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REVIEW COMMISSION

March 27, 2012

BY HAND

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor North
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:

Enclosed, for filing, are the original and fifteen (15) copies of the Comments of PPL Electric Utilities Corporation and PPL EnergyPlus, LLC to the Proposed Rulemaking Order for the above-referenced proceeding.

Respectfully Submitted,

David B. MacGregor

David B. MacGregor

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Enclosures
cc: Aspassia V. Staevska, Law Bureau

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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

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INDEPENDENT REGULATORY
REVIEW COMMISSION

COMMENTS OF
PPL ELECTRIC UTILITIES CORPORATION
AND PPL ENERGYPLUS, LLC
TO THE PROPOSED RULEMAKING ORDER

TO THE PENNSYLVANIA PUBLIC UTILITY COMMISSION:

I. <u>INTRODUCTION</u>

On August 25, 2011, the Public Utility Commission ("PUC" or the "Commission") issued an Proposed Rulemaking Order ("Order" or "Proposed Rulemaking") requesting comments on the proposed amendments to 52 Pa. Code § 54.122, Code of Conduct. The stated purpose of the Order is to strengthen the safeguards currently in place that prohibit incumbent utilities from directly or indirectly favoring their competitive supplier affiliates. *See* Order at 2. The Proposed Regulations were published in the *Pennsylvania Bulletin* on February 11, 2011, with a 45-day comment period, i.e., on or before March 27, 2012. PPL EnergyPlus, LLC ("PPL EnergyPlus") and PPL Electric Utilities Corporation ("PPL Electric") jointly offer the following Comments to the Proposed Rulemaking. In these Comments, PPL EnergyPlus and PPL Electric collectively will be referred to as the "PPL Companies."

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PPL EnergyPlus is the energy marketing and trading subsidiary of PPL Corporation. PPL EnergyPlus buys and sells energy commodities and structured products in the competitive wholesale markets. PPL EnergyPlus is also active in competitive retail markets, and offers electricity supply, natural gas supply, and renewable energy products to commercial, industrial, and institutional customers. In addition, PPL EnergyPlus has expanded its electricity supply offerings to residential customers of PECO Energy, PPL Electric, and Metropolitan Edison Company. PPL EnergyPlus has been continuously licensed as an EGS in Pennsylvania since 1998. Throughout this time PPL EnergyPlus has actively supported and promoted retail competition in the Commonwealth and the Mid-Atlantic region. PPL EnergyPlus believes that its familiarity and experience in the competitive wholesale markets will benefit the Commission and parties in this proceeding.

PPL Electric is a "public utility" and an "electric distribution company" ("EDC") as those terms are defined under the Public Utility Code, 66 Pa.C.S. §§ 102 and 2803, subject to the regulatory jurisdiction of the Commission. PPL Electric furnishes electric distribution, transmission, and default service provider ("DSP") electric supply services to approximately 1.4 million customers throughout its certificated service territory, which includes all or portions of twenty-nine counties and encompasses approximately 10,000 square miles in eastern and central Pennsylvania.

The Proposed Regulations include, among other things, limitations and conditions on the use of a Pennsylvania EDC's or corporate parent's name, branding, logo, and general likeness by an affiliated EGS. If these provisions are finalized and adopted by the Commission, a competitive affiliate to a Pennsylvania Corporation with both EDC and EGS subsidiaries would be required to include specific disclaimer language in its marketing materials and, further, would be required to remove any reference to the Pennsylvania Corporation and EDC from its name. The Proposed Regulations also prohibit the sharing of office space, employees, and certain services by a Pennsylvania EDC and an affiliated EGS. If these provisions are finalized and adopted by the Commission, a Pennsylvania EDC and an affiliated EGS would be required to occupy different buildings and would be required to discontinue any sharing or overlap of employees, would be severely limited in what services could be shared, and would be effectively precluded from using a holding company structure for Pennsylvania electric distribution companies.

The PPL Companies are and have been active supporters of both wholesale and retail electric competition and the development of customer choice within the Commonwealth. The PPL Companies appreciate the opportunity to participate in this investigation. As an EGS and an EDC in the Pennsylvania retail electric market, the PPL Companies believe that their comments will provide the Commission with a broad and valuable perspective as it moves forward with this rulemaking.

In this filing, the PPL Companies will first provide in Section III an overview of its comments on the Proposed Regulations to revise the existing Code of Conduct and the significant impacts that the proposed revisions to the existing competitive safeguards will have on the PPL Companies and their operations. In Section IV, the PPL Companies will provide responses to the specific proposals set forth in the Commission's Proposed Rulemaking Order. Finally, in Exhibit 1 to these Comments, the PPL Companies have provided a revised version of the Proposed Regulations that shows PPL Companies' recommended insertions and deletions.

II. EXECUTIVE SUMMARY

For numerous reasons, the Commission should not adopt the proposed rulemaking without significant modifications.

The Commission's existing Code of Conduct was adopted by the Commission in 2000 following a lengthy stakeholder process and formal rulemaking. During the course of this prior proceeding, the Commission considered a number of proposed revisions contained in the current proposed rulemaking including prohibitions on the use of an EDC's name or logo by an affiliated EGS, the sharing of services, and regulation on the transfer of goods and services between an EDC and an affiliated EGS. However, the Commission ultimately decided **against** adopting regulations on these issues when it adopted the existing Code of Conduct.

Since adopting the existing Code of Conduct, Pennsylvania's EDCs and affiliated EGSs have spent considerable resources and made significant investments to successfully implement these regulations. The PPL Companies believe that the existing Code of Conduct has worked well and has aided in the successful development of Pennsylvania's electric retail market. Indeed, over 1.6 million Pennsylvanians, representing over 50% of Pennsylvania's retail electric load, have availed themselves to the benefits of competitive electricity supply.

The PPL Companies do not object to many of the proposed revisions to the Commission's existing Code of Conduct. However, the PPL Companies do oppose a number of the proposed revisions, including prohibiting an affiliated EGS from having the same or similar name of its corporate parent or a regulated EDC; restricting an affiliated Pennsylvania EGSs from sharing office space, employees, and certain services with a Pennsylvania EDC within a holding company structure; and adopting a blanket rule that all property transferred by a utility to an affiliated EGS must be at market value.

First, the PPL Companies oppose the restriction on affiliated EGS use of a corporate parent name or an EDC name for the following reasons: (1) the proposed restriction is unnecessary, as no evidence has been offered to support a claim that the Commission's current disclaimer requirement is not working effectively; (2) the proposed restriction would deprive customers of truthful and useful information needed to make informed shopping decisions; (3) the proposed restriction would provide an unfair competitive advantage to out of state EGSs and their affiliates that remain free to promote their own brand; (4) the proposed restriction would destroy the substantial investment made by affiliated EGSs to develop and promote their brand; (5) the proposed restriction conflicts with the rules adopted by the vast majority of other competitive retail electric states; and (6) the proposed restriction violates the PPL Companies' legal rights in several ways including, violation of the free speech guarantees of the U.S. and Pennsylvania constitutions, the Commission lacks statutory authority to prohibit trademarks, and the restriction constitutes an impermissible regulatory taking.

Second, the PPL Companies oppose the proposed restriction on shared offices, employees, and services to the extent that the proposed restrictions are intended to restrict Pennsylvania EDCs and their affiliated EGSs from participating in a holding company and using a service company structure for the following reasons: (1) the proposed restriction is unsupported by the record; (2) the proposed restriction will adversely affect customers by increasing EDC and EGS costs; (3) the proposed restriction will provide an unfair competitive advantage to the many EGSs that are affiliated with out-of-state EDCs who operate within integrated holding company structures; (4) the proposed restriction is inconsistent with FERC regulations; (5) the proposed restriction violates the Commerce Clause of the U.S. Constitution; (6) the proposed restriction, if applied to holding and service companies and not modified, would effectively prohibit Pennsylvania EDCs and affiliated EGSs from participating in a holding and service company structure in violation of the Public Utility Code; and (7) the proposed restriction on the sharing of legal services improperly infringes on the exclusive power of the Pennsylvania Supreme Court to govern the conduct of attorneys.

Third, the proposed restriction on a Pennsylvania EDC's ability to sell, release, or otherwise transfer an EDC asset, service, or commodity to an affiliated EDC "at less than market value" is not necessary. The Commission currently has sufficient authority over EDC transactions, in particular, transactions with an EDC affiliate, pursuant to Chapters 11 and 21 of the Public Utility Code. The proposed restriction requiring EDC transactions with an affiliate EGS be at market value is inconsistent with prior Commission decisions, would limit the Commission's current discretion to approve transactions at less than market value and unreasonably interferes with the management of public utilities.

III. <u>OVERVIEW</u>

A. EXISTING CODE OF CONDUCT

The Commission's existing Code of Conduct regulations were adopted in 2000 following an extensive stakeholder process that resulted in parties providing the

Commission with consensus principles for use in the Competitive Safeguards regulations.[1] Where consensus was not reached, the Commission evaluated the various positions through a formal rulemaking process culminating in the existing regulations, which require affiliated EGSs to use disclosure language and prevent improper sharing of marketing and other competitively sensitive information between EDCs and their affiliated EGSs.

In its *2000 Competitive Safeguards Order*, the Commission addressed a number of the provisions proposed in the Commission's current proposed rulemaking including: (1) limitations on an EGS' use of an affiliated EDC's name or logo; (2) restrictions on the sharing of operational and managerial personnel, facilities, and information; (3) requirements to adopt cost allocation rules for common costs; and (4) regulation of the transfer of non-power goods and services between an affiliated EDC and EGS. Following the receipt of comments and reply comments, the Commission decided against adopting specific provisions on these matters and approved the existing Code of Conduct. In addition to addressing these issues in its *2000 Competitive Safeguards Order*, the Commission also considered and rejected similar provisions when reviewing and approving individual EDC restructuring plans.[2]

In rejecting these proposals, the Commission noted that its approved Competitive Safeguard Regulations and provisions of the Public Utility Code provided the

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[1] *Rulemaking Regarding the Establishment of Competitive Safeguards for the Pennsylvania Electric Industry*, Docket No. L-00980132, Final Rulemaking Order entered February 13, 1998. ("*2000 Competitive Safeguards Order*").

[2] *See, Application of PECO Energy Company for the Approval of its Restructuring Plan Under Section 2806 of the Public Utility Code and Joint Petition for Partial Settlement, et al,* Docket No. R-00974104 (Order entered May 29,. 1998); and *Application of Pennsylvania Power & Light Company for Approval of Restructuring Plan Under Section 2806 of the Public Utility Code*, Docket No. R-00973954 (Order entered June 15, 1998).

Commission with adequate oversight should any of the issues addressed by the rejected provisions become an issue in Pennsylvania. Further, the Commission noted that parties could file a complaint, pursuant to 66 Pa.C.S. § 2811(f), asking the Commission to remedy anti-competitive behavior, insofar as it is within the Commission's power to do so. The Commission's authority over such matters has not changed since 2000. That is, should a market participant raise any of the issues sought to be addressed in the proposed rulemaking in the future, the Commission has sufficient authority to act.

In addition, the PPL Companies have successfully implemented the existing Code of Conduct regulations. To do so, the PPL Companies have spent considerable resources and made significant investments to ensure compliance. The PPL Companies submit that the existing Code of Conduct has worked well and has aided in the successful development of the Pennsylvania electric retail market. At present, Pennsylvania has a vibrant competitive retail electric market. Indeed, today in Pennsylvania, more than 1.6 million retail customers representing over 50% of Pennsylvania's retail electric load are receiving their electricity supply from an entity other than the default service provider according to the Commission's competition website, www.papowerswitch.com.

The PPL Companies believe that the proposals contained in the Proposed Rulemaking will adversely and unfairly impact market participants and their customers; potentially harming rather than assisting the development of Pennsylvania's electric retail market. Specifically, if the provisions addressed in detail below are adopted, the restrictions will significantly increase costs to EGSs and EDCs. The increase in costs will result in increasing rates for EDC ratepayers, EGS customers, and place affiliated EGS companies like PPL EnergyPlus at a competitive disadvantage as compared to other EGSs that are affiliated with out-of-state EDCs who operate within integrated utilities with holding company structures. The increased costs associated with the unsupported and overly restrictive restrictions would negatively impact Pennsylvania's retail electric market, market participants, and customers.

The Commission's existing Code of Conduct established extensive rules and codes of conduct to prevent improper sharing of marketing and other competitively sensitive information between EDCs and their affiliated EGSs. Several of the requirements set forth in the Proposed Regulations would establish additional, unjustified rules and limitations. There is no evidence of any violations of the existing Competitive Safeguards regulations governing the code of conduct, and the Commission has provided no basis, other than the lapse of time, for the proposals set forth in its proposed regulations.

B. PROPOSED CODE OF CONDUCT

The PPL Companies do not object to many of the proposed revisions to the Commission's existing Code of Conduct. However they do object to a number of proposed revisions, including the prohibition on an affiliated EGS having the same or similar name of the parent company and the regulated EDC; the restrictions on affiliated EGSs from sharing office space, employees, or certain services with a Pennsylvania EDC; and the proposed blanket rule that all property transferred by a utility to an affiliated EGS must be at market value. As addressed in detail below, neither the Commission nor any of the commenting parties to the Commission's Advance Notice of

Proposed Rulemaking ("ANOPR") have provided any reasonable basis to support these proposals.

In initiating the current proceeding, the Commission simply stated in its ANOPR that the Competitive Safeguard regulations were adopted in 2000 and that since that time EDC rate caps have come off.[3] Subsequently, in a Joint Motion approved by the Commission in an unrelated merger proceeding, the Commission directed that several issues be addressed in the Proposed Regulations including, an examination as to whether EDC-affiliated EGSs should be required to change their trade names to be dissimilar from their EDC affiliates, and protections so that EDC-affiliated EGSs do not inappropriately benefit from the use of resources shared with their affiliated EDCs.[4] The PPL Companies note that in directing that these issues be addressed in this proceeding, the Commission approved a Joint Motion stating that concerns raised by the parties in the merger proceeding are, "largely speculative, and so we decline to adopt their proposed condition in their entirety." Joint Motion at 2. Further, in directing that these issues be addressed in this proceeding, the Commission has failed to provide any substantial basis to modify the current Code of Conduct to address these issues.

Pursuant to Section 1504 of the Public Utility Code, the Commission is authorized to adopt "just and reasonable" regulations. 66 Pa.C.S. § 1504. For

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[3] *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, (Advanced Notice of Proposed Rulemaking Order entered on March 18, 2010). ("ANOPR").

[4] See *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*, (Order entered March 8, 2011). Joint Motion of Robert F. Powelson and John F. Coleman, Docket Nos. A-2010-2176520 and A-2010-2176732.

Commission regulations to be valid and binding require that the regulations to be adopted are within the granted power of the Commission, issued pursuant to proper procedure, and reasonable. *Popowsky v. Pennsylvania Public Utility Commission*, 910 A. 2d 38, 53 (Pa. 2006).

In response to the ANOPR, only six parties' submitted comments and these parties' comments were, in large part, complimentary of the Pennsylvania retail electric market and the effectiveness of the Commission's existing Code of Conduct. Neither the Commission nor any commenting party to the Commission's ANOPR identified specific behavior or defects with the existing Code of Conduct necessitating the significant revisions contained in the Proposed Rulemaking. The PPL Companies are unaware of any violations of existing Commission rules and Codes of Conduct or behavior that is negatively impacting Pennsylvania's retail electric market, or that warrants the proposed regulations. The major changes contained in the Proposed Regulations are unnecessary, unsupported, and could harm the development of retail competition.

As addressed below, a number of the proposed provisions exceed the Commission's authority under the Public Utility Code and the United States (and Pennsylvania) Constitutions. Further, these provisions are contrary to past Commission decisions, unfairly discriminate against Pennsylvania-affiliated EGSs, and could ultimately harm the retail competitive market and consumers. Several of the proposed changes addressed below do not constitute good public policy, would not promote retail competition, and would increase costs to customers. Adoption of the proposed changes in the absence of record support or clear need would be unwise and an abuse of agency discretion.

IV. COMMENTS OF THE PPL COMPANIES

The PPL Companies do not object to the Commission's proposal to realign the Code of Conduct according to subject matter for a more convenient use. The PPL Companies have organized their specific comments on each proposal consistent with the subject matter categories identified by the Commission: (a) non-discrimination requirements; (b) customer requests for information; (c) prohibited transactions and activities; (d) accounting and training requirements; (e) dispute resolution procedures; and (f) penalties.

A. SECTION 54.122(1) NON-DISCRIMINATION REQUIREMENTS

1. Section 54.122(1)(i) - (v)

The Proposed Regulations renumber the existing Sections 54.122(1), (2), and (5) – (7) of the Commission's Code of Conduct.

The PPL Companies have no comments on these provisions.

B. SECTION 54.122(2) CUSTOMER REQUESTS FOR INFORMATION

1. Section 54.122(2)(i)

The Commission proposes to modify subsection (9) of its existing Code of Conduct to require that EDCs provide requesting customers with information about EGSs. Specifically, pursuant to the Proposed Regulation, EDCs will be required to provide customers with 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 equal and nondiscriminatory means, according to the customer's preference. Further, the revised regulation provides that EDCs, "may not recommend or offer an opinion on the relative merits of particular suppliers."

The PPL Companies agree with this modification.

2. Section 54.122(2)(ii)

The Proposed Regulations propose to remove references in subsection (10) of the existing Code of Conduct regarding Pennsylvania-affiliated EGSs using the EDC's name and logo as part of the EGS's trade name or corporate appearance for marketing and communication purposes.

