

COMMONWEALTH OF PENNSYLVANIA



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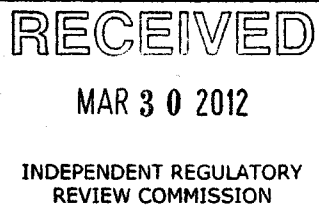
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IRWINA. POPOWSKY
Consumer Advocate

March 27, 2012

2929

Rosemary Chiavetta
Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120



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

Dear Secretary Chiavetta:

Enclosed please find the Office of Consumer Advocate's Comments, in the above-captioned proceeding.

Copies have been served upon all parties of record as shown on the enclosed Certificate of Service.

Sincerely,

A handwritten signature in black ink that reads "Barrett C. Sheridan".

Barrett C. Sheridan
Assistant Consumer Advocate
PA. Attorney ID# 61138

Enclosures

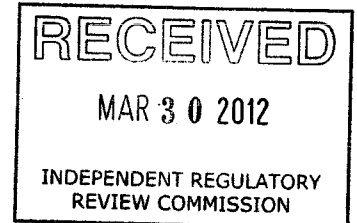
cc: Certificate of Service
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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

2929

Notice of Proposed Rulemaking for :
Revision of Electric Distribution Company : Docket No. L-2010-2160942
Code of Conduct at 52 Pa. Code § 54.122 :



COMMENTS OF THE
OFFICE OF CONSUMER ADVOCATE

I. INTRODUCTION

On August 25, 2011, the Public Utility Commission (PUC or Commission) issued a Notice of Proposed Rulemaking Order (Rulemaking Order) at Docket No. L-2010-2160942. The Order was published in the Pennsylvania Bulletin on February 11, 2012, wherein comments from interested parties were requested. See 42 Pa.B. 796.

Prior to entering the Rulemaking Order, on March 18, 2010, the PUC issued an Advance Notice of Proposed Rulemaking seeking input on how well the Code of Conduct which governs electric distribution companies (EDCs) and electric generation suppliers (EGSs) has operated and whether revisions are necessary to fulfill the purposes of Chapter 28 of the Public Utility Code. See Advance Notice of Proposed Rulemaking for Revision of Electric Distribution Company Code of Conduct at 52 Pa. Code § 54.122, Docket No. L-2010-2160942 (ANPRM Order). As noted in the ANPRM Order, the Commission proposed to limit the scope of the rulemaking to the EDC Code of Conduct, as the Commission has developed regulations or

rulemakings to address other aspects of retail competition for electric supply service. The Code of Conduct regulations, 52 Pa. Code § 54.122, have been in effect since July 8, 2000.

The OCA filed comments in response to the ANPRM Order, recommending that the Commission modify and update the different ways in which an EDC may provide consumers with information about EGSs licensed to offer service in the EDC's service area. Other parties filed comments, including the Energy Association of Pennsylvania (EAP), the National Energy Marketers Association (NEM), the Pennsylvania Energy Marketers Coalition (PEMC), and West Penn Power Company (West Penn). Metropolitan Edison Company, Pennsylvania Electric Company, and the Pennsylvania Power Company filed joint comments (FirstEnergy Companies).

Based on the comments and the Commission's evaluation of codes of conduct and similar regulations in other states with retail choice for electric utility service, the Commission has proposed to revise and reorganize Section 54.122 by subject area. The Commission has proposed to divide Section 54.122 into six categories, including non-discrimination requirements, customer requests for information, prohibited transactions and activities, accounting and training requirements, dispute resolution procedures, and penalties.

The OCA appreciates the opportunity to comment on the operation of the Code of Conduct and proposed revisions. Although the focus of the Code of Conduct is on the interaction between EDCs and EGSs, including affiliates of the EDC, the OCA notes that retail consumers are also directly impacted. The proposed revised Code of Conduct addresses how customers will obtain information about EGSs operating in their area and how EDCs and EGSs may market services to retail consumers. Retail consumers will also benefit from a revised Code of Conduct which includes safeguards to support a functioning competitive market.

