the Pennsylvania Office of Consumer Advocate; the Energy Association of Pennsylvania; the National Energy Marketers Association; the Pennsylvania Energy Marketers Coalition; West Penn Power Company; Metropolitan Edison Company; Pennsylvania Electric Company; and Pennsylvania Power Company.

Pursuant to a second Motion adopted at the Public Meeting of February 24, 2011, the Pennsylvania Public Utility Commission identified additional safeguards for a properly functioning competitive market to be included in this rulemaking. The additional safeguards, along with the received comments pursuant to the ANOPR, were taken into consideration in developing and drafting the regulation.

(20) Include a description of any alternative regulatory provisions which have been considered and rejected and a statement that the least burdensome acceptable alternative has been selected.

N/A

(21) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulations.

No.

(22) How does this regulation compare with those of other states? How will this affect Pennsylvania's ability to compete with other states?

Most states that allow shopping in the retail electricity sector have similar, if not more stringent, provisions to the proposed regulation. For instance, Texas' Code of Conduct establishes safeguards that govern the interaction between utilities and their affiliates in a way that avoids potential market-power abuses and cross-subsidization between regulated and unregulated activities. Contracts between utilities and their affiliates need to follow competitive bidding practices. 16 TAC §§ 25.272-3.

Illinois has a similar regulation that governs the relationship between electric utilities and their affiliates and prohibits discrimination against unaffiliated interests. 83 Ill. Adm. Code 450.

The New Jersey Board of Public Utilities (BPU) has adopted regulations governing the relationship between electric distribution companies and their affiliates. N.J.A.C. 14:4-3.1, *et seq.* This regulation also applies to incumbent gas utilities and their competitive affiliates. The New Jersey BPU has recently proposed to readopt its Energy Competition Rules at N.J.A.C. 14:4, with minor amendments unrelated to affiliate relations.

The Maryland Public Service Commission has promulgated regulations governing the relationship between incumbent gas and electric utilities and their affiliated competitive suppliers. Code of Maryland Regulations (COMAR), 20.40.01.01, *et seq.* The regulation identifies authorized utility-affiliate transactions, prohibited transactions and conduct, rules on sharing of personnel, record and reporting requirements for these transactions.

The Public Utility Commission of Ohio has adopted regulations requiring corporate separation of incumbent utilities and affiliated competitive suppliers. Ohio Annotated Code (OAC Ann.) 4901:1-37-01, *et seq.*

The Massachusetts Department of Public Utilities has adopted regulations governing the relationship between electric distribution companies and their competitive supplier affiliates. 220 CMR 12.01, *et seq.* The regulations identify prohibited transactions, anti-competitive practices, structural separation requirements, etc.

Other jurisdictions that have adopted similar codes of conduct include Michigan, Maine, Connecticut, New Hampshire, and Oregon.

The prevalence of these codes of conduct in jurisdictions that allow retail electricity shopping is a strong indication of the necessity to develop stringent regulations that guard against cross subsidization and promote competitive markets. To ensure that these goals are met and that Pennsylvania competes with other states effectively, it is necessary for the Commission to revise its regulation as proposed.

(23) Will the regulation affect any other regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations. No.
(24) Submit a statement of legal, accounting or consulting procedures and additional reporting, recordkeeping or other paperwork, including copies of forms or reports, which will be required for implementation of the regulation and an explanation of measures which have been taken to minimize these requirements. None.
(25) Please list any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, elderly, small businesses, and farmers. N/A
(26) Include a schedule for review of the regulation including: A. The date by which the agency must receive public comments: 45 days after publication in *Pa.B.* B. The date or dates on which public meetings or hearings will be held: ____N/A________ C. The expected date of promulgation of the proposed regulation as a final-form regulation: 2012 - 2013 D. The expected effective date of the final-form regulation: upon publication E. The date by which compliance with the final-form regulation will be required: _____TBD_______ F. The date by which required permits, licenses or other approvals must be obtained: ______N/A______
(27) Provide the schedule for continual review of the regulation. Review will be provided as needed.

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FACE SHEET
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BY Amy M. Elliott (DEPUTY ATTORNEY GENERAL)	Pennsylvania Public Utility Commission (AGENCY)	BY Bohdan R. Pankiw Bohdan R. Pankiw Chief Counsel
JAN 10 2012 DATE OF APPROVAL	DOCUMENT/FISCAL NOTE NO. L-2010-2160942/57-287	8/25/2011 DATE OF APPROVAL
	DATE OF ADOPTION August 25, 2011	
☐ Check if applicable Copy not approved. Objections attached	BY Rosemary Chiavetta Rosemary Chiavetta TITLE Secy (SECRETARY)	☐ Check if applicable. No Attorney General approval or objection within 30 days after submission.