The PPL Companies' objection to the Commission's proposed limitations and conditions on the use of a Pennsylvania Corporate Parent and EDC's name, branding, logo, and general likeness by an affiliated EGS are addressed below in its Comments to Section 54.122(3)(iv).

C. SECTION 54.122(3) PROHIBITED TRANSACTIONS AND ACTIVITIES

1. Section 54.122(3)(i)

The Proposed Regulation provides that an EDC may not subsidize an affiliated EGS. In addition, the proposed section provides that costs or overheads related to competitive, non-regulated activities of an affiliated EGS may not be included in the rates of an EDC.

Although no evidence has been provided to support the need for this new provision, the PPL Companies do not oppose this provision. However, the PPL Companies stress that PPL Electric does not subsidize PPL EnergyPlus or any of its operations. To the extent PPL Electric provides services to PPL EnergyPlus, PPL Electric does so consistent with Section 54.122(7) of the Commission's existing Code of Conduct, which requires that EDCs "supply all regulated services and apply [their] tariffs provisions in a nondiscriminatory manner." 52 Pa. Code § 54.122(7). Further, PPL Electric does not currently recover, nor will it seek to recover costs or overheads related to competitive, non-regulated activities of PPL EnergyPlus. Finally, the PPL Companies emphasize that they have and will continue to adhere to the Commission's existing and legally enforceable Code of Conduct provisions finalized and adopted by this Commission.

2. Section 54.122(3)(ii)

The Proposed Regulation at Section 54.122(3)(ii) provides that:

> (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 in regulated rates.

The Proposed Regulation would prohibit an EDC from selling, releasing, or transferring any asset, service, or commodity that has been included in rate base to an affiliated EGS for less than market value.

a. There Is No Evidence To Support The Requirement That EDC Assets Transferred Or Sold To An Affiliated EGS Be At Market Value

In proposing this provision, the Commission has not identified either a specific issue that the adoption of this prohibition would serve to correct or how this proposed provision will serve to improve electric retail competition in Pennsylvania. Indeed, PPL Electric, like all major utilities in Pennsylvania, has affiliated interest agreements that price inter-company transactions at cost, and when an agency is changing a long-standing policy, it is required to explain and support that change. The Commission has provided no such support here.

b. The Commission Has Adequate Authority Under The Public Utility Code To Monitor And Regulate EDC Transfers Of Property To Affiliated EGSs

The stated intent of the Proposed Rulemaking is to implement and enforce the provisions of the Electricity Generation Customer Choice and Competition Act, Chapter 28 of the Public Utility Code, 66 Pa.C.S. §§ 2801, *et seq*. However, Chapter 28 nowhere provides the Commission with authority to set or regulate the value of assets transferred or sold by an EDC. Indeed, Chapter 28 requires that EDCs treat affiliated and non-affiliated EGSs alike. 66 Pa. C.S. § 2803. The Proposed Regulation, if adopted, would permit an EDC to transfer an asset to a non-affiliated marketer at less than market value, but to an affiliate only at market value. That result would violate Chapter 28 and the public interest.[5]

The proposed requirement that an EDC not sell, release, or otherwise transfer an EDC asset, service, or commodity to an affiliated EGS "at less than market value" is not necessary as the Commission currently has sufficient authority over EDC transactions and, in particular, transactions between an EDC and its affiliates. Indeed, Chapters 11 and 21 provide the Commission with the authority to review proposed transfers of assets and to regulate agreements between an EDC and its affiliates.

Chapter 11 requires that an EDC obtain a certificate of public convenience prior to transferring "the title to, or the possession or use of, any tangible or intangible property used or useful in the public service." 66 Pa.C.S. § 1102(a)(3). To grant a certificate of public convenience, the Commission find that the proposed transaction

[5] In addition, the proposal is inconsistent with FERC rules, which require that the sale of goods and services, excluding power at wholesale, by a public utility to a market-regulated power sales affiliate or non-utility affiliate must be at the higher of cost or market price. *See* 18 C.F.R. § 35.44.

would "promote the service, accommodation, convenience, or safety of the public in some substantial way." *City of York v. Pennsylvania Public Utility Commission*, 295 A. 2d 825, 828 (Pa. 1972). The "substantial public interest" standard articulated in *City of York* is satisfied by a simple preponderance of the evidence of benefits, and such burden can be shown without legally binding commitments or quantifiable benefits. *Popowsky v. Pennsylvania Public Utility Commission*, 594 Pa. 583, 611, 615, 937 A.2d 1040, 1057, 1059 (2007).

The Commonwealth Court previously has considered and rejected the argument that the public benefits of a transaction cannot be determined until the market value of the transferred asset is known. In *Middletown Township v. Pennsylvania Public Utility Commission*, 482 A.2d 674 (Pa. Cmwlth. 1984), a township argued that, among other things, the "Commission's determination of whether the acquisition was or was not in the public interest necessarily demanded that the probable cost of acquisition be calculated as part of that process." *Id.* at 682. The Commonwealth Court disagreed, stating:

> Such a determination ... does not necessarily play a significant role, if any, in the public interest determination. When public utility property is sold either in an arms-length transaction or a forced acquisition, the compensation received ... represents capital belonging to the utility and its stockholders, and not to the utility's customers, nor may those monies be transferred to the remaining customers in the form of lower rates. *Philadelphia Suburban Water Company v. Pennsylvania Public Utility Commission*, 427 A.2d 1244 (Pa. Cmwlth. 1981), *citing Board of Public Commissioners v. New York Telephone Company*, 271 U.S. 23, 32, 46 S.Ct. 363, 366, 70 L.Ed. 808 (1926), (customers pay for service, not for the property used to render it; by paying . . . bills for service they do not acquire any interest, legal or equitable in the property used for their convenience or in the funds of the company). Under the facts of this

> case, there was no need for a determination of the price in order to decide whether the acquisition was in the public interest. The compensation would inure to the benefit of the stockholders and company itself, and have little, if any, direct impact on the Water Company's customers.

Id. at 682. Accordingly, the market value of an asset transferred by a public utility is not necessary to the determination of whether the proposed transaction provides public benefits under Chapter 11 of the Public Utility Code. Clearly, the Courts have determined that there is nothing in Chapter 11 of the Public Utility that requires assets transferred or sold by an EDC to be at market value. *See also Application of UGI Penn Natural Gas, Inc. for Approval of the Transfer by Sale of 9.0 Mile Natural Gas Pipeline, Appurtenant Facilities and Right of Way, Located in Mehoopany, PA*, Docket No. A-2010-2213893, p. 18 (July 25, 2011) (hereinafter, "*PNG Application*") ("The express language in Sections 1102, [and] 1103 ... of the Code does not require that the [asset] must be transferred at the fair market value").

In addition, Chapter 21 of the Public Utility Code requires Commission approval for any affiliated interest contract before the contract can become effective, as well as provides the Commission with continuing jurisdiction over affiliated interest agreements. Thus, such transactions, to the extent they are made between affiliated interests within the meaning of 66 Pa.C.S. § 2101, must follow the rules of Chapter 21 of the Public Utility Code, at the risk of being disallowed or voided pursuant to those statutory provisions.

Section 2102(a) of the Public Utility Code provides that:

> No contract or arrangement providing for the furnishing of management, supervisory, construction, engineering, accounting, legal, financial, or similar services, and no contract or arrangement for the purchase, sale, lease, or exchange of any property, right, or thing or for the furnishing of any service, property, right or thing other than those above enumerated,

> made or entered into after the effective date of this section between a public utility and any affiliated interest shall be valid or effective unless and until such contract or arrangement has received the written approval of the commission. If such contract is oral, a complete statement of the terms and conditions thereof shall be filed with the commission and subject to its approval.

66 Pa.C.S. § 2102(a). Thus, to the extent a transaction between an EDC and an affiliated EGS falls under the aegis of Chapter 21, the EDC must adhere to the rules of Chapter 21, at the risk of the contract being disallowed or voided. Further, Chapter 21 provides that the Commission shall not approve affiliate contracts "unless satisfactory proof, is submitted of the cost to the affiliated interest of rendering the services or of furnishing the property or service to the public utility." 66 Pa.C.S. § 2102(b).

Currently, the Commission reviews all EDC filings pursuant to Chapters 11 and 21 on a case by case basis, and, based upon the facts presented in each case, makes its determination pursuant to the Public Utility Code. The proposed regulation would unjustifiably limit the Commission's existing discretion by fixing the price, *i.e.*, market value, for the sale of utility assets to affiliates.

The proposed regulation is unnecessary and would unduly restrict the Commission's existing discretion under Chapters 11 and 21 of the Public Utility Code. Although in some instances market value may be appropriate based upon the facts presented, there is no need for the Commission to establish a blanket rule of market value. The Commission's existing statutory authority provides it with sufficient legal authority to review transactions between an EDC and its affiliated EGS. It is in the context of these proceedings that the Commission may properly review and impose a "market value" condition, if it finds it is necessary, appropriate, and supported by the facts of a particular case. There historically have been numerous instances where the Commission has found that the transfer to an affiliate at depreciated original cost is in the public interest, and there is no reason not to expect those instances to continue.[6] Absent a waiver, the Proposed Regulation would not permit the Commission to depart from the market value requirement. The Commission should maintain its existing discretion under the Public Utility Code and not establish a binding rule that will not be appropriate in all cases.

The Proposed Regulation would harm customers when fair market value may be less than the depreciated original cost. To the extent that the customers of the utility funded the transferred asset through rates, customers could incur increased costs as a result of the loss. *See Barasch, et al. v. Pennsylvania Public Utility Commission*, 515 A.2d 651, 653 (Pa. Cmwlth. 1986) (acknowledging that the gain or loss on an investment should accrue to those who have provided the funding for the investment) (citing *Philadelphia Suburban Water Company v. Pennsylvania Public Utility Commission*, 427 A.2d 1244 (Pa. Cmwlth. 1981)). Also, there may be transactions

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[6] The PPL Companies note that requiring the sale of utility assets at market value through a general rulemaking is inconsistent with all relevant Commission precedent. Indeed, the Commission has routinely approved the sale of utility assets to affiliates at depreciated original cost. *See, e.g., Application of PECO Energy Company for Approval of its Restructuring Plan Under Section 2806 of the Public Utility Code*, Docket Nos. R-00973953, et al., 1997 Pa. PUC LEXIS 51; 181 P.U.R.4th 517 (December 23, 1997) (approving the transfer of generation assets to affiliates at the depreciated original cost); *Application of Pennsylvania Power & Light Company*, Docket No. R-00973954 1998 Pa. PUC LEXIS 131 (June 15, 1998) (same); and *Pennsylvania Public Utility Commission v. T. W. Phillips Gas & Oil Co.*, Docket Nos. R-00051178 (August 22, 2006) (adopting the Recommended Decision approving a joint petition for settlement that provided for, among other things, approval of T. W. Phillips' transfer of production plant assets to its unregulated subsidiary, and removal from T. W. Phillips' books of account the original cost of the transferred assets and the amount of depreciation reserve applicable to the original cost as of the transfer date).

where the transfer at depreciated original cost to an affiliate benefits customers and the public.[7]

The Proposed Regulation would restrict the Commission's ability to approve such transactions, which could result in the loss of important and significant public benefits. The better approach is a case-by-case review, which has been the Commission's customary practice.

c. The Proposed Restriction Unreasonably Interferes With The Management of Public Utilities

While EDCs are private corporations whose businesses are affected with a public interest, they own the property they devote to public service, and retain the right to either sell an asset with Commission approval or to not sell it.[8] As the Commission has previously explained:

> The utility has the discretion to consider the risks and benefits of available alternative business transactions and then to decide which transaction to ultimately present to the Commission for consideration and approval. It is well-established that the Commission's authority to interfere with the internal management of a utility is limited and "[t]he Commission is not empowered to act as a super board of directors for the public utility companies of this state." *See Metropolitan Edison Co. v. Pa. PUC*, 437 A.2d 76, 80 (Pa. Cmwlth. 1981).

[7] For example, in *PNG Application*, the Commission approved the transfer of a pipeline from UGI Penn Natural Gas to UGI Utilities, Inc. – Electric Division ("UGIES") and UGI Energy Services, Inc. at the net depreciated value. The Commission found that the transfer of the pipeline to UGIES at the net depreciated value would provide would provide benefits to customers and the public.

[8] The free alienation of property is an inherent right of the owner, subject only to restraint if against the public interest. *Northern Pennsylvania Power Co. v. Pennsylvania Public Utility Com.*, 5 A.2d 133, 134 (Pa. 1939), *abrogated and overruled on other ground by*, 449 Pa. 136, 295 A.2d 825, (1972) *and* 17 A.3d 425 (Pa. Cmwlth. Ct. 2011). The right to sell property is a basic component of ownership that is well-established in the common law of this country. *See Perin v. Carey*, 65 U.S. 465, 494-95 (1860). An unreasonable restraint on alienation is an effective prohibition against transferability.

PNG Application, p. 19.

As explained above, the Commission presently has the authority to review proposed transfers of assets, to regulate agreements between an EDC and its affiliates, and to determine if such transactions are in the public interest, i.e., provide some substantial public benefit. If there are public benefits, the Commission should approve the proposed transaction. If there are not public benefits, the Commission should reject the proposed transaction or provide the EDC with a list of conditions that the Commission believes would make the transaction in the public interest, including an adjusted transfer or sale price for the asset. At that point, the EDC can determine whether to sell the asset subject to those conditions or not.

By restricting the purchase price to an affiliate, without any evidence of any problem to be solved or any evidence that this restriction will in any way promote retail competition, the proposed regulation would unreasonably restrict the alienation of the utility companies' property and unreasonably interfere with the internal management of a public utility.

3. Section 54.122(3)(iii)

The Proposed Regulation provides that an EDC may not allow an affiliated EGS to secure credit through the pledge of assets in rate base or to pledge money necessary for utility operations.

The PPL Companies do not oppose this provision.

4. Section 54.122(3)(iv) provides as follows:

"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 disclaimer and enters into an appropriate licensing agreement specifying the rights.

> **(A) The disclaimer shall state that the electric generation supplier is not the same company as the electric distribution company whose EDC identifier is featured and that a customer does not need to buy the electric generation supplier's products or services to continue receiving services from the electric distribution company.**
>
> **(B) In print and Internet communications, the disclaimer shall be placed immediately adjacent to the EDC identifier and be in equal prominence to the main body of the text. In radio or television communications, the disclaimer shall be clearly spoken."**

Requiring an EGS to use a reasonably prominent disclaimer is sensible public policy, so long as it is implemented in a workable and practical manner. PPL does not oppose the inclusion of a clear and reasonable disclaimer in advertising materials, and indeed, PPL EnergyPlus *already includes* a clear and conspicuous disclaimer regarding its affiliated EDC and parent company that fully complies with the PUC's proposed disclaimer content in sub-part 3(iv)(A). PPL also already fully complies with the PUC's proposal that this disclaimer "shall be clearly spoken" in radio advertisements. *See* PUC Proposal 3(iv)(B). PPL EnergyPlus has used its best efforts to successfully implement the PUC's existing disclaimer requirement since 2000, and it has been PPL EnergyPlus' experience that the necessary regulatory information has been communicated to consumers effectively and efficiently.[9]

The first sentence of proposed sub-part 3(iv)(B), however, is extremely and unduly vague, and to the extent understandable unnecessarily onerous, harmful to

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[9] PPL EnergyPlus's standard disclaimer that it includes in its print, internet, television, and other advertisements is the following: "PPL EnergyPlus LLC is an unregulated subsidiary of PPL Corporation. PPL EnergyPlus is not the same company as PPL Electric Utilities. The prices of PPL EnergyPlus are not regulated by the Pennsylvania Public Utility Commission. You do not have to buy PPL EnergyPlus electricity or other products in order to receive the same quality regulated services from PPL Electric Utilities." A representative sample of PPL EnergyPlus's advertising materials that include this disclaimer are attached to these comments as Exhibit 2.

consumers by making EGS advertising materials unnecessarily cluttered and confusing. That sentence provides that "[i]n print and Internet communications, the disclaimer shall be placed immediately adjacent to the EDC identifier and be in equal prominence to the main body of the text." *See* PUC Proposal 3(iv)(B). Critical disclaimer issues regarding the "immediately adjacent" and "equal prominence" requirements are ignored altogether, providing ambiguity that will entice gaming of the system and deceptive marketing practices by dishonest competitors.

For example, regarding "immediately adjacent," the regulation does not specify whether the disclaimer must be immediately adjacent to the *first use* of the EDC identifier, or whether the disclaimer may be located next to each EDC identifier (even if the name is used multiple times in a given communication); whether the disclaimer must be used on every page of a multi-page print ad; whether including the disclaimer towards the bottom of the page (a relatively common practice) would constitute "immediate proximity" for purposes of this proposed regulation; or whether use of the EDC identifier on an envelope or mailer would also require disclaimers "immediately adjacent" to that as well.

The requirement that the disclaimer be of "equal prominence to the main body of the text" is equally vague, problematic, and unnecessary. PPL agrees that a print disclaimer must be more than "mice type," and must be reasonably prominent and legible; and its longstanding practice shows that these standards can be met without draconian rules. The PUC proposal, however, does not address what an advertiser must do for print ads that, like most print ads, include several different size fonts (larger font for headline; several smaller fonts for prose; etc.), and its text makes compliance a guessing game, rife with the possibility of selective and discriminatory enforcement Must the advertiser make the disclaimer as large as the headline? Is it permissible if the advertiser makes the disclaimer as large as the smallest text in the ad? There is no good reason to commence a regulatory regime that presents these unanswered questions and forces supply companies to proceed under a cloud of uncertainty.

