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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

Comments of the
National Energy Marketers Association

The National Energy Marketers Association (NEM)[1] hereby submits comments on the Proposed Rulemaking Order [hereinafter "Proposed Rulemaking"] adopted by the Commission in the above-referenced proceeding on August 25, 2011, and published in the Pennsylvania Bulletin on February 11, 2012. In this proceeding the Commission is reviewing the existing Competitive Safeguard provisions of the Code which became effective in July 2000. In 2010, the Commission initiated this proceeding by issuing an Advance Notice of Proposed Rulemaking to consider appropriate changes to the Competitive Safeguard regulations in view of the current state of market development and changes that had taken place in the decade since the regulations were first put in place. NEM and other stakeholders submitted comments in response. Subsequently, in 2011, the Commission identified additional issue areas for consideration in the Competitive Safeguards and adopted its Proposed Rulemaking Order upon which comments are now being sought.

[1] The National Energy Marketers Association (NEM) is a non-profit trade association representing both leading suppliers and major consumers of natural gas and electricity as well as energy-related products, services, information and advanced technologies throughout the United States, Canada and the European Union. NEM's membership includes independent power producers, suppliers of distributed generation, energy brokers, power traders, global commodity exchanges and clearing solutions, demand side and load management firms, direct marketing organizations, billing, back office, customer service and related information technology providers. NEM members also include inventors, patent holders, systems integrators, and developers of advanced metering, solar, fuel cell, lighting and power line technologies.

This document reflects the views of the National Energy Marketers Association and does not necessarily reflect the views of any specific member of the Association.

In the Proposed Rulemaking the Commission proposes to divide the rules into six subject matter categories: 1) non-discrimination requirements; 2) customer requests for information; 3) prohibited transactions and activities; 4) accounting and training requirements; 5) dispute resolution procedures; and 6) penalties. In addition to the reordering of concepts, the Commission proposes a number of substantive changes to the rules including:

1) requiring utility representatives to refer customers to the Commission's retail choice website and offer to provide customers with a list of current suppliers, if a customer requests information about competitive suppliers;

2) expressly prohibiting the utility from financially subsidizing an affiliated supplier;

3) prohibiting the transfer of any regulated utility assets to an affiliated supplier at less than market value;

4) requiring a supplier to enter into a licensing agreement with a utility before using an EDC identifier (any word, term, name, symbol, device, registered or unregistered mark, or any combination thereof that identifies or is owned by an electric utility) and to use a prominent disclaimer advising that the supplier is not the same company as the utility and that a customer need not buy the supplier's services or products in order to continue receiving services from the utility;

5) prohibiting a supplier (affiliated or non-affiliated) from having the same or substantially similar name or fictitious name as the utility or its corporate parent;

6) prohibiting a supplier's employee or agent from representing itself as an employee of the utility;

7) prohibiting joint marketing, sales and promotional activities by utilities and affiliate suppliers unless the joint marketing, sales, or promotional activities are offered to all suppliers in the same manner under similar terms and conditions;

8) prohibiting the utility and affiliated suppliers from sharing office space and requiring they be physically separated by occupying different buildings; and

9) requiring that the business relationship between utility and affiliated supplier be documented in a cost allocation manual.

In response to these proposed substantive revisions to the Competitive Safeguards, NEM offers the following recommendations:

- The utilities provision of information about the Commission's PAPowerSwitch website and a list of suppliers supports the goal of educating consumers and is consistent with the policies endorsed in the Commission's on-going retail markets investigation. (Proposed Section 54.122(2)).

- The prevention of cross-subsidization between utilities and affiliated entities is central to ensuring competitive neutrality among market participants and should be expressly prohibited in the Competitive Safeguard regulations. (Sections 54.122(3)(i) and (3)(ii)).

- If a utility name is used by an entity, affiliated or non-affiliated, the entity must make proper disclosures with respect to its relationship with the utility, i.e., the focus of the regulations should be on proper disclosure regardless of the entity's affiliation. (Proposed Sections 54.122(3)(iv), (3)(v) and (3)(vi)).

NEM has explained each of these recommendations in further detail below.

I. Utility Provision of Information About Commission Retail Choice Website and Suppliers (Proposed Section 54.122(2))

The Commission has proposed to update the existing provision in the Competitive Safeguard regulations at Section 54.122(9) that currently requires the utilities to make supplier lists available to requesting customers. In proposed Section 54.122(2), the utilities obligation to disseminate a supplier list to requesting customers would be supplemented by its obligation to also provide the address of the Commission's retail choice website. NEM strongly supports this addition to the regulations as it is consistent with and reinforces all of the efforts that the Commission and the stakeholders have undertaken to promote awareness of the PAPowerSwitch site and consumers use of this helpful resource when making their electric shopping decisions. This was reinforced most recently in the Commission's Final Order approving Intermediate Work Plan in the investigation into the retail electricity market, a primary component of which

included consumer education to be achieved through utility mailings that feature the PAPowerSwitch site.[2] Indeed, when a consumer calls the utility and makes inquiry about competitive suppliers, and the utility provides the consumer with the PAPowerSwitch web address and a list of suppliers in the utility's service territory in response thereto it will have performed a valuable public service. Again, this provision aligns with the Commission's recent decision in the retail markets investigation in its endorsement of referral programs to consumers contacting the utility call center.[3] Just as important, by adhering to the Section as proposed it will ensure that the availability of energy choice is communicated to consumers in a competitively neutral fashion.