L-2010-2160942
Proposed Rulemaking
Revisions to Code of Conduct at
52 Pa. Code Section 54.122
52 Pa. Code, Chapter 54

The Pennsylvania Public Utility Commission on August 25, 2011, adopted a proposed rulemaking order which amends the Commission's existing regulations regarding competitive safeguards to be consistent with Chapter 28 of the Electricity Generation Customer Choice and Competition Act. The contact person is Aspassia Staevska, Law Bureau, 425-7403.

EXECUTIVE SUMMARY

L-2010-2160942/57-287

Rulemaking Re: Code of Conduct

52 Pa. Code § 54.122

On March 18, 2010, the Public Utility Commission (PUC) issued an Advance Notice of Proposed Rulemaking (ANOPR) seeking input from the regulated community, statutory advocates, and interested parties on revisions to the Code of Conduct regulations applicable to electric distribution companies and electric generation suppliers engaged in the retail electricity market within the Commonwealth of Pennsylvania. Numerous parties provided comments in response to the ANOPR.

Pursuant to a second Motion adopted at the Public Meeting of February 24, 2011, the PUC identified additional safeguards for a properly functioning competitive market to be included in this rulemaking. The additional safeguards, along with the received comments pursuant to the ANOPR, were taken into consideration in developing and drafting the regulation. The PUC issued the proposed regulation on August 25, 2011.

The proposed revisions to the regulation are designed to foster the continued development of Pennsylvania's retail electricity competitive market. Specifically, the regulation accomplishes this goal by providing safeguards against cross subsidization between electric distribution companies and their affiliated electric generation suppliers, minimizing customer confusion resulting from the use of similar names, symbols, and marks, and adding additional transparency to shared corporate services between the electric distribution companies and their affiliated electric generation suppliers.

The contact persons for this proposed rulemaking are Aspassia V. Staevska (717.425.7403; astaevska@pa.gov), and Robert F. Young (717.787.5000; rfyoung@pa.gov).

EXHIBIT B

SUMMARY OF REGULATIONS IN
OTHER JURISDICTIONS CONSIDERED BY
THE COMMISSION

Summary of Select Code of Conduct Provisions in States Cited by the PAPUC in the IRRC Regulatory Analysis Form for Revisions to 52 Pa. Code §54.122

	Statutory Authority	Is Physical Separation in Different Buildings Required?	Restrictions on EGS Name	Shared Services[1]	Cost Allocation Manual
TX	V.T.C.A., Utilities Code §39.051(d) (excerpted in Proposed Comments)	No. • Physical separation in the *same* building permitted under 25 Tex. Admin. Code §25.272(d)(5).	• No requirement to change name to differ from affiliated EDC or corporate parent. • Only restriction is that prior to 9/1/2005, competitive affiliate may not use utility corporate name, trademark, brand or logo in advertising without a disclaimer. §25.272(h)(1)	• Expansive definition of corporate support services that allows EGS and EDC to share *common officers/directors, property,* equipment, IT system, legal services, etc. as long as utility implements adequate safeguards to prevent transfer of confidential information or create opportunity for preferential treatment. §25.272(d)(3)	Not required, but must maintain sufficient records to allow for an audit if requested by the commission. §25.272(d)(6), (e)(2)
IL	220 Ill. Comp. Stat. 16-119A, 16-121 (excerpted in Proposed Comments)	No physical separation provision.	• Restriction against joint marketing. Ill. Admin. Code tit. 83, §450.25(a) • However, the regulations explicitly provide that nothing in that restriction "shall be construed as prohibiting an affiliated interest in competition with [EGSs] from using the corporate name or logo of an electric utility or electric utility holding company." §450.25(b)	• Carve-out for "corporate support" includes: corporate oversight and governance involving administrative services financial management services, data processing, shareholder services, human resources, employee benefits, regulatory affairs, legal services, lobbying, non-marketing research and development activities, and strategic planning. §450.10	Yes. §450.140(d)

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[1] Section 54.122(11)(4)(iii) of the Pennsylvania Public Utility Commission's proposed revisions to the Code of Conduct prohibits shared employees or services except for corporate services, emergency support services, or tariff services offered to all [EGSs] on a non-discriminatory basis. Corporate support services do *not* 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.