A final significant shortcoming in sub-part (iv)(B) is the requirement that the regulatory disclaimer be clearly spoken in television advertisements. While PPL EnergyPlus *already includes* its regulatory disclaimer in its radio advertisements, requiring a spoken disclaimer in television commercials is unnecessarily restrictive and unnecessary, since consumers would subsequently see the disclaimer on a website or printed material by which they pursued any interest in that supplier. Requiring a television commercial to include a spoken regulatory disclaimer means that an advertiser will not be able to convey as much other valuable educational information to consumers.

In sum, PPL is not opposed to the introductory paragraph of sub-part (iv), sub-part (iv)(A) in its entirety, and that portion of sub-part (iv)(B) regarding a spoken disclaimer in radio advertisements. The remainder of the PUC's sub-part (iv)(B), however, is unduly vague and would harm consumers and will create incentives for gaming the system. PPL appreciates the PUC's desire to eliminate disclaimers that are confusing and not communicated effectively to consumers (e.g., an illegible television disclaimer). However, behavioral rules such as disclaimer requirements inherently require ongoing oversight and flexibility on the part of the regulator, and the PUC's proposed sub-part (iv)(B) will cause more harm than good.[10]

In addition to not opposing the PUC's current disclaimer requirements and substantial aspects of this proposed sub-part (iv), the PPL Companies urge the PUC to broaden its regulations so that a reasonably prominent disclaimer must be used by all EGSs who are: (1) doing business in Pennsylvania; (2) affiliated with an EDC whether or not the EDC or its parent company is located within or outside the Commonwealth; and (3) are using a name similar to their corporate parent or similar to their affiliated electric distribution company. *See* Exhibit 1 to these comments for the PPL Companies' proposal in this regard. This "plain English" disclaimer must be included in the EGS's offer and would provide customers additional understanding of the EGS marketing to them and its relevant corporate affiliations. Unless an out-of-state entity and its affiliated in-state EGS are required to include a disclaimer, these entities will secure an unjustified competitive advantage that potentially harms consumers and their competitors that are subject to the current requirements.

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[10] The PPL Companies do not oppose the requirement in the introductory paragraph in subpart (iv) that that an EGS must enter into "an appropriate licensing agreement specifying the rights" regarding the EGSs' use of the defined "EDC identifier." The PPL Companies note, however, that what is "appropriate" for a license agreement varies widely depending on the background context, especially where the license agreement is between two affiliates. Such licenses need not, and quite often do not, include a wide variety of provisions that are commonly included in licenses between two unaffiliated parties. A license between two affiliates will often be a very concise document and yet still provide all necessary protections for both licensor and licensee. It is the PPL Companies' understanding that the existing proposal and its requirement of "an appropriate" license do not contradict these facts.

5. Section 54.122(3)(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 [6 months after the effective date of adoption of this proposed rulemaking]."

Consumers would be greatly harmed by this proposal, which is inconsistent with § 54.122(3)(iv), and it should be struck in its entirety. Consumers need information in order to make effective consumption and investment decisions, and trademarks supply it. The PUC has provided no empirical or other evidence that consumers are being harmed by EGSs using the same or substantially similar name as an affiliated EDC or corporate parent. The proposed branding restriction is *a limitation on completely accurate information* – the PUC has not contended otherwise – and taking such information away from consumers will work against consumers' benefit. The PPL Companies' comments in this regard are supported and discussed at greater length in the attached Declaration of Kenneth Gordon, an economist with extensive experience in the utility industry and formerly the Chair of two state public utility agencies. Mr. Gordon's Declaration, which details his substantial credentials and substantive conclusions, is attached as Exhibit 3.

Accurate trademarks, including company names, reduce customers' search and information costs and enable trademark owners to provide customers with an array of products and services with a common visual identity. If efficient retail competition is going to continue to develop in Pennsylvania, competitors must be able to convey price information and other competitive attributes to consumers in a clear and cost-effective manner, and as Mr. Gordon discusses in his Declaration (at ¶¶ 7-10), and as the courts have repeatedly recognized, brand names play an integral role in providing short-hand competitive information easily and quickly to consumers.[11]

The significant benefits for consumers based on unfettered and accurate brand name information do not end there. Clear brand identification *provides accountability* and an incentive for trademark owners to maintain consistent quality levels and provide better service to customers. When a trademark owner provides a number of products that have a common brand identity, that owner must strive to avoid having "any lemons," because brand name damage based on one service will harm the owner's entire range of products and services, and thus future earnings and cash flows.[12] Given the fundamental importance of reliability in the utility industry, market-based incentives to provide a consistently high-level of customer service should be encouraged, not prevented. That is especially so where, as here, there is no evidence whatsoever that consumers are being harmed or that competitors are being prevented from entering the market. Indeed, as Mr. Gordon discusses at length in his Declaration (at ¶¶ 7, 22-24), there is no need for this trademark prohibition given the state of the retail competition market in Pennsylvania.

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[11] *See, e.g., Qualitex Co. v. Jacobson Prods. Co., Inc.*, 514 U.S. 159, 163–64 (1995) (trademark law reduces consumer search costs because a trademark "quickly and easily assures a potential customer that *this* item—the item with this mark—is made by the same producer as other similarly marked items that he or she liked (or disliked) in the past") (emphasis in original); *Ty Inc. v. Perryman*, 306 F.3d 509, 510 (7th Cir. 2002) ("The fundamental purpose of a trademark is to reduce consumer search costs by providing a concise and unequivocal identifier of the particular source of particular goods."); *Union Nat'l Bank of Texas v. Union Nat'l Branch of Texas*, 909 F.2d 839, 844 (5th Cir. 1990) (trade marks are "distinguishing features which lower consumer search costs") (internal quotation marks omitted).

[12] *See Berner Int'l Corp. v. Mars Sales Co.*, 987 F.2d 975, 982 (3d Cir. 1993) (holding that trademark protection "encourages sellers to create and maintain products of reliable quality that consumers associate with their mark") (citation omitted); *Union Nat'l Bank of Texas v. Union Nat'l Branch of Texas*, 909 F.2d 839, 844 (5th Cir. 1990) (holding that trademarks "encourage higher quality production by discouraging free-riders").

Restricting the ability of affiliated EGSs, EDCs, and corporate parents to communicate truthfully to consumers will hurt consumers and make competition less efficient, because consumers will not be able to make efficient decisions if they do not know the true opportunities and opportunity costs that they face. *See* Gordon Decl. ¶¶ 7-10, 15-18. The information thus conveyed could be important to reasonable consumers who are trying to educate themselves and select their preferred supplier. Put simply, the prohibition in sub-part (v) would deprive consumers of access to information that they could use or not use *as they see fit* when making their purchasing decisions.

The PUC's proposed regulation appears to be based on the assumption that informed consumers cannot be effective or wise consumers. The PUC has presented no evidence to support these assumptions. Its proposal would harm the very consumers that the PUC should be aiming to protect.

There is no basis for any supposition that the affiliated EGS's use of a corporate name or logo might somehow deceive customers into confusing that affiliated EGS with the EDC or corporate parent. The PUC, however, has presented no evidence that customers will be deceived by learning of a corporate affiliation, and they would not be. Especially in light of existing disclaimers and the proposed disclaimer provision, the marketplace already distinguishes between unregulated EGSs, their corporate parents, and regulated EDCs.

Nor is there any evidence to support the view that customer loyalty to a particular EDC or corporate parent would interfere with the efficient workings of the market. Customer loyalty to a particular utility company is no more evidence of market failure than customer loyalty to any brand name consumer product, automobile, or other product. Customers reduce their search and information costs through various means, including exposure to truthful advertising materials, reviewing accurate information from reputable third-party publications, sharing information with others, and selecting those established brands in which they have learned to have confidence (or reflecting those in which they have lost it). To deprive consumers of their ability to act on this accumulated store of knowledge by requiring an affiliated EGS to conceal its identity would destroy any benefit that customers derive from their loyalty or disloyalty. Legitimate competitive differentiation is beneficial to consumers and not unlawful or harmful market power. It should not be impaired by regulation. *See id.* ¶¶ 7-17, 22-24.

Other states' approaches demonstrate that a trademark prohibition is unnecessary and unwise public policy. The PUC stated in its rulemaking that this trademark prohibition was added because "this requirement varies in different jurisdictions" (Proposed Rulemaking at 6), but in fact *the vast majority of states that have instituted competitive retail electric markets lack any such prohibition*, and require at most a reasonable disclaimer. Of the twenty-two states (including Pennsylvania) that currently or previously permitted the creation of competitive retail electricity supply markets, (a) seventeen states require or required an express disclaimer; (b) three states do not or did not require a disclaimer; and (c) only two states – Maine and Delaware – prohibit the use of a public utility's name by a competitive supplier, and each of these states is distinguishable from Pennsylvania. First, unlike Pennsylvania, both of these states imposed their joint marketing restrictions when electric retail competition was first introduced in order to "jump start" an infant industry, not many years later after retail competition was already stable and flourishing. (In comparison to Delaware and Maine, Texas also enacted joint marketing restrictions when electric retail competition began, but repealed these unnecessary restrictions after competition had matured.) Furthermore, in Delaware, the joint marketing restrictions were enacted in a settlement, not after in-depth fact-finding, and as with any negotiated resolution that encompasses a wide range of issues, the utilities' marketing concessions likely enabled more favorable terms on other matters. *See id.* ¶¶ 19-21.[13]

These states' nearly unanimous conclusion that, at most, a disclaimer is all that is needed to maximize consumer welfare is absolutely correct and the same result is warranted here.

<u>Proposed regulation § 54.122(3)(v) is not only unwise and unnecessary – if enacted it will violate the PPL Companies' rights in several significant ways</u>. As discussed above, proposed § 54.122(3)(v) will harm consumers and disservice the Commonwealth's goals of creating an active and efficient marketplace. However, this is not only a provision that *should not* be enacted – it is also a provision that *cannot lawfully be enacted*, for several reasons that are discussed at length in the attached Addendum A. As discussed in this Addendum: (1) proposed § 54.122(3)(v) violates the free speech guarantees of the U.S. and Pennsylvania constitutions because it requires EGSs to cease all use of their current trade names to disguise their relationship to EDCs and parent companies; (2) the PUC lacks the statutory authority to prohibit trademarks in this manner; and (3) the proposed trademark prohibition would constitute an impermissible regulatory taking. Any of these arguments standing alone is sufficient

[13] *See* Attachment KG-3 to the Gordon Declaration for what is believed to be a comprehensive recitation of the statutory language that is currently in effect in those states with competitive retail electricity markets that have legislated over this issue.

to invalidate proposed § 54.122(3)(v), and the PPL Companies respectfully urge the PUC to examine this Addendum and its arguments carefully.

<u>The proposed 6-month transition period is impracticably short and will cause hardship and confusion for consumers, who will not be given nearly enough time to process the name changes and educate themselves</u>. For all of the reasons above, sub-part (v) should be stricken in its entirety. If the PUC refuses to do so, this sub-part should apply to all EGSs doing business in Pennsylvania that share the name of a corporate parent or are affiliated with an EDC, whether or not that corporate parent or EDC is in-state or out-of-state.

Furthermore, if sub-part (v) is not struck, PPL notes that the 6-month period that the PUC has proposed for EGSs to completely rebrand is unworkable and will greatly harm consumers who have been exposed to the company names in question for many years (e.g., "PPL EnergyPlus" has been used for approximately fifteen years). Forcing established companies to immediately transition to new company names with not nearly enough time for research and educational outreach will only exacerbate the consumer confusion that will inevitably occur, and, respectfully, the PUC's proposed deadline displays no concern for the massive financial and manpower resources that will need to be employed by each EGS to rebrand, or the tremendous number of complex logistical steps that are involved (selecting and clearing company names and trademarks, some of which will bear no resemblance to the prior name; preparing and filing for the necessary trademark and corporate name protection; preparing the tremendous amount of new advertising and educational materials; disseminating these materials in a timely and coherent manner so that the rebranding resonates in the marketplace; etc.).

Consumers will be heavily damaged because they will not be given nearly enough time to process the name changes that will be occurring throughout the marketplace.

If rebranding is required, EGSs, EDCs, and corporate parents should be given <u>at least two years</u> to discontinue use of the prior company name and make a full transition to a new corporate name and trademark. And, of course, this two-year period should be stayed pending the inevitable legal challenges that would occur if this regulation were adopted.

6. Section 54.122(3)(vi)

The Proposed Regulation prohibits employees or agents of an EGS to represent that they are employees of an EDC through their actions or their attire.

The PPL Companies support the addition of this provision to the Commission's Code of Conduct.

7. Section 54.122(3)(vii)

The Proposed Regulation provides that an EDC and its affiliated EGS may not engage in joint marketing, sales, and promotional activities unless the activities are offered to all EGSs in the same manner and under similar terms and conditions.

The PPL Companies do not oppose this provision. Further, the PPL Companies note that they have never engaged in any joint marketing, sales, or promotional activities.

8. Section 54.122(3)(viii)

The Proposed Regulation prohibits EDCs and EGSs from engaging in false or deceptive advertising.

The PPL Companies support this provision.

9. Sections 54.122(3)(ix) and (4)(iii)

These Proposed Regulations provide as follows:

> (3) Prohibited transactions and activities.
>
> * * *
>
> (ix) An electric distribution company and affiliated electric generation supplier may not share office space and shall be physically separated by occupying different buildings.
>
> (4) Accounting and training requirements.
>
> (iii) An electric distribution company and affiliated electric generation supplier or transmission supplier may not share employees or services, except for corporate support services, emergency support services, or tariff services offered to all electric generation suppliers on a non-discriminatory basis. Temporary assignments of employees from an electric distribution company to an affiliated electric generation supplier or transmission supplier, for less than 1 year, shall be considered the same as sharing employees.
>
> (A) "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.

The Proposed Regulations prohibit an EDC and its affiliated EGS from sharing office space, employees, and numerous services, and would prohibit an EDC and its affiliated EGS from operating in a common building or from sharing employees. In addition, the Proposed Regulation restricts what services could be shared between a Pennsylvania EDC and its affiliated EGS.

If the intent of the Proposed Regulations is to restrict the direct sharing of offices, services, and employees between Pennsylvania EDCs and their affiliated EGSs, the PPL Companies, in large measure, do not oppose the Commission's Proposed Regulations. PPL Electric and PPL EnergyPlus currently do not directly provide any of the restricted services set forth in the Proposed Regulations to one another. However, the PPL Companies believe that requiring an EGS affiliated with a Pennsylvania EDC to occupy separate buildings from an EDC is excessive and unnecessary to accomplish the goals of the regulation.

If the Commission intends the Proposed Regulations to restrict Pennsylvania EDCs and their affiliated Pennsylvania EGSs from participating in a holding company, including the use of existing service companies within the holding company structure, the PPL Companies oppose these Proposed Regulations for the following reasons:

- Lack of Support for Need of the Restrictions: The Commission has provided no rational basis for the imposition of these unduly restrictive requirements. That is, there is no record to support these proposals.

- Adverse Effect on Customers: The proposed prohibition of an EDC and its affiliated EGS from sharing certain corporate services will result in increasing EDC costs and ultimately rates to customers. In addition, the proposed restrictions will unfairly increase costs to affiliated EGSs. These increases will result in Pennsylvania-affiliated EGSs becoming less competitive in the market as compared to affiliated EGSs of out-of-state holding companies or integrated utilities with shared services.

- Existing FERC Rules: Contrary to the Commission's Proposed Regulations, the FERC permits the sharing of services and facilities. Thus, the Proposed Regulations would require Pennsylvania EDCs to implement conflicting and inconsistent rules with FERC practice and policy.

- Commerce Clause: The Proposed Regulation seeks to restrict Pennsylvania EDCs and their affiliated EGSs from sharing corporate services. However, the Commission fails to acknowledge that many out-of-state EGSs are part of a holding company structure and will continue to benefit from the service company model because the Proposed Regulation does not bar their use of shared corporate services. As addressed below, this result violates the Commerce Clause of the United States Constitution.

- Application to Parent Companies: The PPL Companies assume that the Commission does not intend the Proposed Regulations to apply to parent companies. To do so would effectively prohibit EDCs and affiliated EGSs to participate in a holding company structure. Such a rule would violate Section 2804(5) of the Public Utility Code, which provides that the Commission, "may permit, but shall not require, an electric utility to...reorganize its corporate structure." 66 Pa. C.S. § 2804(5).

- Improper Restriction on Practice of Law: Further, the Commission's Proposed Regulation would preclude a Pennsylvania EDC and its affiliated EGS from sharing "legal services". This restriction improperly infringes upon the exclusive power of the Supreme Court to govern the conduct of attorneys practicing law within the Commonwealth.

Finally, and in the alternative, if the Commission determines to impose restrictions on the sharing of services to Pennsylvania EDCs and their affiliated EGSs in the holding company structure, the proposed restrictions are overly broad and require modification. Specifically, the PPL Companies request that the prohibited "corporate support services" be limited to the following services: purchasing of electric transmission facilities and wholesale market products, hedging and arbitrage, transmission and distribution service operations, and system operations. To prohibit services such as legal, regulatory services, billing, customer service and strategic management and planning is unnecessary and would require Pennsylvania EDCs and affiliated EGSs to absorb these function into their own operations, thereby losing the economies of scale achieved through service corporations.