The OCA supports the Commission's proposed reorganization of Section 54.122 by subject area and adoption of the OCA's recommendation made during the ANPRM phase. The OCA has reviewed the proposed revised Section 54.122 and notes that there is some subject matter overlap with other Commission initiatives directed at improving the competitive market for electric service in Pennsylvania. The OCA Comments will focus in part on those areas where the Commission should assure that the Code of Conduct language complements proposed regulations governing sales and marketing practices and the Commission's orders on a number of retail market initiatives.

II. COMMENTS

A. Proposed Section 54.122(1)(ii): The Commission Should Remove The Definition Of "Customer Information" From The Nondiscrimination Requirements

As part of its reorganization of the current provisions of Section 54.122, the Commission has proposed to cluster several requirements under the "Nondiscrimination Requirements" category. Rulemaking Order at 5. As part of the changes, the Commission proposes to move Subpart (1) and (2) to new Subparts (1)(i) and (ii). EDCs would be barred from giving an EGS, whether an affiliate or not, any preference or advantage in "(i)... processing a request by a distribution customer for retail generation supply service" or "(ii) ... in the dissemination or disclosure of customer information" Rulemaking Order, Annex A, pp. 5-6.

The OCA supports the Commission's decision to group together those provisions that relate to the principle that an EDC should not discriminate in the provision of service. Upon review of these nondiscrimination requirements, the OCA notes that both the current and proposed regulation include a definition of the term "customer information." Section 54.122(2) currently provides:

Subject to customer privacy or confidentiality constraints, an electric distribution company may not give an electric generation supplier, including without limitation its affiliate or division, any preference or advantage in the dissemination or disclosure of customer information and any dissemination or disclosure shall occur at the same time and in an equal and nondiscriminatory manner. "Customer information" means all information pertaining to retail electric customer identity and current and future retail electric customer usage patterns, including appliance usage patterns, service requirements or service facilities.

52 Pa. Code § 54.122(2); see also proposed Section 54.122(1)(ii). The OCA recommends that the last sentence of proposed Section 54.122(c), which defines customer information, be deleted.

The key purpose of this Code of Conduct provision is to describe a nondiscrimination requirement that applies to EDCs and EGSs in a particular context. The OCA notes that the opening phrase "[s]ubject to customer privacy and confidentiality constraints" acknowledges an important limitation but does not attempt to define or describe the full scope of those constraints. Such detail is unnecessary, where the focus of the regulation is on the conduct of EDCs and EGSs and the potential for discriminatory conduct. Any questions as to scope of customer privacy protections may be answered by a review of the Public Utility Code, other Commission's regulations, and relevant Commission orders.

The OCA submits that the same reasoning supports deletion of the current definition of "customer information" from the Code of Conduct nondiscrimination requirements. The Code of Conduct's nondiscrimination requirements establish safeguards for the purpose of promoting competitive markets. Section 54.122(2) and revised Section 54.122(1)(ii) prohibit disclosure or dissemination by an EDC which is done in a discriminatory manner. The regulatory description of what constitutes an EDC's affirmative disclosure obligations and the scope of "customer information" subject to those disclosure obligations is best addressed in a separate, but coordinated, body of regulations or guidelines. The OCA notes that through

Commission orders, specifically the Commission's November 2010 Interim Guidelines for Eligible Customer List Order and November 2011 Final Order on Reconsideration, the Commission and interested parties, including the OCA, have worked to define the affirmative obligations of EDCs to disclose and make available customer information and just what customer information is subject to such disclosure. Interim Guidelines for Eligible Customer List, Docket Nos. M-2010-2183412, et al., Opinion and Order (Nov. 12, 2010), Final Order on Reconsideration, Docket No. 2010-2183412, et al., Order (Nov. 15, 2011) [appellate history omitted].