NJ	N.J. Stat. Ann. §48:3-55 (excerpted in Proposed Comments)	No. • N.J. Admin. Code tit. 14, §14:4-3.5(e) only provides that utility may not "share office space" with competitive affiliate	• Permitted to use corporate name of affiliate with disclaimer. §14:4-3.5(k) • No disclaimer required outside of NJ. §14:4-3.5(l)	• Permits access to computer and IT systems and shared office space, office equipment, services and systems" so long as "adequate system protections are in place to prevent the accessing of information of data between the utility and its affiliate(s)" (14:4-3.5(e)(1)	Yes. §14:4-3.5(n), (o)
MD	Md. Code Ann. Pub. Util. Cos. §7-505(b)[2]	No clear restriction. • Md. Code art. 20, §40.02.02 (C)(2) only provides that "[a] utility may not operate from the same physical location used by a core service affiliate" but does not provide that they must operate in separate *buildings*.	• No restriction on EGS' use of the EDC name and logo with a disclaimer. §40.02.02 (A).	• Personnel may be shared except for operational, advertising, marketing or market research personnel and any individual that possesses competitively sensitive information that will be used in the course of performing a job function. §40.02.04.	Yes. §40.02.07

[2] Section 7-505(b)(10)(iii) provides: "On or before July 1, 2000, the Commission shall require, among other factors, functional, operational, structural, or legal separation between the electric company's regulated businesses and its non-regulated businesses or non-regulated affiliates." In addition, Section 7-505(b)(3) requires the MD PSC to order EDCs to adopt policies and practices reasonably designed to prevent discrimination or unreasonable preference in favor the EDCs affiliates and any other practices that could result in non-competitive electricity prices to customers. Finally, Section 7-505(b)(13)(ii) provides that: "the Commission shall require each [EDC] to adopt a code of conduct to be approved by the Commission by a date to be determined by the Commission to prevent regulated service customers from subsidizing the services of unregulated businesses or affiliates of the [EDC]."

OH	Ohio Rev. Code Ann. §4928.17[3]	No physical separation provision.	• No prohibition on use of shared corporate name/logo or on joint advertising. • However, joint advertising and/or marketing activities must be described in corporate separation plan, including when and where the name and logo of the EDC will be utilized and how the structural safeguards of Ohio Admin Code §4901:1-37-04(A) are met.[4]	• Employees and facilities may be shared as long as the EGS affiliate's employees do not have access to any information about the EDC's transmission or distribution systems (e.g., system operations, capability, price, curtailments, and ancillary services) that is not available to other EGSs. §4901:1-37-04(A)(4), (D)(3) • Additionally, shared representatives/employees shall clearly disclose upon whose behalf their public representations are being made. §4901:1-37-04(D)(11) • As with joint advertising, the Ohio PUC found that the regulations do not need to specifically address how separation between electric utility and affiliates' business operations is achieved and that such issues may be addressed through the complaint procedures contained in §4901:1-37-05(B)(11). Rulemaking Order at 11.	Yes. §4901:1-37-04(A)(6)

3 Ohio's statute establishing competitive retail electric service requires each utility to establish plans for corporate separation between affiliated entities. Section 49.2817(A)(3) provides: "The plan is sufficient to ensure that the utility will not extend any undue preference or advantage to any affiliate, division, or part of its own business engaged in the business of supplying the competitive retail electric service or nonelectric product or service, including, but not limited to, utility resources such as trucks, tools, office equipment, office space, supplies, customer and marketing information, advertising, billing and mailing systems, personnel, and training, without compensation based upon fully loaded embedded costs charged to the affiliate; and to ensure that any such affiliate, division, or part will not receive undue preference or advantage from any affiliate, division, or part of the business engaged in business of supplying the noncompetitive retail electric service."

4 Upon application for rehearing on, *inter alia*, modifications to the code of conduct regulations, the Ohio PUC specifically found that it would be unduly restrictive to prohibit joint advertising between an electric utility and its affiliates and found that the complaint procedure under the regulations is more appropriate than the rulemaking to address corporate separation issues. *In the Matter of Amended Substitute Senate Bill No. 221*, Case No. 08-777-EL-ORD, 2009 WL 382486, at *11 (Ohio P.U.C. Feb. 11, 2009) ("Rulemaking Order").