The PPL Companies have addressed these arguments in greater detail below.

a. Proposed Regulations are Appropriate if Limited to the Sharing of Offices, Services, and Employees Between Pennsylvania EDCs and Affiliated EGSs

If the Proposed Regulations are intended to restrict the direct sharing of offices, services and employees by and between Pennsylvania EDCs and their affiliated EGSs, the PPL Companies do not oppose the Commission's Proposed Regulations. Currently, PPL Electric and PPL EnergyPlus do not share services or employees. As noted above, any current business communications or transactions between PPL Electric and PPL EnergyPlus are the same as between PPL Electric and any other competitive EGS in Pennsylvania. However, as noted above, the PPL Companies believe that requiring an EGS affiliated with a Pennsylvania EDC to occupy separate buildings from an EDC is excessive and unnecessary to accomplish the goals of the regulation. Indeed, there are less restrictive methods to accomplish separation between the EDC and EGS, including requiring separate work areas but not separate buildings. Requiring separate work spaces, coupled with the adherence to all applicable codes of conduct, adequately addresses the Commission's interests in this regard. Therefore, if the Proposed Regulations are applied to the sharing of services between a Pennsylvania EDC and its affiliated EGS, the PPL Companies' current operations comport with the proposed restrictions.

b. No Basis for the Proposed Regulations on Shared Offices, Services, and Employees to Apply to the Holding Company Structure

Like many of Pennsylvania's EDCs, the PPL Companies are part of a holding company, the creation of which was approved by this Commission. The PPL Companies have operated as part of its existing holding company structure since

2000.[14] Included within the holding company structure are separate service companies to provide corporate support services. When those service companies were established, the affiliated companies implemented sufficient safeguards to prevent improper sharing of competitively sensitive information. Indeed, the PPL Companies adhere to the PPL Corporation's Standards of Integrity ("Standards") which are an integral part of the PPL Companies' corporate business ethics and compliance program, and are applicable to all directors, managers, officers, employees, and agents as appropriate of PPL Corporation and its subsidiaries for which an affiliate has operating control. The Standards contain the legal and ethical principles that must be followed by everyone working within the PPL corporate organization of companies and provide guidelines for the way these individuals are expected to conduct business.

The PPL Companies believe that the Commission's existing Code of Conduct regulations have worked effectively to the benefit of Pennsylvania's electric retail market, and Pennsylvania's retail market is working well with over 1.6 million customers shopping. The success of electric competition in Pennsylvania is evident in PPL Electric's service territory, where over 580,000 of PPL Electric's customers, representing 71.5% of PPL Electric's total load, have availed themselves to the

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[14] Indeed, the Commission originally approved the reorganization of PPL corporate system in 1995, when it approved PP&L Resources, Inc., a public utility holding company, as the parent corporation of PPL Electric. *Application of Pennsylvania Power & Light Company for Approval, Pursuant to Chapter 11 of the Public Utility Code, of Certain Transactions in Connection with the Utility's Establishment of a Holding Company Structure*, Docket No. A-110500F.206 (February 10, 1995). In 2000, the Commission approved PP&L, Inc. being renamed PPL Electric Utilities Corporation, and PPL Corporation as the name of the holding company. On July 1, 2000, PPL Corporation and PPL Electric completed a corporate realignment in order to effectively separate PPL Electric's regulated transmission and distribution operations from its deregulated generation operations.

competitive retail supply.[15] Electric retail competition is working well in Pennsylvania. The Proposed Regulations relative to sharing of offices, services, and employees will hinder not help Pennsylvania's electric retail market, if such Proposed Regulations are to applied to holding companies.

The PPL Companies' current holding company structure includes the use of separate service companies to provide certain corporate support services. The Commission's Proposed Regulations, if applied to existing holding company structures, would severely restrict the sharing of employees to provide services to both the EDC and its affiliated EGS, including where the two entities are part of a holding company structure.[16]

The holding company structure has become standard in the utility industry, including among Pennsylvania EDCs and utilities located outside Pennsylvania. The holding company structure allows large corporations to offer a variety of products and services. In addition, the use of the holding company structure permits companies to operate in multiple jurisdictions. Through the holding company structure, companies are able to provide a number of services and functions through shared employees. Further, the service company structure reduces costs to the EDC and the affiliated EGS to the benefit of their customers. An example of this is the use of a services company. Services companies are used to provide services such as accounting, purchasing, IT,

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[15] Pennsylvania Electric Shopping Statistics, January 1, 2012, Pennsylvania Office of Consumer Advocate (http://www.oca.state.pa.us/Industry/Electric/elecstats/Stats0112.pdf).

[16] The PPL Companies note that the Proposed Regulation does not affirmatively define the term "corporate support services" but instead provides a list of services that, in the Commission's view, are not "corporate support services." Based upon the list of prohibited services, it is difficult to determine what, if any services, could be shared by an EDC and an affiliated EGS in the existing holding company structure. Specifically, as addressed below, the proposed exclusion of billing, collection, customer service, information systems, and legal services is over broad and unnecessary.

human services, regulatory affairs, and legal services to affiliated companies. The shared service company employees provide these services to affiliated companies at fully allocated cost, including overheads and benefits.

The PPL Companies, like other Pennsylvania and other state EDCs, share employees through the holding company structure, i.e., service companies. In Pennsylvania, the service agreements between the EDC and its affiliated companies are regulated by the Commission pursuant to Chapter 21 of the Public Utility Code discussed *supra*. Further, the Commission has established extensive rules and regulations to prevent improper sharing of marketing and other competitively sensitive information between EDCs and their affiliated EGSs. The Commission's existing Code of Conduct has struck an appropriate balance between ensuring against anticompetitive behavior between an EDC and its affiliated EGS, and allowing corporations to benefit from the economies of scale to be achieved through the holding company structure. The Commission has not identified any violations of the Commission's existing rules and regulations necessitating the overly broad restrictions in the Proposed Regulations. Moreover, neither the Commission nor any party to this proceeding has provided any evidence to support the conclusion that the current holding company structure used by Pennsylvania's EDCs has harmed retail competition. However, if, in the future, there were violations of the Commission's existing rules and regulations relative to the sharing of office space, employees, or services, the PPL Companies believe that the Commission currently has the requisite authority it needs to address such violations.

The successes achieved by Pennsylvania's retail electric market have occurred under the existing Code of Conduct, which adequately and effectively addresses the concerns raised relative to the sharing of offices, services, and employees. No regulatory changes are warranted.

c. The Proposed Regulations if Applied to Holding Company Structure Will Adversely Affect Customers and Retail Electric Competition

The proposed exclusion from the definition of "Corporate Services" of functions that may be shared through the holding company structure by an EDC and its affiliates is overly restrictive. The PPL Companies currently do not receive the following services from their participation in the holding company structure: purchasing of electric transmission facilities and wholesale market products, hedging and arbitrage, transmission and distribution service operations, and system operations. Therefore, the PPL Companies do not oppose the proposed restrictions on the sharing of these services. However, the PPL Companies believe that the Commission's proposal to exclude billing, collection, customer service, engineering, IT, regulatory, and legal service functions is overly broad. The exclusion of these functions from the definition of permitted shared "corporate support services" would substantially increase costs to affiliated EGSs and place the affiliated EGSs at a competitive disadvantage against out-of-state EGSs that are able to avail themselves of the benefits of a holding company structure. Indeed, Pennsylvania's affiliated EGSs would find themselves with a Hobson's choice – incur the additional costs to establish a separate corporate service framework so that they may continue to operate in Pennsylvania's retail electricity market, or exit Pennsylvania's market and focus only on retail markets in other states that do not impair their ability to participate in and benefit from a holding company structure. The exit of affiliated EGSs from Pennsylvania's market would reduce the number of competitive options available to Pennsylvania retail electric consumers, and increase the fixed costs recoverable from EDC customers via increased rates. The overly restrictive functions excluded from the definition of "corporate support services" would require EDCs and affiliated EGSs to absorb these functions into their own operations, thereby losing the benefit of the economies scale achieved through service corporations. That result is unnecessary and not sound public policy.

Instead of adopting overly broad and restrictive requirements on only Pennsylvania EDCs and their affiliates, the Commission should continue to permit Pennsylvania EDCs and their affiliated EGSs to share billing, collection, customer service, engineering, IT, regulatory, and legal service functions. The Commission's existing rules and regulations prevent the improper sharing of marketing and other competitively sensitive information between EDCs and their affiliated EGSs. Further, the Commission has proposed additional restrictions in this proceeding that would provide additional safeguards. This approach would permit the continued sharing of these services and maintain sufficient safeguards and Commission oversight over the interaction between EDCs and their affiliated EGSs.

d. Existing FERC Rules

The Proposed Regulations would exclude from the definition of "corporate support services" many of the functions currently included in existing FERC rules, which permit the use of service companies. Should the Commission adopt the Proposed Regulations relative to the sharing of offices, employees, and services, Pennsylvania EDCs would be required implement conflicting and inconsistent rules for dealing with service company issues.

FERC's regulations on this issue are contained in 18 CFR Part 358 - Standards of Conduct for Transmission Providers ("FERC Standards"). In short, the FERC

Standards require that employees engaged in transmission system operations to function independently of employees engaged in marketing functions, and that a Transmission Provider treat all transmission customers, affiliated and non-affiliated, on a nondiscriminatory basis and not operate the transmission system to preferentially benefit its affiliates.

Prior to implementing its current FERC Standards, the FERC applied the former corporate separation approach adopted in Order No. 2004.[17] The former corporate separation approach made it difficult for companies to transact needed business because all the employees of a marketing affiliate were required to be completely walled off from the transmission provider's transmission function employees. The previously required corporate separation approach resulted in companies needing to create whole "categories of employees who could be shared" between the transmission provider and the marketing affiliate, such as officers and members of the board, field and maintenance employees, and risk management employees. Implementation of the corporate separation approach resulted in the identification of issues – including whether employees, such as lawyers, accountants, and rate design personnel, should be exempt from being completely walled off.

In Order No. 717[18], FERC rejected the former corporate separation approach and adopted its current independent function rules. The adoption of the current independent

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[17] *Standards of Conduct for Transmission Providers*, Order No. 2004, FERC Stats. & Regs. ¶ 31,155 (2003), *order on reh'g*, Order No. 2004-A, FERC Stats. & Regs. ¶ 31,161, *order on reh'g*, Order No. 2004-B, FERC Stats. & Regs. ¶ 31,166, *order on reh'g*, Order No. 2004-C, FERC Stats. & Regs. ¶ 31,172 (2004), *order on reh'g*, Order No. 2004-D, 110 FERC ¶ 61,320 (2005), *vacated and remanded as it applies to natural gas pipelines sub nom. National Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831 (D.C. Cir. 2006).

[18] *Standards of Conduct for Transmission Providers*, Order No. 717, FERC Stats. & Regs. ¶ 31,280 (2008), *order on reh'g*, Order No. 717-A, FERC Stats. & Regs. ¶ 31,297, *order on reh'g*,

function rules eliminated many of the issues related to "categories of employees that could be shared" under the former approach,[19] because under the current rules only marketing function employees must function independently from transmission function employees.

Thus, the FERC rules permit the sharing of services, provided that the employees that are engaged in transmission services operate independently of affiliated employees who are engaged in marketing functions.[20] The FERC rules also permit the sharing of facilities, provided that the marketing function employees do not have access to any facilities used for transmission or reliability operations.[21]

The Commission's Proposed Regulations prohibit EDCs and affiliated EGSs from sharing services such as billing, collection, customer service, information systems, regulatory, and legal services. In addition, the Commission's Proposed Regulations expressly prohibit EDCs and affiliated EGSs from sharing buildings or facilities. Should the Commission adopt these proposed restrictions, PUC requirements would be inconsistent with current FERC practice and policy that allow shared services and facilities. Therefore, the Proposed Regulations would require Pennsylvania EDCs to implement conflicting and inconsistent rules for dealing with service company issues. This will increase costs and ultimately rates to customers.

e. Commerce Clause

Order No. 717-B, 129 FERC ¶ 61,123 (2009), *order on reh'g*, Order No. 717-C, 131 FERC ¶ 61,045 (2010), *order on reh'g*, Order No. 717-D, 135 FERC ¶ 61,017.

[19] *See* Order No. 717 at P 123.

[20] 18 C.F.R. §358.5.

[21] *See Id.*.

The Proposed Regulation would prohibit EGSs affiliated with Pennsylvania EDCs from occupying the same building, and sharing employees services, thus imposing substantial costs on the Pennsylvania EDC and its affiliated EGS.

Several retail marketers from other states are active in the Pennsylvania retail electric market. These out-of-state marketers are affiliates of major utility holding companies that employ service companies and/or shared services, but the Proposed Regulation does not appear to apply to these entities. The Commission's Proposed Regulation would thereby create an unfair and unreasonable competitive advantage for out-of-state EGSs.

In addition, the PPL Companies note that several Pennsylvania-affiliated EGSs, including PPL EnergyPlus, do not limit their marketing activities to the Commonwealth. PPL EnergyPlus actively engages in marketing its services in various other state retail electric markets, including Maryland, Delaware, and New Jersey. However, because the proposed prohibition on shared offices, employees, and services do not apply to out-of-state marketers, the Proposed Regulation would put PPL EnergyPlus and other EGSs affiliated with a Pennsylvania EDC at a competitive disadvantage when conducting marketing activities outside of the Commonwealth.

The Commerce Clause forecloses local laws that impose commercial barriers or discriminate against an article of commerce by reason of its origin or destination out of State. *See C&A Carbone v. Town of Clarkstown*, 511 U.S. 383, 390 (U.S. 1994) (*citing Hughes v. Oklahoma*, 441 U.S. 322 (1979)). The Pennsylvania Supreme Court has explained that the "Commerce Clause has a negative or dormant aspect which limits the power of the states to erect barriers against interstate trade where Congress has not affirmatively acted to either authorize or forbid the challenged state activity ...." *Empire Sanitary Landfill v. Pennsylvania Department of Environmental Resources*, 684 A.2d 1047, 1055 (Pa. 1996)).

The Proposed Regulation's prohibition on shared offices, employees, and services by an EGS affiliated with a Pennsylvania EDC substructure substantially burdens interstate commerce. EGSs like PPL EnergyPlus that are affiliated with a Pennsylvania EDC would be at a competitive disadvantage with respect to marketing activities conducted outside the Commonwealth. Given the increase in costs, an EGS affiliated with a Pennsylvania EDC would not be able to effectively compete against out-of-state marketers offering the same or similar services in the interstate retail electric market.

Moreover, that burden is clearly excessive in relation to the local benefits, and thus impermissible. Pennsylvania currently has a robust competitive market, with participation by both in-state and out-of-state marketers. Importantly, there is no evidence that the sharing of offices, employees, and services by EGSs and their affiliated Pennsylvania EDCs, subject to the existing Code of Conduct, has negatively impacted competition in the retail electric market, or that the proposed rule would affect any net benefit. But the proposed regulation would act as an economic bar to EGSs with an affiliated Pennsylvania EDC from entering the interstate retail electric market. Such EGSs would be required to choose between: (1) participating in the Pennsylvania retail electric market, at a competitive disadvantage to out-of-state marketers not subject to the prohibition on sharing offices/employees/services; or (2) abandoning their marketing activities in Pennsylvania and pursuing such activities in other states where they can continue to use shared offices/employees/services to more effectively compete in the interstate market. This is a significant burden on EGSs with an affiliated Pennsylvania EDC and, moreover, it could have serious repercussions on competition by the loss of customers' ability to select in-state EGSs over out-of-state marketers.

Given the existing robust competitive market, the safeguards of the existing Code of Conduct and affiliate interest agreements, and the competitive disadvantage to EGSs affiliated with a Pennsylvania EDC to effectively compete in both the intrastate and interstate retail electric markets, the proposed prohibition would impose a burden clearly excessive in relation to the local benefits. For these reasons, the Proposed Rulemaking, if approved, would violate the dormant Commerce Clause protection of interstate commerce.

f. Section 2804(5)

Section 2804(5) of the Public Utility Code limits the Commission's power to regulate Pennsylvania's restructured electric utility industry so that it does not extend to the power to require reorganization of an EDC's corporate structure. 66 Pa.C.S. § 2804(5). If the currently proposed exclusion of shared services were applied to a Pennsylvania's EDC's parent corporation, the restrictions would effectively mandate that Pennsylvania EDCs reorganize their existing corporate structure in violation of Section 2804(5).

The proposed regulation excludes "strategic management and planning" as a permissible form of corporate support services. This exclusion, if applied to the parent company for Pennsylvania EDCs and their affiliated EGSs, would prohibit the corporate offices of parent company from overseeing the corporate operations of its EDC and affiliated EGS via "strategic management and planning" for these entities, effectively conflicting with Section 2804(5) of the Public Utility Code.

g. Impermissible Regulation of Attorneys

The Commission's Proposed Regulation would preclude a Pennsylvania EDC and its affiliated EGS from sharing "legal services." This restriction improperly infringes upon exclusive power of the Supreme Court to govern the conduct of attorneys practicing law within the Commonwealth. *Lloyd v. Fishinger*, 529 Pa. 513, 605 A.2d 1193, 1196 (1992). This exclusive power is granted to the Court by Article V, Section 10(c) of the Pennsylvania Constitution, which provides in pertinent part that:

> The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts. . . . All laws shall be suspended to the extent that they are inconsistent with rules prescribed under these provisions.