II. Prevention of Cross-Subsidization between Utilities and Affiliated Entities is Central to Ensuring Competitive Neutrality Among Market Participants (Sections 54.122(3)(i) and (3)(ii))

In NEM's May 17, 2010, comments in this proceeding we noted that one of the purposes of the Competitive Safeguard regulations set forth in current Section 54.121 is to, "prevent the cross-subsidization of service amongst customers, customer classes, or between related electric distribution companies and electric generation suppliers." NEM suggested that this goal be incorporated in the regulations through: 1) an express prohibition against subsidies of non-regulated activities by regulated entities; and also by 2) prohibiting a regulated entity from selling, releasing, or otherwise transferring assets, services or commodities that have been included in regulated rates at less than fair market value. This recommendation was drawn from NEM's own, "Uniform Code of Conduct for Regulated and Unregulated Suppliers of Energy and

[2] Docket I-2011-2237952, Final Order, entered March 2, 2012, at pages 7-12.
[3] Id. at 13-33.

Related Services and Technologies,"[4] which was adopted by NEM in 1998 and is one of its founding documents. NEM notes that the Commission proposed to adopt new Sections 54.122(3)(i) and 54.122(3)(ii) which closely follow NEM's two-fold recommendation. The proposed Sections would provide as follows:

> (i) An electric distribution company may not subsidize an affiliated electric generation supplier. Costs or overhead related to competitive nonregulated activities of an affiliated electric generation supplier may not be included in the rates of an electric distribution company.
>
> (ii) An electric distribution company may not sell, release or otherwise transfer to an affiliate electric generation supplier, at less than market value, assets, services or commodities that have been included in regulated rates.

NEM supports the Commission's proposed addition of the new Sections. NEM submits that the prevention of cross-subsidization stands as a central principle in ensuring competitive neutrality among utilities, affiliates and non-affiliates, and the proposed Sections directly respond to this issue.

III. Proper Disclosure of an Entity's Relationship with the Utility Should be the Focus of the Competitive Safeguard Regulations (Proposed Sections 54.122(3)(iv), (3)(v) and (3)(vi))

The concept of the communication of a supplier's relationship with the utility is raised in three sections of the Proposed Regulations: Section 54.122(3)(iv) pertaining to a supplier's licensing of an "EDC identifier"; Section 54.122(3)(v) that would prohibit affiliated and non-affiliated suppliers from having the same or substantially similar name to that of the utility; and Section 54.122(3)(vi) which would prohibit supplier employees and agents from representing themselves as utility employees. In its review of these provisions and the potential application to the

[4] A copy of this document was attached to NEM's May 17, 2010, comments in the instant proceeding and can also be viewed at: http://www.energymarketers.com/Documents/FinalUCC.pdf

marketplace, NEM submits, as a general proposition, that if a utility name is used by an entity, affiliated or non-affiliated, that the entity must make proper disclosures with respect to its relationship with the utility. In other words, the focus of the regulations should be on proper disclosure regardless of the entity's affiliation.

NEM believes as a long-standing principle that a utility should not speak on behalf of its unregulated affiliate or give the appearance that it is speaking on behalf of its unregulated affiliate. In addition, a utility and its unregulated affiliate should not trade upon, promote or suggest to any customer, supplier or third party that they may receive preferential treatment as a result of the affiliation. Relatedly, all suppliers, affiliated and non-affiliated, must not misrepresent the nature of their relationship with the utility in their dealings with consumers. For example, the Commission recently adopted Interim Guidelines on Marketing Standards that provide that, "A supplier shall not use bills, company name, marketing materials or consumer education materials of another supplier, distribution company, or government agency in any way that implies a relationship that does not exist." (Interim Guidelines Section F.5.). This is supplemented by the requirement in Section F.3. of the Interim Guidelines that, "door-to-door sales agent or marketing agent shall not dress in uniforms or wear any apparel that contain any branding elements that are deceptively similar to that of the local Pennsylvania distribution company (including logo)," and in Section F.1. that, "Door-to-door sales agents or marketing agents shall immediately present valid identification issued by the supplier for whom they are seeking to enroll customers. The identification shall be visible at all times, and shall accurately identify the supplier, including its legitimate trade name and logo." In addition, at Section G.1 of the Interim Guidelines it provides that, "An agent shall identify the supplier that he or she represents as an independent energy supplier, and shall identify himself or herself as a

representative of that specific supplier immediately upon first contact with the potential customer. The agent shall also make clear that he or she is not working for, and is in fact independent of the local distribution company or another supplier." The Interim Guidelines also provide in Section G.2. that affiliated suppliers shall comply with the existing provisions in the Competitive Safeguards at Section 54.122(10)[5] requiring disclosure that an affiliated company is not the same as the utility.