At present, there is no such coordination or consistency between the concept of "customer information" contained in Section 54.122(2) of the Code of Conduct and the Interim Guidelines for Eligible Customer List. The definition of "customer information" contained in Section 54.122(2) is broader than what the Commission has included in the Interim Guidelines for Eligible Customer List, particularly where it includes "information pertaining to retail electric identity and current and future retail electric customer usage patterns, including appliance usage patterns, service requirements or service facilities." Retaining this definition of "customer information" in the nondiscrimination provisions of Section 54.122 may incorrectly imply that an EDC may disclose this full range of "customer information," so long as done in a nondiscriminatory manner. In other respects, the definition of "customer information" in Section 54.122(2) is narrower, compared to the concept developed in the Interim Guidelines for Eligible Customer List.

Further, the concept of what constitutes "customer information" will also likely change over time. For example, as smart meter technology is deployed, EDCs and customers will obtain more detailed usage and customer specific data. Issues surrounding the smart meter

data and the impact of Section 2807(f)(3) on the release of smart meter data and the necessary protections will need to be addressed prospectively. 66 Pa.C.S. § 2807(f)(3).

The OCA submits that there should be a single definition of customer information as it relates to EDC disclosure obligations. The Code of Conduct nondiscrimination provision is not the appropriate location for such a definition. The OCA recommends the deletion of the last sentence of proposed Section 54.122(1)(ii) as follows:

~~Subject to customer privacy or confidentiality constraints, an electric distribution company may not give an electric generation supplier, including without limitation its affiliate or division, any preference or advantage in the dissemination or disclosure of customer information and any dissemination or disclosure shall occur at the same time and in an equal and nondiscriminatory manner. 'Customer information' means all information pertaining to retail electric customer identity and current and future retail electric customer usage patterns, including appliance usage patterns, service requirements or service facilities.~~

52 Pa. Code § 54.122(2); see Rulemaking Order, Annex A, proposed Section 54.122(1)(ii).

B. Proposed Section 54.122(2)(i): The Commission Should Coordinate Code Of Conduct Revisions Concerning Customer Requests For Information With Other Commission Initiatives To Support Competitive Markets

In the Rulemaking Order, the Commission has reorganized current Section 54.122(9) and (10) under the “customer requests for information” category, as part of proposed Section 54.122(2)(i) and (ii). The Commission has revised the language in Section 54.122(9) to incorporate recommendations made by OCA and the FirstEnergy Companies to update the variety of ways in which an EDC may communicate to an EDC customer information about EGSs. Rulemaking Order at 3, 5-6. Proposed Section 54.122(2)(i) would allow an EDC to provide, upon request from an EGS customer, “the address of the Commission’s retail choice website and offer to send the most current list of suppliers for that service territory, as compiled by the Commission, by regular mail, electronic mail, facsimile, telephonically, or by other and

nondiscriminatory means, according to the customer's preference." Rulemaking Order, Annex

A. The OCA supports this revision of the Code of Conduct regulations.

The Commission has also proposed to modify current Section 54.122(9), now renumbered as Section 54.122(2)(i), to include the following sentence:

The electric distribution company may not recommend or offer an opinion on the relative merits of particular suppliers.

Rulemaking Order, Annex A, proposed Section 54.122(2)(i). The Commission indicates that the revision will operate so that "EDC representatives may not rank or recommend particular suppliers regardless of their affiliate status." Rulemaking Order at 6. While the OCA agrees this is an appropriate Code of Conduct protection, the OCA is concerned that the inclusion of this express restriction could be read in conflict with the Commission's recent Standard Offer Referral process which is included as part of its Intermediate Work Plan Order. Investigation into Pennsylvania's Retail Energy Market: Interim Work Plan Order, Docket No. I-2011-2237952, Final Order at 30-33, 103-107 (Mar. 2, 2012). On March 2, 2012, the Commission adopted a Final Order providing guidance for a Standard Offer Customer Referral Program that EDCs could implement as part of their Default Service Plans. As part of the Standard Offer Customer Referral Program, EDC customer service representatives will be telling residential consumers about specific EGS offers during certain customer contacts. Id. at 32. The OCA notes that this element of the Code of Conduct revisions requires coordination with the Commission's other endeavors such as the Standard Offer Referral Program. The Commission may want to consider language to reflect this plan.