Any legislative enactment encroaching upon the Court's exclusive power to regulate attorney conduct is unconstitutional. *Lloyd*, 605 A.2d at 1196. The legislature is precluded from "exercising powers entrusted to the judiciary." *Commonwealth v. Stern*, 549 Pa. 505, 701 A.2d 568, 571 (Pa. 1997) (citation omitted).[22]

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[22] *See, e.g., Shaulis v. Pennsylvania State Ethics Comm'n.*, 574 Pa. 680, 833 A.2d 123, 132 (Pa. 2003) (65 Pa.C.S. § 1103(g) of the Public Official and Employee Ethics Act [barring attorney from practicing before former government employer for one year after he leaves employment] is unconstitutional to the extent that it regulates the conduct of former government employees who are also attorneys); *Gmerek v. State Ethics Comm'n.*, 751 A.2d 1241, 1260 (Pa. Cmwlth. 2000), *aff'd*, 569 Pa. 579, 807 A.2d 812 (2002) (Lobbying Disclosure Act, 65 Pa.C.S. § 1303-1311 invalid and unconstitutional insofar as it applied to the conduct of lawyers engaged in lobbying activities, since lobbying activities were "the practice of law"); *Commonwealth v. Stern*, 549 Pa. 505, 701 A.2d 568, 571-73 1997) (18 Pa.C.S. § 4117(b)(1) which criminalized conduct of an attorney for compensating a non-lawyer for client referrals held unconstitutional as violative of separation of powers doctrine; Supreme Court promulgated Pa.R.P.C. 7.2(c) which governs this conduct); *Snyder v. Unemployment Comp. Bd. of Review*, 509 Pa. 438, 502 A.2d 1232, 1233-34 (1985) (Section 410 of the Ethics Act (65 P.S. § 410) permits court employees to participate in partisan political activity is unconstitutional as applied to any person affected by the Court's directive forbidding partisan political activity as violative of Pa. Const. Art. V, § 10(c)); *Wajert v. State Ethics Comm'n.*, 491 Pa. 255, 420 A.2d 439, 442 (1980) (65 P.S. §

D. SECTION 54.122(4) ACCOUNTING AND TRAINING REQUIREMENTS

1. Section 54.122(4)(i)

The Proposed Regulation requires an EDC and affiliated EGS to maintain separate accounting records for their business activities.

The PPL Companies do not oppose this provision and note that they presently maintain separate accounting records.

2. Section 54.122(4)(ii)

The Proposed Regulation requires an EDC to maintain a "cost allocation manual" to contain, in a single document, a description of the relationship between EDC and its affiliated EGS. The "cost allocation manual" is to include an organizational chart, identify contractual relationships, job positions, and descriptions of all shared employees, and include a log of business activities between the EDC and its affiliated EGS. Further, the Proposed Regulation would require that the "cost allocation manual" be filed with the Commission within six months of the effective date of the Proposed Regulation. The Commission will review the EDC's "cost allocation manual" during the course of the Commission's audit and management efficiency investigation provisions in § 516 of the Public Utility Code.

The PPL Companies support this provision.

403(e), providing that no former official or public employee could represent a person on any matter before the governmental body with which the employee or official was previously associated, is an unconstitutional encroachment upon the exclusive power of the Court to regulate the practice of law); *In re 42 Pa. C.S. § 1703*, 482 Pa. 522, 394 A.2d 444, 446-47(1978) (42 Pa.C.S. § 1703, Open Meeting Law, as applied to the judiciary, is a violation of separation of powers doctrine); *Pennsylvania Co. for Insurances on Lives and Granting Annuities v. Scott*, 346 Pa. 13, 29 A.2d 328, 329-30 (1942) (pursuant to separation of powers doctrine, the legislature cannot interfere with a judgment or decree of the judicial branch); *In re Splane*, 123 Pa. 527, 16 A. 481 (1889) (law attempting to regulate admission to the bar was unconstitutional because admission to the bar is a judicial, not a ministerial act, solidifying the Court's position as the governmental branch with control over the legal profession).

3. Section 54.122(4)(iii)

The Proposed Regulation revises existing Section 54.122(11) of the Code of Conduct to severely limit the sharing of employees or services between Pennsylvania EDCs and their affiliated EGSs.

The PPL Companies' objections to this provision were addressed *supra* in response to Section 54.122(3)(ix).

4. Section 54.122(4)(iv)

The Proposed Regulation is currently set forth in Section 54.122(8) of the existing Code of Conduct and requires EDCs and their affiliated EGSs to implement the Commission's Code of Conduct.

The PPL Companies have no comments.

E. SECTION 54.122(5) DISPUTE RESOLUTION PROCEDURES.

1. Section 54.122(5)(i)

The Proposed Regulation renumbers the existing dispute resolution process contained in Section 54.122(4) of the Code of Conduct.

The PPL Companies have no comments.

F. SECTION 54.122(6) PENALTIES

1. 54.122(6)(i)

The Proposed Regulation provides that EDCs and EGSs that do not comply with the Commission's Code of Conduct will be subject to penalties under 66 Pa. C.S. § 3301 (relating to civil penalties for violations).

The PPL Companies have no comments.

V. CONCLUSION

The Commission should **not** adopt these regulations as proposed. The proposed regulations are not in the interests of either Pennsylvania's consumers or Pennsylvania's Electric Generation Suppliers and Electric Distribution Companies. Adopting these regulations as proposed will result in significant harm to Pennsylvania's consumers or Pennsylvania's Electric Generation Suppliers and Electric Distribution Companies, and will result in needless and costly litigation against the Commonwealth and the Commission. Instead, the Commission should modify its proposed regulations consistent with the comments of the PPL Companies.

Respectfully submitted,

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Date: March 27, 2012

Attorneys for PPL Electric Utilities Corporation
& PPL EnergyPlus, LLC

TAB

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EXHIBIT 1

THE PPL COMPANIES' COMMENTS ON PROPOSED RULEMAKING

The PPL Companies' Proposed Revisions To PUC Proposed Regulations

TITLE 52. PUBLIC UTILITIES
PART I. PUBLIC UTILITY COMMISSION
Subpart C. FIXED SERVICE UTILITIES
CHAPTER 54. ELECTRICITY GENERATION CUSTOMER CHOICE
Subchapter E. COMPETITIVE SAFEGUARDS

Section 54.122. Code of Conduct

Electric generation suppliers and electric distribution companies shall comply with the following requirements:

(1) Nondiscrimination requirements.

(i) An electric distribution company may not give an electric generation supplier, including without limitation its affiliate or division, a preference or advantage over another electric generation supplier in processing a request by a distribution company customer for retail generation supply service.

(ii) 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, a preference or advantage in the dissemination or disclosure of customer information and dissemination or disclosure shall occur at the same time and in an equal and nondiscriminatory manner. The term "customer information" means 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.

(iii) An electric distribution company may not illegally tie the provision of an electric distribution service within the jurisdiction of the Commission to one of the following:

(A) The purchase, lease or use of other goods or services offered by the electric distribution company or its affiliates.

(B) A direct or indirect commitment not to deal with a competing electric generation supplier.

(iv) An electric distribution company may not provide a preference or advantage to any electric generation supplier in the disclosure of information about operational status and availability of the distribution system.

(v) An electric distribution company shall supply regulated services and apply tariffs to nonaffiliated electric generation suppliers in the same manner as it does for itself and its affiliated or division electric generation supplier and uniformly supply regulated services and apply its tariff provisions in a nondiscriminatory manner.

(2) Customer requests for information.

(i) If an electric distribution company customer requests information about electric generation suppliers, the electric distribution company shall provide the address of the Commission's retail choice web site 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 equal and nondiscriminatory means, according to the customer's preference. The electric distribution company may not recommend or offer an opinion on the relative merits of particular suppliers. In addition, an electric distribution company may provide the mailing address, web site address and telephone number of an electric generation supplier if specifically requested by the customer by name. To enable electric distribution companies to fulfill this obligation, the Commission will maintain a written list of licensed electric generation suppliers. The Commission will regularly update this list and provide the updates to electric distribution companies as soon as reasonably practicable. The Commission will compile the list in a manner that is fair to electric generation suppliers and that is not designed to provide a particular electric generation supplier with a competitive advantage.

(ii) An electric distribution company or an electric generation supplier ~~its affiliate or division~~ may not state or imply that delivery services provided to an electric generation supplier, including but not limited to an affiliate or division, or to a customer of either are inherently superior, solely on the basis of the affiliation with the electric distribution company, to those provided to another electric generation supplier or customer or that the electric distribution company's delivery services are enhanced should supply services be procured from any electric generation supplier, including but limited to an ~~its~~ affiliate or division.

(3) Prohibited transactions and activities.

(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.~~

(ii~~i~~) An electric distribution company may not allow an affiliate electric generation supplier to secure credit through the pledge of assets in the rate base of the electric distribution company or the pledge of money necessary for utility operations.

(iii~~v~~) 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 disclaimer and enters into an appropriate licensing agreement specifying the rights.

(A) The disclaimer shall state that the electric generation supplier is not the same company as the electric distribution company whose EDC identifier is featured and that a customer does not need to buy the electric generation supplier's products or services to continue receiving services from the electric distribution company.

(B) ~~In print and Internet communications, the disclaimer shall be placed immediately adjacent to the EDC identifier and be in equal prominence to the main body of the text.~~ In radio ~~or television~~ communications, the disclaimer shall be clearly spoken. A simplified plain language disclaimer may be used for television. For the purposes of this subsection, the term electric distribution company includes an electric distribution company operating in Pennsylvania in addition to similar entities operating as electric power distribution utilities in any state in the United States.

~~(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.).~~

(v) All electric generation suppliers providing services in Pennsylvania that are (a) affiliated with an electric distribution company or parent company (regardless of whether the location of that electric distribution company or parent company, is inside or outside Pennsylvania), and (b) using a name that is the same as or substantially similar to the name of that electric distribution company or parent company, must include a reasonably prominent disclaimer in all advertisements and other marketing and promotional communications that discloses (i) the identity of the affiliated electric distribution company and parent company;

(ii) that the electric generation supplier is not the same company as the affiliated electric distribution company and parent company; (iii) that the services offered by the electric generation company are not regulated by the Pennsylvania Public Utility Commission; and (iv) that the customer need not purchase services from the electric generation supplier in order to be eligible for services from the affiliated electric distribution company or parent company.

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

(vii) An electric distribution company and an affiliated electric generation supplier may not engage in joint marketing, sales or promotional activities unless the joint marketing, sales or promotional activities are offered to electric generation suppliers in the same manner under similar terms and conditions.

(viii) An electric distribution company or electric generation supplier may not engage in false or deceptive advertising to customers with respect to the retail supply of electricity in this Commonwealth.

(ix) An electric distribution company and affiliated electric generation supplier may not share office space and shall either be physically separated by occupying different buildings or establish separate work areas with restricted access.

(4) Accounting and training requirements.

(i) An electric distribution company and an affiliated electric generation supplier shall maintain separate accounting records for their business activities.

(ii) An electric distribution company that has an affiliated electric generation supplier shall document the business relationship through a cost allocation manual.

(A) The cost allocation manual must include an organizational chart, identify contractual agreements between the two entities, include job positions and job descriptions of shared or temporarily assigned employees and a log of business transactions between the electric distribution company and electric generation supplier.

(B) The cost allocation manual shall be filed with the Commission by ___ (Editor's Note: The blank refers to 6 months after the effective date of adoption of this proposed rulemaking.). Substantial revisions to the cost allocation manual shall be filed when necessary. The cost allocation manual shall be posted by the electric distribution company on its web site within 48 hours of filing with the Commission.

(C) The cost allocation manual shall be reviewed as part of the audits and management efficiency investigations under section 516 of the code (relating to audits of certain utilities).

(iii) An electric distribution company and affiliated electric generation supplier or transmission supplier may not share their employees or services, except for corporate support services, emergency support services or tariff services offered to electric generation suppliers on a nondiscriminatory basis. Temporary assignments of employees from an electric distribution company to an affiliated electric generation supplier or transmission supplier, for less than 1 year, shall be considered the same as sharing employees. <u>This provision only applies to the direct sharing of employees and services between an electric distribution company and affiliated electric generation supplier or transmission supplier. An electric distribution company and affiliated electric generation supplier or transmission supplier may share services provided by other affiliated companies in a holding company structure, including, but not limited to the parent corporation and the use of services companies.</u>

(A) 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, <u>and</u> ~~engineering, billing, collection, customer service, information systems, electronic data interchange, strategic management and planning, account management, regulatory services, legal services, lobbying,~~ marketing or sales.

(B) Emergency support services are temporary services necessary to protect consumer safety or prevent interruption of service.

(C) The electric distribution company shall report to the Commission by January 31 of each year the work history of each shared, temporarily assigned or permanently transferred employee to the affiliated electric generation supplier during the previous calendar year and the employee's new position with the affiliate.

(iv) An electric distribution company and its affiliated or divisional electric generation supplier shall formally adopt and implement these provisions as company policy and shall take appropriate steps to train and instruct its employees in their content and application.

(5) Dispute resolution procedures. An electric distribution company shall adopt the following dispute resolution procedures to address alleged violations of this section:

(i) Regarding a dispute between an electric distribution company or a related supplier, or both, and an electric generation supplier (each individually referred to as a "party" and collectively referred to as "parties") alleging a violation of this section, the electric generation supplier shall provide the electric distribution company or related supplier, or both, a written notice of dispute which includes the names of the parties and customers, if any involved, and a brief description of the matters in dispute.

(ii) Within 5 days of receipt of the notice by the electric distribution company or related supplier, or both, a designated senior representative of each of the parties shall attempt to resolve the dispute on an informal basis.

(iii) If the designated representatives are unable to resolve the dispute by mutual agreement within 30 days of the referral, the dispute shall be referred for mediation through the Commission's Office of Administrative Law Judge. A party may request mediation prior to that time if it appears that informal resolution is not productive.

(iv) If mediation is not successful, the matter shall be converted to a formal proceeding before an administrative law judge and the prosecuting parties shall be directed to file a formal pleading in the nature of a complaint, petition or other appropriate pleading with the Commission within 30 days or the matter will be dismissed for lack of prosecution. A party may file a complaint, petition or other appropriate pleading concerning the dispute under any relevant provision of the code.

(6) Penalties. An electric distribution company or electric generation supplier that does not comply with this subchapter shall be subject to penalties under section 3301 of the code (relating to civil penalties for violations).

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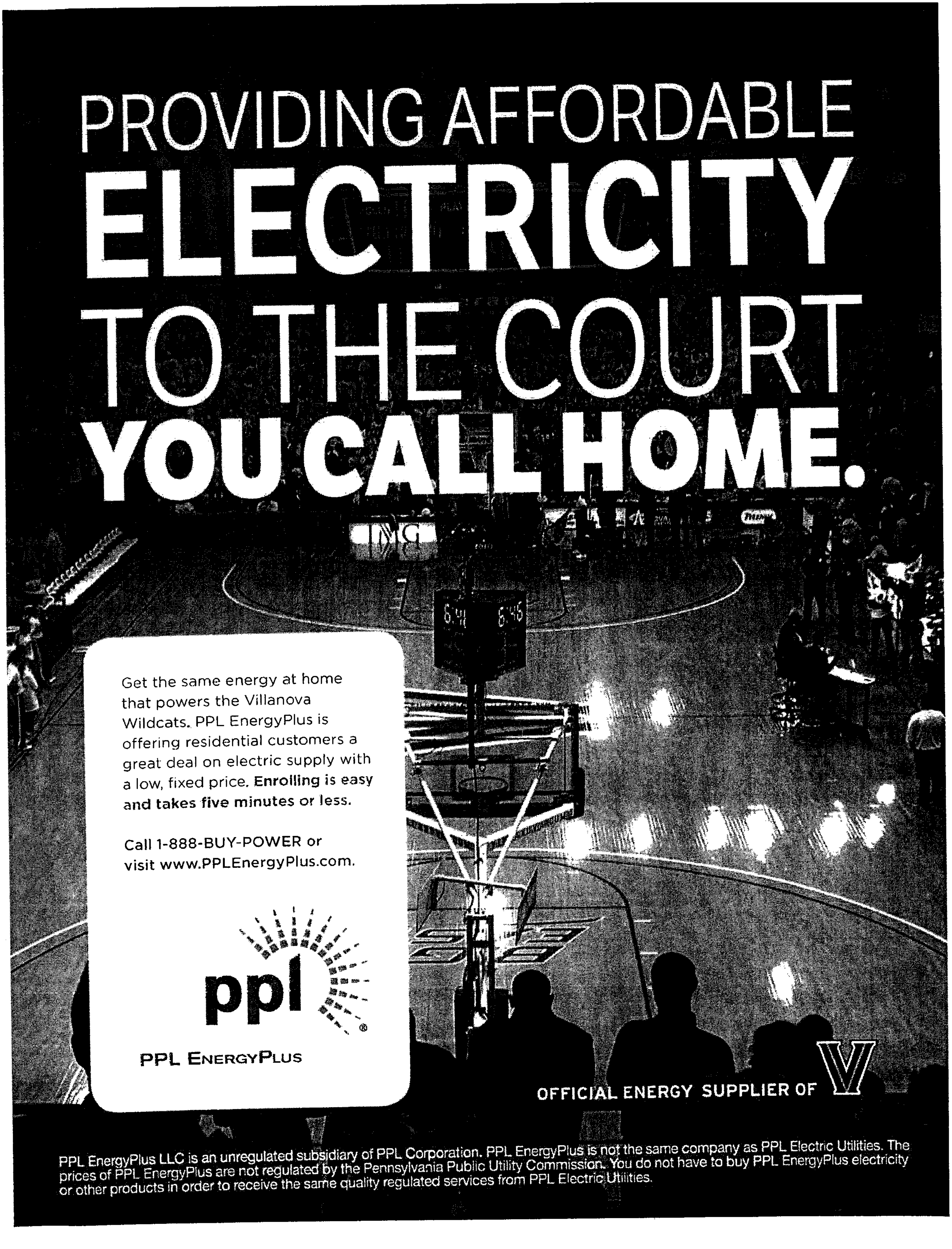
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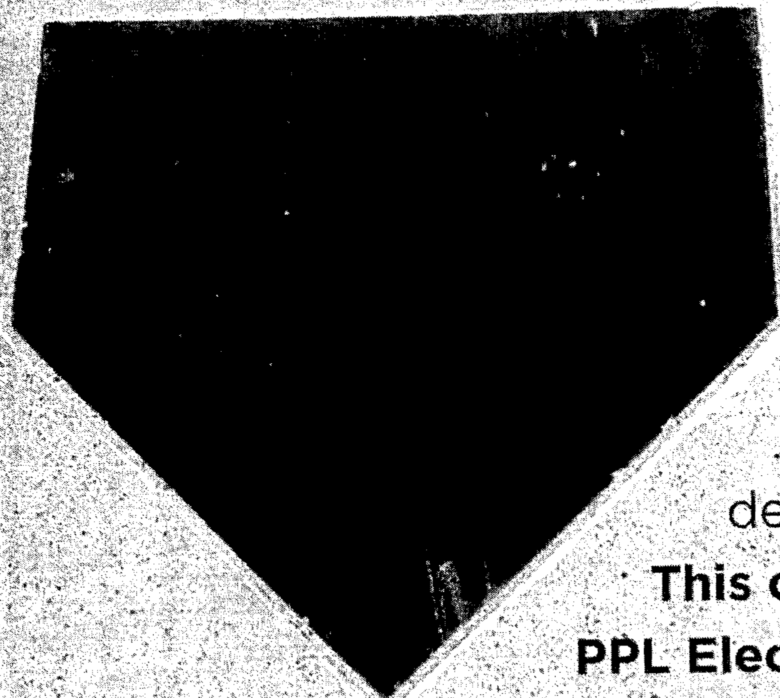