MA	Mass. Gen. Laws ch. 164, §1C[5]	No clear restriction. • Mass Regs. Code tit. 220, §12.03(15) only provides that EDCs *employees shall be* "physically separated" from those of the EGS but does not include separate building requirement. • In addition, the Department may approve an exemption from this requirement upon a showing by the EDC that shared facilities would be in the best interests of the ratepayers and have minimal anticompetitive effect, and that the costs can be fully and accurately allocated between EDC and EGS. §12.03(17)	• Use of EDC's corporate name or logo by EGS permitted with a disclaimer that no advantage accrues to a customer in the use of the EDC's services and that a customer need not purchase any product or service from any competitive energy affiliate to obtain service from the EDC on a non-discriminatory basis. §12.03(13) • The Department specifically held that restrictions on the use of an EDC's corporate name and logo must be drafted narrowly because (1) excessive restriction could violate the EDC's First, Fifth and Fourteenth Amendment rights; (2) corporate name and logo provide valuable information to customers regarding affiliations; and (3) customer confusion is highly unlikely to occur from mere use of a corporate name or logo.[6] • *Exception*: use of EDC corporate name and logo in joint advertising/marketing. §12.03(12)	• No shared employees without exemption under §12.03(17). §12.05(15)	Yes. §12.04(4)

[5] The Massachusetts Restructuring Act requires the Massachusetts Department of Telecommunications and Energy to promulgate standards of conduct "which shall ensure the separation of [EDC] affiliates" and that prohibit various activities, including joint advertising and marketing programs. Mass. Gen. Laws ch. 164, §1C (1997). In addition the Department has the general authority to review and prescribe an EDC's relationship with its affiliate. *See id.* at §§1F, 76A, 76C, 85, 85A, 94A-C.

[6] *See In the Matter of Relationship Between Electric and Gas Distribution Companies and Their Affiliates*, 186 P.U.R.4th 491, 502-503 (Mass. D.T.E. 1998).

MI	Mich. Comp. Laws §460.10a(4)[7]	No. • §II.E of the Code of conduct only provides that a utility and EGS must "maintain separate offices."[8]	Use of EDC's corporate name or logo by EGS permitted with a disclaimer that the EGS is not regulated and its service is not regulated. Code of Conduct §II.D	• No sharing of "facilities, equipment or operating employees" among EDC, affiliate EGS and other entities within the existing corporate structure. • There is, however, a carve-out for computer hardware and software "with documented protection to prevent discriminatory access to competitively sensitive information". Code of Conduct §II.D • In its implementing Order, the Commission found that the sharing of financial, personnel and payroll information is permissible. Code of Conduct Order at 13.	No, but required to file annual compliance plan. *Code of Conduct* §VI.
ME	35-A M.R.S.A. §3205[9]	Yes. • EDC employees "must be located in a separate building from the employees of the affiliated competitive provider." Code Me. R. tit. 65-407, ch. 304 §3(K). • The Maine PUC, however, may approve an exemption from this requirement upon a showing by the EDC that shared facilities would be in the best interests of the	• No express prohibition on the use of EDC or parent corporate name or logo as long as no appearance of speaking on behalf of each other or representation that any advantage accrues to customers or others in the use of the EDC's services as a result of that customer's or others' dealing with the affiliated EGS. §3(I)(1), (2) • Prohibition against joint advertising/marketing and EDC may not promote its affiliated competitive provider or any product or service offered by the same and vice versa. §3(I)(3), (4)	• Like Massachusetts, no shared employees or telecommunications/computer systems without exemption under §3(K)(1).	Yes. §6; 35-A M.R.S.A. §3205(3)(H)

7 Michigan's Customer Choice and Electricity Reliability Act confers on the Michigan PSC the express authority to establish a code of conduct that includes "measures to prevent cross-subsidization, information sharing, and preferential treatment, between a utility's regulated and unregulated services, whether those services are provided by the utility or the utility's affiliated entities. Mich. Comp. Laws §460.10a(4)

8 In Michigan, the Code of Conduct was implemented via orders in a contested case rather than by rule. *See In the Matter of the Approval of a Code of Conduct for Consumers Energy Company and The Detroit Edison Company*, Case No. U-12134 (order entered on Dec. 4, 2000) ("Code of Conduct Order").