C. Proposed Section 54.122(3): Modifications To The New Provisions Regarding Prohibited Transactions And Activities Are Needed

The Commission has proposed to modify and expand the Code of Conduct's description of prohibited transactions and activities as part of proposed revised Section 54.122(3)(i) through (ix). Rulemaking Order at 6-8. The OCA recommends clarifications to proposed Section 54.122(3)(iv), (v), and (vi), to strengthen these safeguards and assure that they do not conflict with one another.

1. Proposed Section 54.122(3)(iv): Prominent Disclaimers Are Needed, If An EGS's Use Of An EDC Identifier Is An Allowable Use Under The Code Of Conduct

As one new safeguard, the Commission has proposed Section 54.122(3)(iv) with Subparts (A) and (B). In the Rulemaking Order, the Commission explained that the revision will require EGSs to "feature a prominent disclaimer" as a condition of any use of an EDC identifier. Rulemaking Order at 7. The OCA supports this requirement. The OCA recommends a modification of proposed Section 54.122(3)(iv) to ensure that the requirement that the disclaimer be prominent is better communicated by the Code of Conduct to EDCs and EGSs.

As drafted, proposed Section 54.122(3)(iv) would apply to an EGS's use of an "EDC identifier," when used "in connection with the sale, offering for sale, distribution or advertising of goods or services..." Rulemaking Order, Annex A. An EDC identifier could be a "word, term, name, symbol, device, registered or unregistered mark or combination thereof... that identifies or is owned by an electric distribution company..." Id. The EGS could only use the EDC identifier in these circumstances so long as the EGS "includes a disclaimer and enters into an appropriate licensing requirement specifying the rights." Id. Section 54.122(3)(iv) does not, however, communicate the need for the disclaimer to be prominent.

While proposed Section 54.122(3)(iv)(B) does describe how the disclaimer must be presented, in order for an EGS's use of an EDC identifier to be allowable and not barred by the Code of Conduct, the disclaimer requirement may not be sufficient. Section 54.122(3)(iv)(B) as proposed states:

(B) In print and Internet communications, the disclaimer shall be placed immediately adjacent to the EDC identifier and be equal in prominence to the main body of the text. In radio or television communications, the disclaimer shall be clearly spoken.

Rulemaking Order, Annex A. The OCA is concerned that relying solely on Subpart (B) of proposed Section 54.122(3)(iv) to convey the important requirement that the disclaimer must be prominent may not fully carry out or convey the Commission's intent.

The OCA submits that proposed Section 54.122(3)(iv) should be revised to be consistent with the Commission's intent that EGSs will be required to "feature a prominent disclaimer" as a condition of any use of an EDC identifier. To fully capture the Commission's intent, proposed Section 54.122(3)(iv) which states the two preconditions to an EGS's allowable use of an EDC identifier should also include the requirement that the disclaimer be prominent.

Proposed Section 54.122(3)(iv) should state:

(iv) An electric generation supplier may not use a word, term, name, symbol, device, registered or unregistered mark or a combination thereof (collectively and singularly referred to as "EDC identifier") that identifies or is owned by an electric distribution company, in connection with the sale, offering for sale, distribution or advertising of goods or services, unless the electric generation supplier includes a prominent disclaimer and enters into an appropriate licensing agreement specifying the rights.

Proposed Section 54.122(3)(iv) (additions in underline). This addition would ensure that the requirement that the disclaimer be prominent is communicated with each Code of Conduct reference to the disclaimer.

2. Proposed Section 54.122(3)(v): Clarification of the Proposed Prohibition of Shared or Similar EDC and EGS Names Is Needed.