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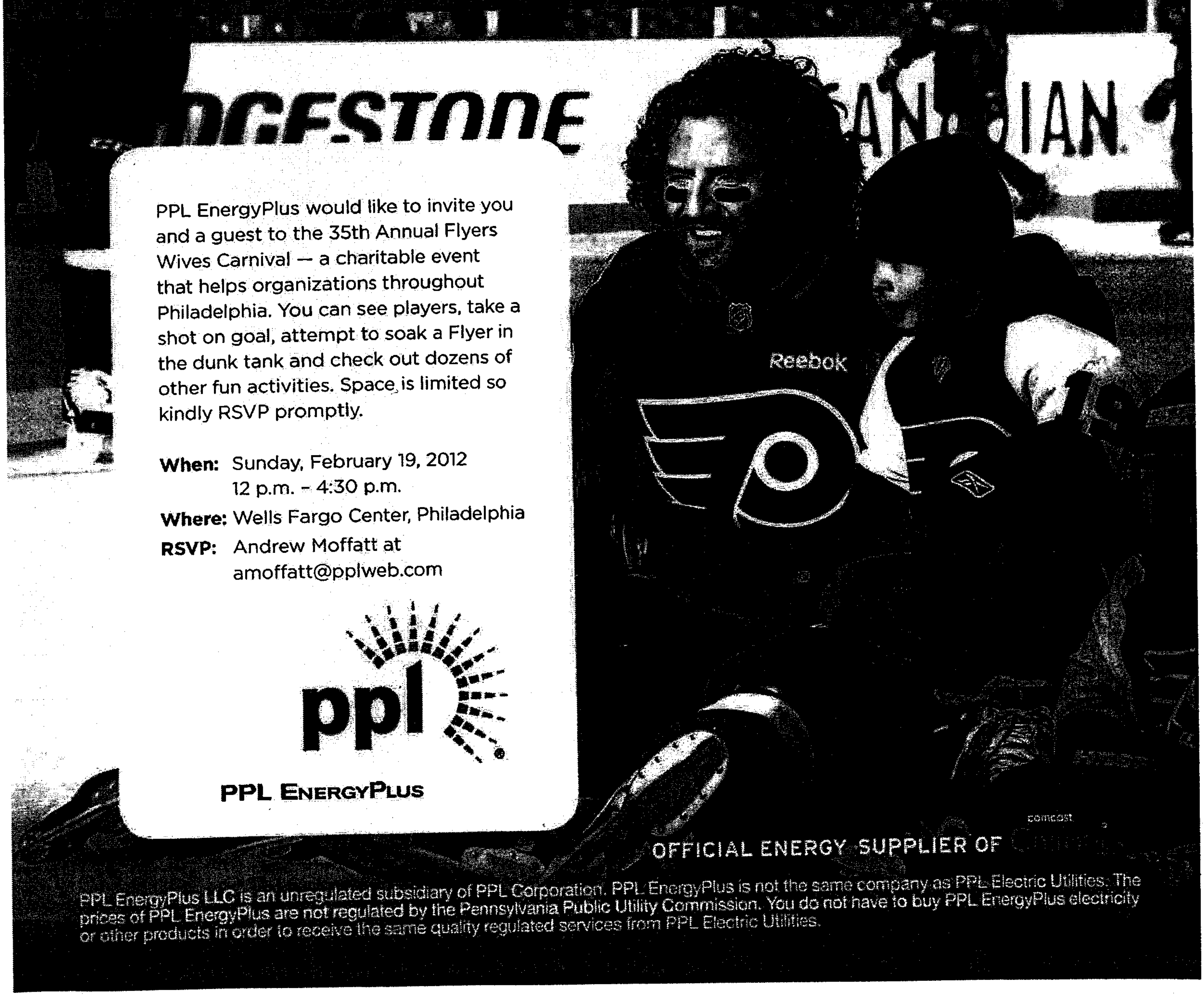

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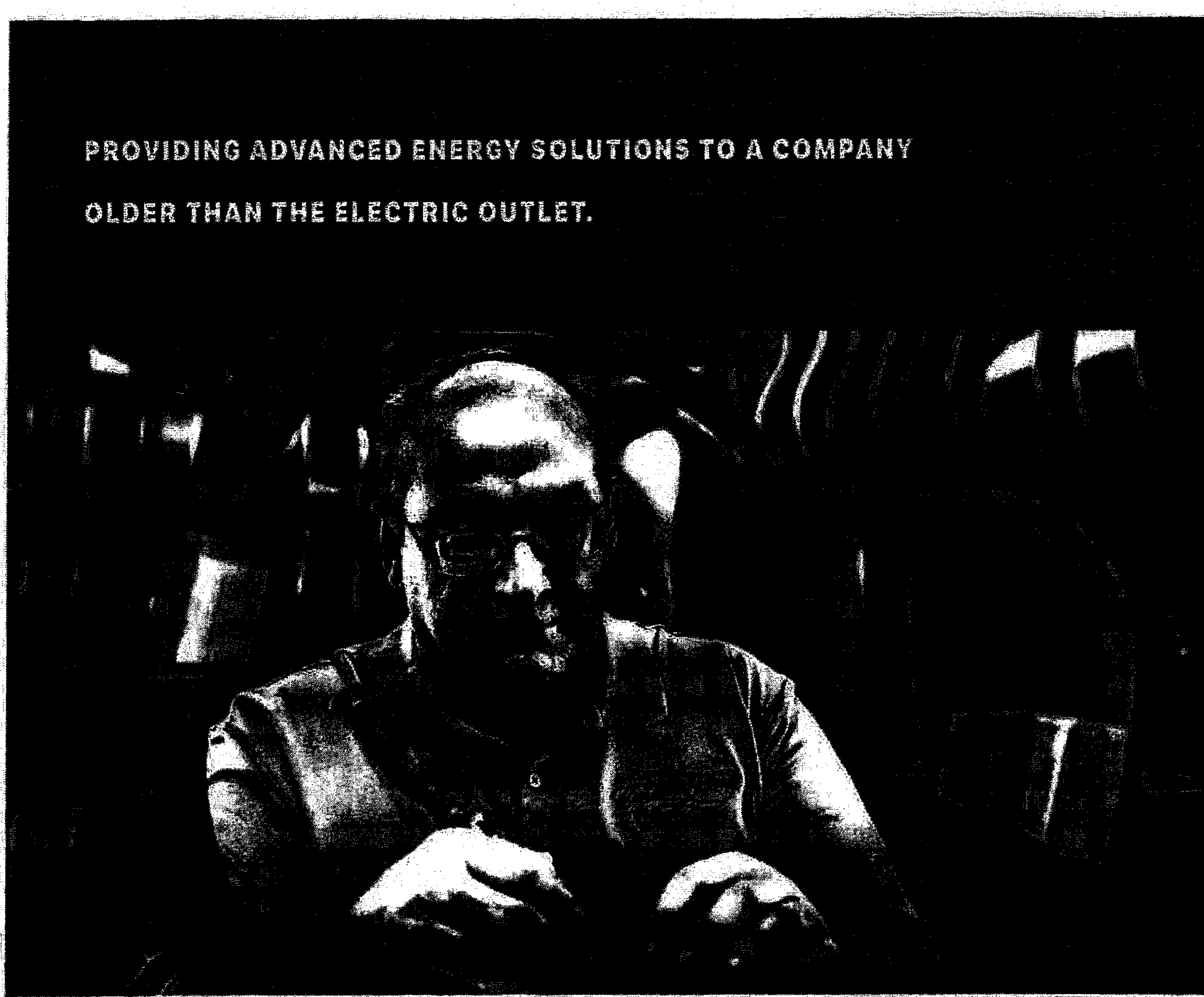

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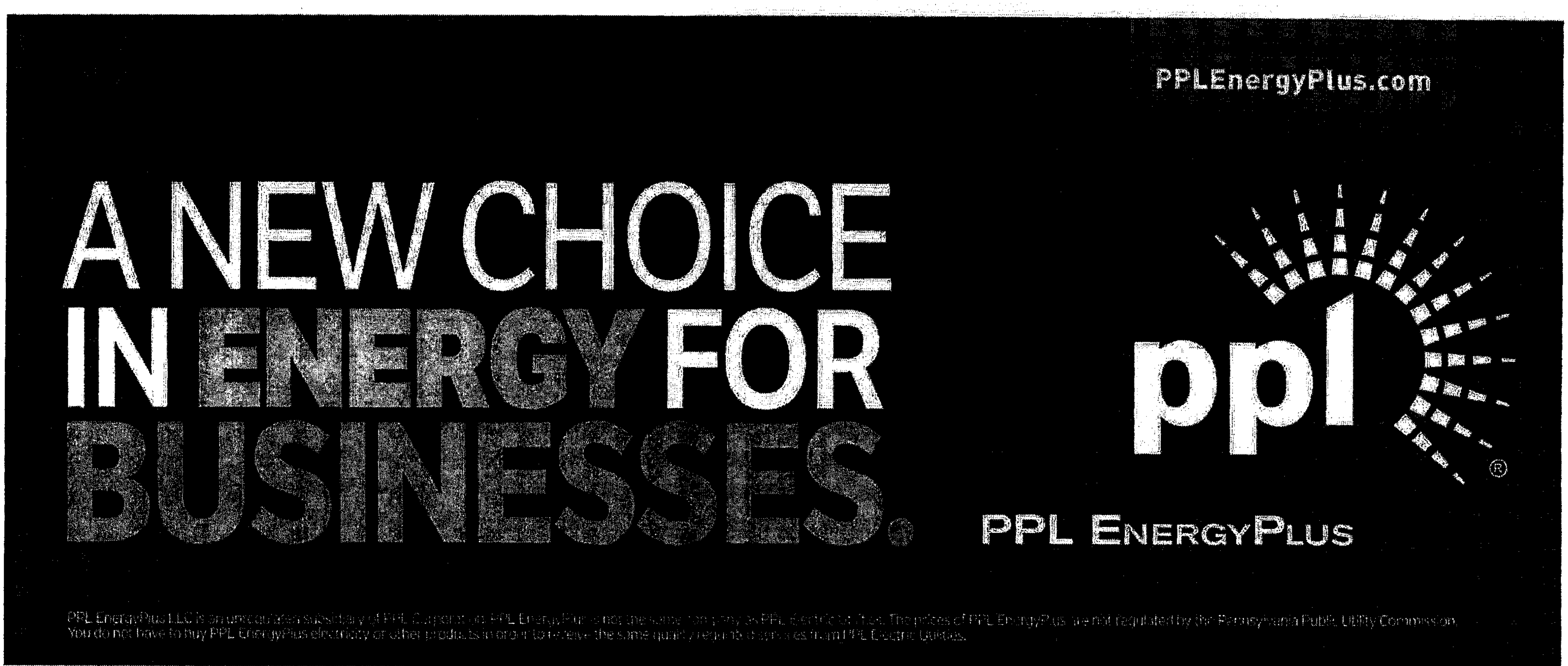
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BEFORE THE
PENNSYLANIA PUBLIC UTILITY COMMISSION

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

DECLARATION OF KENNETH GORDON IN SUPPORT OF PPL ELECTRIC UTILITIES CORPORATION'S AND PPL ENERGYPLUS LLC'S COMMENTS ON PROPOSED RULEMAKING

I, Kenneth Gordon, hereby declare as follows:

I. QUALIFICATIONS, SUMMARY AND CONCLUSIONS

A. Qualifications

1. I am a Special Consultant at National Economic Research Associates, Inc. (NERA), 200 Clarendon Street, Boston, MA 02116. Prior to joining NERA in November 1995 as a Senior Vice President, I chaired the Maine Public Utilities Commission (Maine PUC) from 1988 to December 1992 and then the Massachusetts Department of Public Utilities (Mass. DPU) from January 1993 to October 1995. My Curriculum Vitae is attached as **Attachment KG-1**. I am authorized to make this affidavit on behalf of PPL Electric Utilities Corporation and PPL EnergyPlus, LLC in the above-captioned proceeding.

2. I have been an economist since 1965 and have been directly involved with developing and establishing regulatory policy at the federal and state levels since 1980, when I became an industry economist at the Federal Communications Commission (FCC). I received my A.B. degree from Dartmouth College in 1960. I received my M.A. degree in 1963 and my Ph.D degree in 1973, both in economics, from the University of Chicago. I have taught applied microeconomics, industrial organization, and regulation (as well as other courses) at Georgetown University, Northwestern University, University of Massachusetts at Amherst, and Smith College.

3. From 1980 to 1988, I was an industry economist at the FCC's Office of Plans and Policy, where I worked on a full range of regulatory issues, including telecommunications, cable,

broadcast, and intellectual property rights. At the FCC, a major focus of my work was on activities aimed at introducing competition into communications markets.

4. While I was Chairman, the Mass. DPU issued a series of orders aimed at the reform of electric rate regulation, including revisions to integrated resource management procedures, the introduction of incentive regulation, the treatment of acquisition premiums in mergers and acquisitions, and the design of electric industry restructuring. I was heavily involved in developing Massachusetts' plan to introduce competition in retail electric markets and the concurrent efforts to establish practical policies to address stranded costs and other transitional issues that arise in restructuring the electric utility industry. While in Massachusetts, I co-chaired the Governor's task force on electricity competition.

5. I was also active in the National Association of Regulatory Utility Commissioners (NARUC), serving on its Communications and Executive Committees. In 1992, I served as President of NARUC. In addition, I was Chairman of the BellCore Advisory Committee and the New England Governor's Conference Power Planning Committee.

B. Summary and Conclusions

6. The purpose of my Declaration is to explain why it is important, from an economic and policy standpoint, that the Pennsylvania Public Utility Commission (PPUC or the Commission) not prohibit PPL Electric Utilities Corporation (PPL EU or the Company) and PPL EnergyPlus, LLC (the PPL affiliate) from having "the same or substantially similar name or fictitious name[s]." In particular, I comment on the following proposed language:

> (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 be granted 6 months from the effective date of this regulation to change its name.[1]

[1] Pennsylvania Public Utility Commission, "Proposed Rulemaking Order, Annex A," *Revisions to Code of Conduct at 52 Pa. Code 54.122*, Docket No. L-2010-2160942, August 25, 2011, p. 9.

7. In this Declaration, I draw the following conclusions:

- Bans or limitations on the sharing of resources (*e.g.*, employees, equipment, logos/brands, etc.) between the utility and its retailer affiliate should be carefully considered, narrowly drawn, and based on legitimate concerns for consumer welfare—sharing means realizing "economies of scope," a primary reason for introducing competition.

- Branding and logo restrictions aimed at concealing a supplier's true corporate identity are limitations on accurate information that may be helpful to consumers.

- The appropriate test for competition policies is whether or not they lead to consumer benefits—such as lower prices, better quality and reliability, more service innovations, etc.

- Consumers would be harmed by regulatory restrictions on the use of a brand name and/or logo by an affiliate because they would have less information upon which to base their purchase decision.

- Regulatory rules that restrict the information that competitors can provide to consumers would reduce the efficiency of the competitive process itself.

- A disclaimer, which explains that a utility affiliate does not gain a competitive advantage as a result of its sharing of a name or logo, provides a suitable means of informing consumers. Many jurisdictions require the use of a disclaimer.

- PPL's price freeze ended in January 2010. Since then, a significant number of consumers have chosen to switch to a competitive retail supplier.

- There is no evident need to disrupt the workings of the competitive process in Pennsylvania by imposing, at this late date, further restrictions on consumers' access to accurate information.

C. Logos, Disclaimers, and Efficient Competition

8. Bans or limitations on the use of specific resources in input markets (*e.g.*, capital, labor, or some other valuable market input) are not likely to provide benefits to consumers. Employees, trucks, warehouse space, rights of way, land, and many other factors of production present opportunities for sharing that can reduce the cost of operating in regulated and unregulated businesses alike. These cost saving opportunities are termed "economies of scope," and encouraging their realization is a goal of introducing competition. Banning an unregulated

affiliate's use of utility resources in competitive activities without good cause could seriously erode the efficiency of a competitive electricity market. It would make the unregulated affiliate less competitive and provide advantages to the firm's competitors who are not subject to the restriction. Ultimately, it raises prices for consumers and reduces the unregulated affiliate's incentives to invest.