9 Maine's Restructuring Act requires the Maine PUC to implement rules establishing standard of conduct for EDCs and affiliated competitive providers consistent with the provisions of §3205(3), which include, *inter alia*, the requirement that "employees of an [EDC] may not be shared with, and must be physically separated from those of, an affiliated competitive provider." Me. Rev. Stat. Ann. tit. 35-A, §3205 (4).

		ratepayers and have minimal anticompetitive effect, and that the costs can be fully and accurately allocated between EDC and EGS. §3(K)(1)			
NH	N.H. Rev. Stat. §374-F:7(I)[10]	No. • Prohibits the sharing of office space but expressly provides that separation can be accomplished through "occupation of separate floors of an office building or distinct wings." N.H. Code Admin R. [PUC] §2105.02	• EDC may allow an affiliate, including a competitive energy affiliate, to use its name and logo with a disclaimer that no advantage accrues to a customer in the use of the EDC's services and that a customer need not purchase any product or service from any competitive energy affiliate to obtain service from the EDC on a non-discriminatory basis. §2105.08(a) • No disclaimer required where the name or logo is merely being used for identification of assets or employees and it is impractical to include such disclaimer (e.g. on EGS's vehicles, equipment, clothing etc). §2105.08(b)	• Shared services for "corporate support" permitted and examples include: payroll, taxes, shareholder services, insurance and risk management, IT systems, materials management and procurement, internal auditing, budget administration, call center facilities, billing and payment processing, management and maintenance of owned or leased vehicles and buildings, financial reporting corporate financial planning and analysis, corporate accounting, corporate and strategic planning, treasury services, corporate security, human resources (compensation, benefits, employment polices), employee records, regulatory affairs, lobbying, legal, engineering services other than utility system operations engineering and pension management. §2501.04(b), (c) • The rule expressly excludes employee recruiting, engineering, hedging and financial derivates and arbitrage services, purchasing of natural gas transportation and storage capacity, purchasing of electric transmission, system operations, call center personnel and telephone numbers and marketing. §2501.04(e) • Sharing of "joint corporate oversight, governance, support systems and personnel" shall not allow for the transfer of confidential information from the EDC	No, annual compliance filings are required. §2106

[10] New Hampshire's Electric Utility Restructuring Act authorizes the Commission to establish requirements for competitive electricity supplier including, *inter alia*, standards of conduct. N.H. Rev. Stat. §374-F:7(I)

				to the affiliate, create the opportunity for preferential treatment or unfair competitive advantage, lead to customer confusion or create opportunity for cross-subsidization competitive advantage, lead to customer confusion or crate opportunity for cross-subsidization. §2501.04(d)	
CT	Conn. Gen. Stat. §6-244h[11]	No. • Physical separation required but shall be accomplished, at a minimum, "preferably by occupying separate floors of an office building, or in the alternative, distinct wings." Conn. Agencies Regs §16-244h-5(d)	• Permitted to use corporate name of affiliate with disclaimer and compensation to the EDC as determined in a rate case. §16-244h-5(g)(1) • No disclaimer required outside of CT. *Id.*	• Like New Hampshire, carve-out for "corporate support" includes and is not limited to: payroll, taxes, shareholder services, insurance, financial reporting, corporate financial planning and analysis, corporate accounting, corporate security, human resources (compensation, benefits, employment polices), employee records, regulatory affairs, lobbying, legal, and pension management. It expressly excludes employee recruiting, engineering, hedging and financial derivates and arbitrage services, electric purchasing for resale, purchasing of electric transmission system operations and marketing. §16-244h-5(f)(3) • Sharing of "joint corporate oversight, governance, support systems and personnel" shall not allow for the transfer of confidential information from the EDC to the affiliate, create the opportunity for preferential treatment or unfair competitive advantage, lead to customer confusion or create opportunity for cross-subsidization. §16-244h-5(f)(1), (2)	No, but annual compliance filings are required. §16-244h-7)

[11] Section 16-244h requires the Department of Public Utility Control to establish a code of conduct that includes, *inter alia*, "measures to ensure information, revenues, expenses costs, assets, liabilities or other resources derived from or associated with providing electric transmission or distribution services by an [EDC] are not used to subsidize any generation entity or affiliate."

OR	Or. Rev. Stat. §757.646[12]	No physical separation provision.	• Sharing of name and logo permitted with a disclaimer clarifying that the affiliate is not the same as the EDC and that in order to receive service from the company a consumer does not have to purchase the services of the affiliate. Or. Admin. R. 860-038-0520. • Joint marketing/advertising prohibited. OAR 860-038-0600	• No prohibition against shared services, provided that the EDC does not provide its operational or marketing information to its competitive operations unless it makes such information available to other EGSs. OAR 860-038-0580.	No, but annual *compliance filings* are required as well as PUC access to books and records to review transactions with affiliates. OAR 860-038-0600 and -0640.