The Commission's Proposed Rulemaking on Marketing Standards likewise provides at Section 111.8 entitled "Agent identification; misrepresentation," that,

> (b) Upon first contact with a potential customer, an agent shall identify the supplier that he or she represents. The agent shall state that he or she is not working for, and is independent of the customer's local distribution company or other supplier. This requirement shall be fulfilled either by an oral statement by the agent, or by written material provided by the agent.
> (c) When conducting door-to door activities or appearing at a public event, an agent may not wear apparel or accessories, or carry equipment that contains branding elements, including a logo, that are deceptively similar to that of the local Pennsylvania distribution company.
> (d) A supplier may not use the name, bills, marketing materials or consumer education materials of another supplier, distribution company, or government agency in a way that suggests a relationship that does not exist.
> (e) An agent of a supplier that is an affiliate of a distribution company shall comply with the rules regarding affiliate marketing at § 54.122 (relating to the code of conduct) for an EGS and at § 62.142 (relating to the standards of conduct) for a NGS. (emphasis added).

[5] Section 54.122(10) provides in relevant part that,

> When an electric distribution company's affiliated or divisional supplier markets or communicates to the public using the electric distribution company's name or logo, it shall include a disclaimer stating that the affiliated or divisional supplier is not the same company as the electric distribution company, that the prices of the affiliated or divisional supplier are not regulated by the Commission and that a customer is not required to buy electricity or other products from the affiliated or divisional supplier to receive the same quality service from the electric distribution company. When an affiliated or divisional supplier advertises or communicates through radio, television or other electronic medium to the public using the electric distribution company's name or logo, the affiliated or divisional supplier shall include at the conclusion of any communication a disclaimer that includes all of the disclaimers listed in this paragraph.

In view of the foregoing, NEM suggests that the Commission has already addressed the issue of the communication of a supplier's relationship with the utility. This has been achieved through the provisions of the Interim Guidelines and the Proposed Rulemaking on Marketing Standards as well as existing provisions in the Competitive Safeguards at Section 54.122(10). Indeed, Section 54.122(3)(vi) of this Proposed Rulemaking, which would prohibit supplier employees and agents from representing themselves as utility employees, very closely mirrors the Interim Guidelines and Proposed Marketing Standards. All of these regulations appropriately focus on the proper disclosure of an entity's relationship, be it affiliated or non-affiliated, with the utility.

As to proposed Section 54.122(3)(iv), which would permit a supplier's licensing of an "EDC identifier" subject to the supplier's use of disclaimers, and on the other hand, Section 54.122(3)(v) which would prohibit affiliated and non-affiliated suppliers from having the same or substantially similar name to that of the utility, NEM submits that the language of the Sections appears to be contradictory. In other words, Section 54.122(3)(iv) would permit use of an EDC identifier under certain circumstances while 54.122(3)(v) would expressly and entirely prohibit it. NEM requests that the Commission resolve this inconsistency. To do so, the Commission must balance the perceived harm of the affiliate using a name similar to that of the utility with the reality of a retail marketplace that has been open for over a decade and stakeholders that built businesses and reputations founded on their legitimate business names while in compliance with the existing requirements of the Competitive Safeguard regulations at Section 54.122(10) that require an affiliate to utilize disclaimers that it is not the same company as the utility company.[6] Particularly as the retail energy marketplace continues to grow and expand, as competitive

[6] See also 62.142(a)(15) and (16) applicable to affiliated natural gas suppliers. NEM submits that the Commission has not substantiated a need to apply the stricter proposed standard to affiliated electric suppliers than that which is required of affiliated natural gas suppliers.

suppliers continue to enroll more consumers, as the utilities role as default service provider may soon be supplanted, and as marketing strategies evolve in response thereto, NEM suggests that the regulations will be well-suited to anticipate these changes by focusing on an entity's proper disclosure of its relationship with the utility, which is consistent with the Commission's approach in its Interim Guidelines and Proposed Marketing Standards.

Many of the issues associated with the communication of a supplier's relationship with the utility have been correctly and thoroughly addressed in the Interim Guidelines and Proposed Marketing Standards. To the extent that related issues need to be addressed in the Competitive Safeguard regulations, NEM recommends that the regulations recognize in a straightforward manner that if a utility name is used by an entity, affiliated or non-affiliated, that the entity must make proper disclosures with respect to its relationship with the utility.

Conclusion

NEM appreciates this opportunity to submit comments on the Commission's proposed revisions to the Competitive Safeguard regulations. We support the Commission's adoption of Competitive Safeguard regulations that ensure competitively neutral practices and dealings among the stakeholders as the foundation of a well-functioning competitive retail marketplace.

Sincerely,

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