9. Branding and logo prohibitions are limitations on accurate information in the marketplace. If the proposed language that would prohibit an electric generation supplier from having the "same or substantially similar name or fictitious name"[2] were to be mandated by the Commission, customers would lose access to reputational information that they could use (or not use, as they see fit) as they make their purchasing and consumption decisions. To make informed decisions, consumers need to have access to accurate information. Clear brand identification also provides accountability and, therefore, an incentive for firms to maintain consistent quality levels and provide better service to customers.

10. Brand names provide customers with a set of products with a common identity. Logos provide a common visual identity to a firm's products. Brand names and logos provide a short-hand way of communicating with customers in a clear and cost-effective manner, thereby helping them make better choices by reducing shoppers' search and information costs. The associations customers make in this regard constitute an economy of scope for the firm.[3] Denying consumers' access to accurate information would weaken the efficiency of competition and therefore would not benefit consumers. In **Attachment KG-2,** I provide a copy of a published article that I wrote (with a co-author) entitled "Consumer Sovereignty, Branding, and Standards of Competitive Practice," which explains in greater detail how "[c]onsumers would be

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[2] *Id.*, p. 9.

[3] These associations may not always be positive. Even in this case, however, consumer welfare and market efficiency are promoted.

harmed by regulatory restrictions on the use of a utility's brand name and/or logo by a utility affiliate."[4]

11. Electric restructuring, properly designed, provides *open and nondiscriminatory* entry into the market and allows consumers to choose their provider of retail generation service for themselves. This, in turn, forces all suppliers to seek out, and realize, whatever opportunities they have to operate more efficiently. Indeed, this is the core of the case for introducing competition.

12. Well-designed standards of competitive practice can readily address regulators' legitimate concerns about market power and market practices while still allowing the utility and its affiliate, through the sharing of resources, to capture efficiencies that benefit consumers. While market power concerns, if not properly addressed, could harm consumers, behavioral safeguards (such as codes of conduct) and accounting procedures (*e.g.,* cost allocation guidelines) can and should address these issues in ways that avoid "throwing the baby out with the bath water."

13. When a utility's retail marketing affiliate operates in the utility's service territory, there are two possible areas of regulatory concern. The first is the utility's control over the distribution system, to which potential retail competitors must have access if they are to reach their customers. When retail competition is introduced, each state's restructuring plan must address these access issues through service and rate unbundling and related requirements. Behavioral rules can then be developed to provide an assurance that the utility will treat all competitors, including its own energy marketing affiliate, on a comparable basis. With respect to a utility affiliate's use of the utility's brand name or logo, a disclaimer requirement in the code of conduct could explain, in simple language, that the utility affiliate (and therefore its customer) does not have any special advantage because of its affiliation with the utility.

[4] "Consumer Sovereignty, Branding, and Standards of Competitive Practice," *Electricity Journal*, May 2000, Vol. 13, No. 4, pp. 76-84 (with Wayne Olson).

14. A second regulatory concern is that, without proper regulatory oversight, the utility might have an incentive, as well as opportunities, to shift costs from the unregulated portion into the regulated portion of its business, and then recover those costs through regulated rates. Alternative rate approaches can effectively address this concern by breaking the link between price and cost, which reduces the utility's incentives to shift costs. Cost allocation guidelines can also play a role in addressing cost shifting and cross-subsidization issues. Although sometimes characterized as a cost shifting problem, branding and logo issues do not raise significant concerns in this regard.

15. Consumers would be harmed by regulatory restrictions on providing accurate information. Rules about how sharing shall be accounted for to ensure that monopoly ratepayers do not cross-subsidize competitive activities remain necessary where there continues to be an associated regulatory sector. From an economic standpoint, it is very important that restructuring policies be implemented in ways that lead to efficient competition. This does not mean that entry into markets will be costless or easy, but rather that all actual competitors, incumbents and new entrants alike, will have made (and potential competitors could make) the investments and commitments necessary for them to compete in the market. Regulatory rules that restrict the information that competitors can provide to consumers would harm shoppers.

16. A prohibition on having a similar brand name or logo would prohibit the utility from providing truthful and useful information to customers. Customers need access to good information in order to make informed decisions and therefore many commissions have focused on consumer education and information programs as part of the electric restructuring process. Less efficient consumption decisions resulting from less-informed decisions by consumers could induce entry by less efficient producers, resulting in inefficient competition. Restrictions on the use of brand names and logos by utilities and their affiliates would needlessly raise customers' search and information costs, thereby increasing the chance that consumers will make less-informed consumption decisions. The affiliate's roots in the regulated company and/or other corporate affiliates may appeal (or not appeal) to some customers, perhaps conveying a creditable history of service to local communities, which may act as a spur to other firms to

increase their quality or introduce some attractive new aspect of service, including quite possibly a lower price.

17. Since rate caps ended in PPL EU's service territory in January 2010, there now appears to be a level playing field for retail electricity services in PPL's service territory. I understand that there are now more than 75 retail offers available to residential customers in PPL's distribution service territory as well as a "default service" offer.[5] To the extent that a rate cap may have tilted the playing field so that some consumers were better off taking service under the capped rate rather then searching for a competitive provider, then the expiration of the rate cap would level the playing field, with consumers more likely to search for a better deal from a competitive retail service provider. This has in fact happened in Pennsylvania, with switching rates increasing in PPL's service territory since January 2010.[6]

18. A simple disclaimer requirement can provide a suitable means of informing consumers as to the affiliated supplier's corporate links. An adequate disclaimer would clearly state that: (1) the affiliated service provider is not the same company as the distribution company; and (2) that the products offered by the affiliated service provider are not regulated by the regulatory agency. Importantly, the message to customers should be as simple and straightforward as possible. Disclosure requirements have already been in place in Pennsylvania for many years.

19. Other regulators have agreed that any disclaimer should be implemented in a practical way. For example, the California Public Utilities Commission (CPUC) decided to not require disclaimer language that states that "customers do not have to buy service from the affiliate to continue to receive quality regulated service from the utility," deciding that:

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[5] Before the Pennsylvania House Consumer Affairs Committee, Comments of Sonny Popowsky, Consumer Advocate of Pennsylvania on the status of competitive electricity markets in Pennsylvania, August 2, 2011, p. 2.

[6] I would not put too much emphasis on switching rates as the sole measure of the success or failure of retail competition. I merely note that I understand that 70.2 percent of PPL's load had, as of February 29, 2012, switched to a competitive electric generation provider. For industrial, commercial, and residential customers, the percentage of switched load is 98.6 percent, 84.0 percent, and 46.0 percent, respectively. *See*: Pennsylvania Public Utilities Commission, *Weekly PA Power Switch Update*, February 29, 2012. Accessible at: www.PAPowerSwitch.com (accessed on March 12, 2012).

> After careful reconsideration and further reflection, we now believe that "the original disclaimer set forth in Rule V.F.1 is not narrowly tailored to achieve an appropriate balance between the rehearing applicants' commercial speech rights and our substantial interest in promoting competition. We find the practical aspects raised by the rehearing applicants in their petition for modification and application for rehearing persuasive in determining that we have erred.[7]

20. I have investigated whether other states have barred affiliated retail electric generation suppliers from sharing a brand or logo. I have focused on the states where there is currently an active retail market that has been opened to competition.[8] **Table KG-1** on the next page shows that 13 of these states currently allow the shared use of logos and brands, but require a disclaimer.[9] This is the norm and I see no reason to diverge from this reasonable practice in Pennsylvania at this time. I would also note that New York, Illinois, and Rhode Island allow utility affiliates to compete without requiring a disclaimer. Furthermore, prior to re-regulating, Arizona, Arkansas, Nevada, and New Mexico were in the process of opening their retail electricity markets to retail competition, and in these states, a disclaimer was required. Please see **Attachment KG-3** to my Declaration for what I believe is a comprehensive recitation of the relevant statutory language that is in effect in those states that currently have competitive retail electricity markets and require no more than a disclaimer by the affiliated retail electric generation supplier.

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[7] In **Attachment KG-2,** I provide a paper that I co-authored, which also discusses this topic. California Public Utilities Commission, *Re Establishing Standards of Conduct Governing Relationships Between Energy Utilities and Their Affiliates*, Rulemaking Proceeding 97-04-011, Interim Order 97-04-012, Decision 99-09-033, September 2, 1999.

[8] My starting point for this review was an Energy Administration survey of the status of state electric restructuring activity and retail competition as of July 2006. I then updated that analysis to reflect recent developments and determined these states' requirements with respect to retail affiliates' sharing of logos and branding. Source: The Electric Energy Market Competition Task Force, *REPORT TO CONGRESS ON COMPETITION IN WHOLESALE AND RETAIL MARKETS FOR ELECTRIC ENERGY*, Pursuant to Section 1815 of the Energy Policy Act of 2005, Figure 1-2.

[9] According to Regulatory Research Associates, Virginia has moved away from retail competition in recent years, while California has raised their "cap" on the amount of load that is able to switch to a competitive supplier. *Source*: Regulatory Research Associates, various state reports.

Table KG-1: Active Retail Competition States – Marketing Requirements

State	Allow; Disclaimer Required	Allow; Disclaimer Not Required	Prohibit
California	X		
Connecticut	X		
Delaware			X
Illinois		X	
Maine			X
Maryland	X		
Massachusetts	X		
Michigan	X		
New Hampshire	X		
New Jersey	X		
New York		X	
Ohio	X		
Oregon	X		
Pennsylvania	X		
Rhode Island		X	
Texas	X (until 2005)		
Virginia	X		
Washington, DC	X		

21. Delaware and Maine imposed bans on "joint marketing" at the time that retail competition in electricity was first introduced. Texas also had logo and branding restrictions that were in place for a limited time when electric retail competition began, presumably to jump start the market, but these restrictions were allowed to "sunset" after competition had matured. An "infant industry" justification to barring the sharing of brand names and logos within a company would no longer apply in Pennsylvania. Furthermore, in Delaware, the joint marketing restrictions were agreed to by the utility in a settlement; as with any negotiated resolution of the

issues, the utility may have agreed to the restrictions in order to gain more favorable terms on other issues.[10] Given the current state of retail competition in PPL's service territory, I see no need to consider severe restrictions on logos and branding at this time.

22. There is no apparent need to disrupt the Pennsylvania market. Evidence in Pennsylvania, as well as from other markets that have restructured to accommodate the competitive retailing of electricity, shows that there is no need to distort the competitive process by giving a "leg up" to new entrants. With the end of rate freezes and price caps, retail electricity markets are now able to adjust to competitive levels.

23. It sometimes seems that arguments about brand name and logo sharing are based on the assumption that residential and small commercial customers will be ineffective shoppers of electricity, whether because they are blindly loyal to their traditional supplier or because they are poorly informed. The evidence suggests that consumers will not be fooled by sharing of brands and logos and will be able to make intelligent choices.[11]

24. There is a difference between the legitimate regulatory goal of fostering competition (with its associated benefits to consumers) and the misguided objective of helping competitors—an activity that is not likely to lead to consumer benefits. Consumers should be able to choose their provider of retail electricity for themselves, undistorted by regulatory policies that would give some competitors a competitive advantage by restricting the information that can be provided to consumers. This would be the case here, where the PPL affiliate has been able to share a brand name and logo for over a dozen years without evident harm to the current state of the competitive process in PPL EU's service territory. The Commission should allow the

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[10] Delaware Public Service Commission, *RE Delmarva Power and Light Company dba Conectiv Power Delivery*, PSC Docket No. 99-582, Order No. 5469, June 20, 2000.

[11] The ABACCUS report notes that "Illinois and Pennsylvania are highlighted as having made the most substantial progress since last year." *See*: DEFG, LLC., *Annual Baseline Assessment of Choice in Canada and the United States* (ABACCUS): An Assessment of Restructured Electricity Markets, November 2011, p. 1. *See also*: Philip R. O'Connor, Customer Choice in Electricity Markets: From Novel to Normal, prepared for the Compete Coalition, November 15, 2010.

competitive process to provide the benefits to consumers that are associated with the competitive advantages that utility affiliates—and their rivals—bring to the market.

KENNETH GORDON
Special Consultant
National Economic Research Associates, Inc.

Date: March 27, 2012

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

VERIFICATION

I, Kenneth Gordon, being the Special Consultant at the National Economic Research Associates, Inc., and authorized to make this verification on behalf of PPL Electric Utilities Corporation and PPL EnergyPlus, LLC, hereby state that the facts set forth in this Declaration are true and correct to the best of my knowledge, information and belief; and that I expect to be able to prove the same at any hearing hereof. I understand that the statements herein are made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

Date: March 27, 2012

Kenneth Gordon

Attachment KG-1

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Dr. Kenneth Gordon, since April 2001, has been a Special Consultant with National Economic Research Associates, Inc. specializing in utility regulation and related issues. Prior to that date, Dr. Gordon was a Senior Vice President with National Economic Research Associates. He was Chairman of the Massachusetts Department of Public Utilities from January 1993 to October of 1995. He came to the Massachusetts Commission from the Maine Public Utilities Commission, where he held the office of Chairman from 1988 through the end of 1992. Prior to that, he was an Industry Economist at the Federal Communications Commission's Office of Plans and Policies. Prior to that, he taught at several colleges since 1965, the most recent position having been at Smith College.

Dr. Gordon was an active member of the National Association of Regulatory Utility Commissioners (NARUC) and served as president of that organization in 1992. He was also a member of the Executive Committee, and the Committee on Communications of NARUC. He has served as Chairman of the New England Conference of Public Utilities Commissioners Telecommunications Committee, and is a former Chairman of the Power Planning Committee of the New England Governors' Conference. He currently also serves on several boards and committees. Dr. Gordon has authored a number of publications and lectures widely on topics related to utility regulation.

Dr. Gordon is a graduate of Dartmouth College and holds a masters and doctorate in economics from the University of Chicago.

EDUCATION

University of Chicago	Ph.D	1973
University of Chicago	M.A.	1963
Dartmouth College	A.B.	1960

EMPLOYMENT

April 2001 -	**National Economic Research Associates, Inc.,** Cambridge, MA <u>Special Consultant</u>
August 1996 – March 2001	**National Economic Research Associates, Inc.,** Cambridge, MA <u>Senior Vice President</u>
November 1995 – July 1996	**National Economic Research Associates, Inc.,** Washington, D.C. <u>Senior Vice President</u>
October 1995	**Consulting Economist**
January 1993 - October 1995	**Massachusetts Department of Public Utilities** <u>Chairman</u>
October 1988- December 1992	**Maine Public Utilities Commission** <u>Chairman</u>
1980 - 1988	**Federal Communications Commission, Office of Plans and Policy** <u>Industry Economist</u>
1965 - 1980	**University and College Teaching** (most recently at Smith College)
1963 - 1964	**University of Chicago** <u>Research Associate</u>

PAST APPOINTMENTS AND MEMBERSHIPS

Telecommunications Policy Research Conference
Chair, 1995-1996
Board Member, 1994

Energy Modeling Forum (EMF 15, A Competitive Electricity Industry),
Stanford University
Member

American Economic Association

Transportation and Public Utilities Group, AEA

National Association of Regulatory Utility Commissioners
Communications Committee, 1990 - 1995
Executive Committee, 1991-1995
President, 1992

New England Conference of Public Utility Commissioners
Power Planning Committee
Chairman

Governor's Electric Utility Market Reform Task Force
Co-Chairman

Boston University Telecommunications Forum
Advisor

Center for Public Resources, Legal Program to Develop Alternatives to Litigation
Chairman, Utilities Committee

Office of Technology Assessment, Advisory Panel on International Telecommunications Networks

Bellcore Advisory Committee,
Member and Chairman, 1993 to 1996.

ACTIVITIES

Participant in numerous regional and state committees, organizations, and task forces.

Participant in various NARUC/DOE conferences on gas and electricity issues.

Frequent speaker on electric, telephone and environmental issues nationally.

TESTIMONIES

Before the Missouri Public Service Commission, surrebuttal testimony on behalf of Union Electric Company d/b/a AmerenUE. Case No. ER-2008-0318. November 5, 2008. Subject: nationwide utility cost pressures, policy tools, fuel adjustment mechanisms.

Before the Missouri Public Service Commission, direct testimony on behalf of Union Electric Company d/b/a AmerenUE. Case No. ER-2008-0318. April 4, 2008. Subject: nationwide utility cost pressures, policy tools, fuel adjustment mechanisms.

Before the State of Maine Public Utilities Commission, declaration on behalf of Iberdrola, S.A.. Case No. 2007-355 . December 4, 2007. Subject: merger policy.

Before the New York State Public Service Commission, rebuttal testimony on behalf of New York State Electric and Gas Corporation. Case 05-E-1222. February 21, 2006. Subject: merger policy.

Before the New York State Public Service Commission, direct testimony on behalf of New York State Electric and Gas Corporation. Case No. 05-E-1222. September 30, 2005. Subject: merger policy.

Before the State of Maine, Public Utilities Commission, testimony on behalf of Verizon Communications Inc. and MCI Inc. Docket No. 2005-154. August 19, 2005. Subject: merger policy.

Before the Alberta Energy and Utilities Board, Evidence on behalf of ATCO Gas, ATCO Electric, and ATCO Pipelines. Dockets No. 1399997 and 1400690. June 30, 2005. Subject: ratemaking policy.

Before the State of Vermont, Public Service Board, testimony on behalf of Verizon Communications Inc. and MCI Inc. Docket No. 7056. June 17, 2005. Subject: merger policy.

Before the Connecticut Department of Public Utility Control, on behalf of Southern Connecticut Gas Company, Docket No. 05-03-17. April 29, 2005. Subject: ratemaking policy with respect to mergers issues.

Before the Public Service Commission of the State of Mississippi, testimony on behalf of Verizon Communications Inc. and MCI, Inc. Docket No. ____. April 19, 2005. Subject: merger policy.