The Commission has proposed new Section 54.122(3)(v) which states “that both the affiliated and non-affiliated EGSs be required to change their names to be dissimilar to the EDC.” Rulemaking Order at 7. The proposed Section 54.122(3)(v) states in full:

(v) 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. An electric generation supplier shall change its name by ___ (Editor’s Note: The blank refers to 6 months after the effective date of adoption of this proposed rulemaking.)

Rulemaking Order, Annex A. The OCA agrees with this requirement but is concerned that the relationship between proposed Subsections (3)(iv) and (3)(v) may not be clear.

First, although the Rulemaking Order intends the prohibition against an EGS having a name similar to that of an EDC to apply to both affiliated and non-affiliated EGS, the phrase “as the electric distribution company or its corporate parent” could be read to imply that the focus is on affiliated EGSs that might have a name similar to its EDC affiliate or similar to their common corporate parent. The OCA submits that clarification is needed to cure any ambiguity as to the scope of this proposed Code of Conduct provision.

Second, there appears to be some conflict between Subsection (3)(iv) which would allow an EGS to use an EDC’s name, symbol, trademark and the like under license and subject to appropriate disclaimer and proposed Subsection (3)(v) which prohibits an EGS from having a name or fictitious name which is similar to that of an EDC or the corporate parent of an EDC. The OCA envisions that these restrictions could be reconciled. Commission clarification is needed, however to assist EGSs and EDCs in conforming with such revised Code of Conduct provisions, for the benefit and protection of retail consumers.

3. Proposed Section 54.122(3)(vi): Restrictions On EGS Marketing Tactics Are An Appropriate Element Of Both The Revised Code Of Conduct And The Commission's Marketing Guidelines

The Commission has proposed to add Section 54.122(3)(vi) to prohibit “EGS representatives from falsely claiming to represent the EDC of the service territory.” Rulemaking Order at 8. Proposed Subpart (3)(vi) states:

(vi) An electric generation supplier may not allow an employee or agent to represent himself or herself as an employee of the electric distribution company through his or her attire or actions. An electric generation supplier shall comply with § 54.43 (relating to standards of conduct and disclosure for licensees), regarding agent identification and misrepresentation.

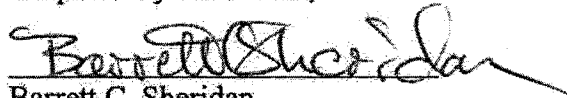
Rulemaking Order, Annex A.¹ In footnote 1 of the Rulemaking Order, the Commission acknowledges that prohibitions against EGS representatives from falsely claiming to represent an EDC are also addressed by proposed Section 111.8 of the Marketing and Sales Practices for Retail Residential Energy Market regulations. Id. at 8, fn. 1. The OCA recommends that the text of proposed Section 54.122(3)(vi) should be revised to provide notice that EGS must conform not only with Section 54.43, but also other Commission regulations and guidelines which govern the marketing and sales practices of EGSs.

¹ The OCA has relied on the text of the Annex A, Proposed Regulations as published at 42 Pa.B. 796. The OCA notes that the Commission's Rulemaking Order, Annex A language did not include the citation to Section 54.43. 52 Pa. Code § 54.43.

III. CONCLUSION

The Office of Consumer Advocate supports the Public Utility Commission's commitment to assure that the market for electric service supply functions fairly, for the benefit of consumers. The OCA recommends that the Commission adopt the OCA recommendations as the Commission promulgates final revisions to the Code of Conduct regulations currently set forth in Section 54.122, 52 Pa. Code § 54.122.

Respectfully Submitted,



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Dated: March 27, 2012
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CERTIFICATE OF SERVICE

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

I hereby certify that I have this day served a true copy of the foregoing document, the Office of Consumer Advocate's Comments, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code §1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 27th day of March 2012.

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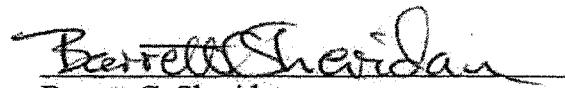
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