12 Chapter 757 expressly confers authority on the Oregon PUC to develop policies to eliminate barriers to the development of a competitive retail market structure, including rules establishing a code of conduct for electric companies and their affiliates to protect against market abuses. Or. Rev. Stat. §757.646. Specifically, Section 757.646(2)(c) provides the authority to "prohibit cross subsidization between competitive operations and regulated operations, including the use of electric company personnel and other resources."

EXHIBIT C

SUMMARY OF ESTIMATED COSTS TO COMPLY WITH THE "SHARED SERVICES" PROVISIONS OF THE PROPOSED CODE OF CONDUCT REVISIONS

Summary of Costs Associated with the Isolation of PA EDCs

Expenses	ME	PN	PP	WP[1]	TOTAL
Chairman of the Board	$ 462	$ 403	$ 73	$ 433	$ 1,371
CEO	291,243	253,676	46,725	272,460	864,104
FERC Policy & Compliance	533,782	478,994	53,224	506,388	1,572,388
Energy Policy	378,543	859,850	87,974	619,197	1,945,564
Finance, Strategic Planning & Operations	130,691	113,736	21,080	122,214	387,721
Information Technology	12,916,912	12,203,016	1,871,402	12,559,964	39,551,294
Accounting	*4,339,062*	*3,688,754*	*614,585*	*4,013,908*	*12,656,309*
Treasury	515,670	474,053	82,436	494,862	1,567,021
Corporate Risk	678,059	588,678	108,591	633,369	2,008,697
Business Development	218,211	185,532	32,949	201,872	638,564
Business Performance	189,289	164,664	31,753	176,977	562,683
Internal Audit	259,179	224,170	37,062	241,675	762,086
Legal	2,150,102	1,737,960	370,289	1,944,031	6,202,382
Rates	2,743,071	2,423,279	325,975	2,583,175	8,075,500
Corp/Real Estate	2,834,527	1,798,262	291,327	2,316,395	7,240,511
Corp Affairs	*590,917*	*516,026*	*94,940*	553,472	1,755,355
Communications	1,791,788	1,572,951	268,354	1,682,370	5,315,463
Human Resources	4,976,364	5,320,030	1,199,976	5,148,197	16,644,567
Total expenses shared with FES & other state EDCs	**$ 35,537,872**	**$ 32,604,034**	**$ 5,538,715**	**$ 34,070,953**	**$ 107,751,574**

Expenses[2]	ME	PN	PP	WP	TOTAL
President of Utilities	234,519	203,974	37,596	219,247	695,336
Utility Support	8,056,030	7,428,919	1,623,535	7,742,475	24,850,959
Utility Operations Support	292,285	255,014	47,214	273,650	868,163
Energy Efficiency & Conservation	9,302,353	9,721,633	9,721,633	9,721,633	38,467,252
Total expenses shared with only other state EDCs	17,885,187	17,609,540	11,429,978	17,957,004	64,881,709
Total expenses - shared with both FES and other state EDCs	**$ 53,423,059**	**$ 50,213,574**	**$ 16,968,693**	**$ 52,027,957**	**$ 172,633,283**

Shared Service - Lost Economies Range (%) [3]	15 % - 25%
Shared Service - Lost Economies Range (%) [3]	**$25.9 million - $43.2 million**

[1] West Penn Power expenses were not isolated in the FERC Form 1. Their costs are estimated at an average of ME & PE.

[2] These expenses reflect the services shared among FirstEnergy EDCs in Pennsylvania and its EDCs in other states. Because the FirstEnergy EDCs located in other states would not be subject to the prohibition on sharing of the corporation services imposed by the proposed revisions to the Pennsylvania Code of Conduct, those EDCs can continue to benefit from the economies of sharing services with other members of the FirstEnergy system. However, in order to allow avoid penalizing the non-Pennsylvania EDCs by forcing the same disaggregationon them, the services shared among EDCs must necessarily also be disaggregated.

[3] This is the assumed cost associated with the loss of economies from the isolation of the PA EDCs.
Source: *Shared Service A Benchmark Study, March 28, 2005.*

Source: 2010 FERC Form 1