Before the Public Service Commission of the State of Colorado, testimony on behalf of Verizon Communications Inc. and MCI, Inc. Docket No. O5A-178T. April 15, 2005. Subject: merger policy.

Before the Illinois Commerce Commission, surrebuttal testimony on behalf of Northern Illinois Gas Company d/b/a Nicor Gas Company. Case No. 04-0779. April 12, 2005. Subject: ratemaking policy.

Before the Illinois Commerce Commission, rebuttal testimony on behalf of Northern Illinois Gas Company d/b/a Nicor Gas Company. Case No. 04-0779. April 5, 2005. Subject: ratemaking policy.

Before the Illinois Commerce Commission, testimony on behalf of Nicor Gas Company. Docket No. 04-0779. November 1, 2004. Subject: ratemaking policy.

Rebuttal testimony before the Arizona Corporation Commission on behalf of Arizona Public Service Company on appropriate regulatory policy following a reversal in policy direction by the regulator. March 30, 2004.

Prefiled Rebuttal testimony before the Public Utilities Commission of Nevada, Sierra Pacific Power Company's 2003 General Rate Case regarding proper regulatory treatment of merger savings and costs. March 29, 2004.

Before the Nevada Public Utilities Commission on behalf of Nevada Power Company, rebuttal testimony on appropriate regulation policy for the recovery of merger-related costs. February 5, 2004.

Before New York State Public Service Commission, rebuttal testimony on behalf of Rochester Gas and Electric Corporation. Docket No. 03-E-0765, 02-E-0198, 03-E-0766. January 15, 2004. Subject: Analysis of utility merger.

Before the Connecticut Department of Public Utility Control, on behalf of Southern Connecticut Gas Company, direct testimony on the role of exogenous cost recovery in a comprehensive incentive rate plan, Docket No. 03-11-20. December 9, 2003.

Before the Florida Public Service Commission on behalf of Verizon Florida Inc., Bell South Telecom, and Sprint-Florida, Docket No. 030867-TL, 030868-TL, 030869-TL and 030961-TI, rebuttal testimony on rate rebalancing. November 19, 2003.

Before the Nevada Public Service Commission on behalf of Nevada Power Company, testimony regarding appropriate rate making policy for the recovery of merger-related costs. October 1, 2003.

Before the Florida Public Service Commission on behalf of Verizon Florida Inc., Bell South Telecom, and Sprint-Florida, Docket No. 030868-TL, direct testimony on rate rebalancing. August 27, 2003.

Before the Arizona Corporation Commission, on behalf of Arizona Public Service Company, Docket Nos. 99-09-03PH02, 99-04-18 PH03, 01-04-04), direct testimony on the proper regulatory policy framework and the importance of credible regulatory commitments. June 27, 2003.

Before the New York State Public Service Commission, on behalf of Rochester Gas & Electric Company, direct testimony regarding the determination of merger-enabled savings. May 16, 2003.

Before the State of New York Public Service Commission on behalf of New York State Electric & Gas Corporation (Case 96-E-0891): Rebuttal testimony on market power analyses used in setting the backout credit. October 30, 2000. (Cosponsored with David Kathan.)

Before the Connecticut Department of Public Utility Control, on behalf of Connecticut Natural Gas Corporation (Docket No. 99-09-03, Phase II): Rebuttal testimony on role of incentive ratemaking. October 11, 2000.

Before the New York Public Utilities Commission on behalf of New York State Electric & Gas Corporation (Case 96-E-0891): Direct testimony on whether the backout credit set in a stipulation continues to be proper. October 4, 2000. (Cosponsored with David Kathan.)

Before the Virginia State Corporation Commission on behalf of Appalachian Power d/b/a/ American Electric Power Company (Docket Case No. PUA980020): Direct testimony regarding use of "asymmetric" transfer price rules. Filed September 20, 2000.

Before the Alberta Energy and Utilities Board, on behalf of ATCO Gas, ATCO Pipelines, and ATCO Electric: Direct testimony addressing affiliate issues. August 31, 2000.

Before the Iowa Utilities Board on behalf of Qwest Corporation (Docket No. INV-00-3): Direct testimony on deregulation of local directory assistance services. August 11, 2000.

Before the Connecticut Department of Public Utility Control on behalf of the Southern Connecticut Gas Company (Docket No. 99-04-18, Phase III): Late-filed Exhibit No. 159 (direct testimony) on the proper design of an incentive ratemaking plan. August 11, 2000.

Before the Connecticut Department of Public Utility Control on behalf of Connecticut Natural Gas Corporation (Docket No. 99-09-03 Phase II): Prefiled supplemental testimony addressing incentive rate-making issues. Filed August 11, 2000.

Before the Maine Public Utilities Commission on behalf of Central Maine Power Company. Surrebuttal testimony regarding the proper role of incentive ratemaking. August 10, 2000.

Before the Pennsylvania Public Utility Commission on behalf of Bell Atlantic PA (now Verizon PA): Direct testimony on the costs and problems with structural separation in telecommunications. June 26, 2000.

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INCIDENTAL TEACHING AND LECTURING

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Yale School of Management and Organization
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Suffolk University Law School
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Boston University

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Consumer Sovereignty, Branding, and Standards of Competitive Practice

Brand names and logos can be an effective short-hand way to convey information to consumers. Consequently, consumers would be harmed by regulatory restrictions on the use of a utility's brand name or logo by its affiliate.

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Consumers would be harmed by regulatory restrictions on the use of a utility's brand name and/or logo by a utility affiliate. Brand names, which provide a common identity to an array of services, can help to reduce customers' search and information costs, while providing economies of scope to the firm. Logos can provide a common visual identity to a firm's various products. Restrictions on utilities' and utility affiliates' ability to communicate to consumers would not benefit consumers or improve the efficiency of competition.

Standards of competitive practice—or codes of conduct—are behavioral rules that govern the relationship between a regulated utility and its unregulated affiliates. Standards of competitive practice have been adopted in a number of states during the last several years. In many of these code-of-conduct proceedings, onerous restrictions on a competitive affiliate's use of the utility's brand name and logo have been proposed. In most states, however, regulators have not actually imposed burdensome restrictions on utilities and their affiliates. With respect to use of brand name and logo, for example, a utility affiliate has in most cases simply been required to provide a disclaimer to explain that it does not gain a competitive advantage as a

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result of its affiliation with the incumbent utility. This is a reasonable public policy approach, so long as it is implemented in a workable and practical manner. After all, brand name and logos can be a very effective short-hand way to convey (accurate) information to consumers; denying consumer access to that information would weaken the efficiency of competition and would not benefit consumers.

I. Regulatory Concerns

Well-designed standards of competitive practice can readily address regulators' legitimate concerns about market power and market practices while still allowing the utility and its affiliate, through the sharing of resources, to capture efficiencies that benefit consumers. While market power concerns, if not properly addressed, could harm consumers, behavioral safeguards (such as codes of conduct) and accounting procedures (e.g., cost allocation guidelines) can (and should) address these issues in ways that avoid "throwing the baby out with the bath water."

When a utility's retail marketing affiliate operates in the utility's service territory, there are two possible areas of regulatory concern. The first is the utility's control over the distribution system, to which potential retail competitors must have access if they are to reach their customers. When retail competition is introduced, each state restructuring plan must address these access issues through service and rate unbundling and related requirements. Behavioral rules can then be developed to provide an assurance that the utility will treat all competitors, including its own energy marketing affiliate, on a comparable basis. With respect to a utility affiliate's use of the utility's brand name or logo, a disclaimer requirement in the code of conduct could explain, in simple language, that the utility affiliate (and therefore its customer) does not have any special advantage because of its affiliation with the utility.

Although characterized as a cost shifting problem, branding and logo issues do not raise significant concerns in this regard.

A second regulatory concern is that, without proper regulatory oversight, the utility might have an incentive, as well as opportunities, to shift costs from the unregulated portion into the regulated portion of its business, and then recover those costs through regulated rates. Alternative rate approaches, such as price regulation, can effectively address this concern by breaking the link between price and cost, which reduces the utility's incentives to shift costs. Cost allocation guidelines can also play a role in addressing cost shifting and cross-subsidization issues. Although sometimes characterized as a cost shifting problem, branding and logo issues do not raise significant concerns in this regard.

II. Consumer Sovereignty

The concept of "consumer sovereignty" rests on the reasonable premise that economic activities must ultimately be aimed at satisfying consumers.[1] With retail competition, consumers would gain the ability to choose their provider of generation services, unrestricted by policymakers or regulators. Consumers, however, will not be able to make efficient decisions if they do not know the true opportunities (and opportunity costs) that they face. Regulatory policies that distort the price signals and other important pieces of information that consumers face with regard to natural gas and electricity consumption, however well intentioned, are antithetical to the concept of consumer sovereignty and will lead to a less efficient outcome where society's scarce resources are *not* allocated to their highest-valued purpose—which would be costly to consumers. Regulatory rules that withhold market information—such as clear indications of who the supplier is—from consumers would harm, rather than benefit, consumers.

Consumer benefits should be the primary criteria for judging competition policies. Regulatory rules that restrict the information that competitors can provide to consumers—such as restrictions on the use of an incumbent utility's brand name or logo by an affiliate of that utility—would not benefit customers. The appropriate test for competition policies is whether or not they lead to benefits (lower prices, better quality, service innovation, etc.) to consumers, and not whether one or another competitor benefits from their adoption. Regulators should require proponents of policies that handicap incumbents (or give a "leg up" to new entrants) to demonstrate how they would lead to net overall benefits for consumers—not merely for new competitors. Restrictive regulatory rules on brand and logo identity would unnecessarily handicap a potentially efficient utility affiliate from competing, thereby reducing the choices available to consumers and increasing competitors' opportunities to exercise market power.

III. Information and Retail Competition

The fundamental premise of changing the structure of the natural gas and electric industries from monopoly to one of customer choice is that competitive market forces are preferable to administrative forces in yielding improved efficiency and outcomes for customers. Competitive markets have the unique ability to match the demands of consumers to the supply decisions of producers in a manner that realizes potential efficiencies as completely as possible.

An essential element of such markets is that anyone who wishes to enter the market can do so, bringing whatever special capabilities or resources they may have to the task. It is by this process that the efficiencies associated with scope and scale are discovered and realized. This market discovery process can only occur if firms are free to make their own decisions about what to produce or not produce—and are able to communicate freely with consumers about their products and services. As part of this, firms must be able to succinctly indicate who they are to consumers. The 1997 "Economic Report of the President" noted:

Market discovery can only occur if firms are free to succinctly indicate who they are to consumers.

> An insufficiently appreciated property of markets is their ability to collect and distribute information on costs and benefits in a way that enables buyers and sellers to make effective, responsive decisions. . . . As tastes, technology, and resource availability change, market prices will change in corresponding ways, to direct resources to the newly valued ends and away from obsolete means. It is simply impossible for governments to duplicate and utilize the massive amount of information exchanged and acted upon daily by the millions of participants in the marketplace.[2]

Consumers need information in order to make effective consumption (and investment) decisions. Markets have the effect of dispersing knowledge throughout the many firms and consumers in the economy. Through the natural market process of numerous buyers and sellers making individual decisions, competitive markets allow consumer demands to be sorted out, and aggregated by efficient producers at as low a cost as possible. The price information provided by the market gives buyers and sellers information that they need to make their individual production and purchasing decisions. Information provided by these energy markets can guide consumers as they seek out and use providers of gas and electricity services.

Consumers are very effective at becoming well informed when they are financing a car, selecting automobile insurance, or buying a new furnace for their house—and one of the strengths of markets is their ability to reduce consumers' information costs. In competitive markets, prices play the critical role in the exchange process by facilitating the discovery of knowledge and information about market conditions that will make the individual market participants as well off as possible. Customers can economize on search and information costs through (1) exposure to advertising materials, (2) reviewing information from readily available information sources (e.g., newspaper articles), (3) sharing information with others (i.e., "word of mouth"), and (4)

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relying on information specialists (e.g., *Consumer Reports* or EnergyGuide.com). Similarly, consumers can reduce their search and information costs by selecting those brands that they have learned to have confidence in.

Brand names thus provide customers with a set of products that share a common identity, while simultaneously providing economies of scope to the firm. Logos provide a common visual identity to a firm's various products. As retail competition continues to develop, competitors in retail gas and electric markets will seek to convey price information and other competitive attributes to consumers in a clear and cost-effective manner, and brand names and logos will play an important role in providing short-hand competitive information to consumers.

IV. Restrictions on the Use of Brand Names and Logos Harm Consumers

Consumers would be harmed by regulatory restrictions on the use of the utility's brand name and/or logo by a utility affiliate. The first effect of a prohibition on providing truthful and useful information is straightforward: it reduces consumer welfare. Reliance on competitive markets is based on the principle that the firms that can produce most efficiently, based on forward-looking costs, and bring the most value to consumers, should (and will) prevail. Efficient competition is present when all competitors are free to succeed or fail in the marketplace on the basis of their relative efficiencies and advantages in serving consumers. If less efficient producers enter the market as a result of regulatory-mandated information distortions, inefficient competitors may be able to increase their market share. Failure to produce at the lowest achievable costs is a socially undesirable outcome because it would result in the inefficient use of society's resources and higher prices to consumers.

Consumers would be harmed by regulatory restrictions on the use of the utility's brand name and/or logo by a utility affiliate.

Second, customers would lose access to information that they could use (or not use, as they see fit) as they make their purchasing and consumption decisions. Ironically, restrictions on the use of brand names and logos by utilities and their affiliates would cause consumers to lose information on who they are dealing with at a time when many regulators and state legislatures are funding consumer education programs and generally searching for ways to help consumers adjust to the new energy marketplace. In short, customers' search and information costs are needlessly raised, and consequently so are the odds that consumers will make poorly informed choices.

Third, clear brand identification provides accountability and, therefore, an incentive for firms to maintain consistent quality levels and provide better service to customers. When a firm provides a number of products that have a common brand identity, the firm will strive to avoid having any "lemons" because of the impact that damage to the brand name could have on future earnings and cash flows. Firms will vary in their performance and reputation. Given the overarching importance of reliability in this industry, it seems clear that market-based incentives to provide a high level of customer service and reliability should be encouraged, rather than prevented.

Branding and logo restrictions are limitations on (accurate) information. It is virtually inconceivable that taking such information out of the market will work to the benefit of customers. In the face of restrictions on the use of the name, companies would not be able to convey information to customers that customers may find important or valuable to them in making choices. Customers may prefer to subscribe to an energy services company that is affiliated with the utility. The reasons will most likely vary widely—perhaps the customer is a stockholder of the corporation, is related to someone who works for the corporation, has a favorable impression about the company, or likes the specific attributes of the products that the

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firm is offering. It does not really matter why a customer may want to subscribe to a utility affiliate. Customers should be free to make their choices based on whatever information they deem relevant. That is the essence of customer choice.

V. Misplaced Arguments about Branding, Logos, and Standards of Competitive Practice

New entrants into retail gas and electricity markets frequently propose standards of competitive practice (also known as codes of conduct) that unnecessarily shackle affiliates of incumbent utilities—and thereby would give a "leg up" to other competitors. These proposals are designed to reduce the affiliates' share of competitive generation and retailing markets and to promote the interests of new entrants. Unfortunately, such an approach can actually dampen competition by reducing the need for competitors to bring forth new or better services or more efficient production processes.

In some cases, suggestions have been made that utilities and their affiliates should be forced to "completely separate" themselves from each other; restrictions on a utility's (or its affiliate's) use of a common brand name and logo have been included in these sorts of extreme proposals. These sorts of recommendations ignore the importance of economies of scope and scale in producing efficiencies that benefit consumers.

A. Mischaracterizations of Utility Affiliates' Market Power

Regulators must be careful to distinguish legitimate competitive advantage—which is beneficial to consumers and which regulation should not impair—from market power. While it is critically important that unbundled, open access tariffs for essential transmission and distribution facilities provide open entry into markets, policies

that dictate outcomes by handicapping utility companies and their affiliates with respect to nonessential inputs are likely to harm rather than benefit consumers.[3]

Economists define market power as the ability to profitably raise prices significantly above competitive levels for a sustained period of time and/or to exclude potential competitors from the market. Retail gas and electricity markets are likely to be national, or at least regional, in scope. From the standpoint of market power, a utility affiliate's possible reputation-based advantage in a specific submarket is not likely to be a barrier to the development of efficient competition if the market is open to entry. Rather than focus on calculations of market share, regulators should strive to assure that markets are open to entry and choices are available to consumers. After all, retail competitors, especially Internet-based competitors, may be able to enter new retail markets at a relatively low cost. Because margins are likely to be low, market leaders are likely to be the ones that can achieve economies of scope and scale by participating in retail gas and electricity markets on a national, or at least regional, basis. For example, Internet-based competitors (such as utility.com, essential.com, SmartEnergy.com, and BrightOptions.com) may be able to compete efficiently in a wide variety of geographic markets and, in doing so, may be able to develop a reputation that allows them to attract and retain customers. Given this context, including effective open access, utility affiliates will likely add to the competitiveness of retail markets, thereby constraining competitors' ability to exercise market power.

Vertical market power concerns are most relevant to the discussion of behavioral rules, such as standards of competitive practice, and refer to the possibility that a firm may be able to use its market power at one stage of the production process to influence price and output at another stage. Thus, a utility that operates a gas or electric distribution system could, absent appropriate safeguards, influence price and output

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in the competitive retail market in its service territory.

Sharing resources by a utility and its affiliate does not necessarily confer market power. Integration is common in many industries and is not in itself a source of market power. Businesses integrate for a variety of reasons, including risk management, the capture of scale and scope economies, and to reduce transaction costs. Moreover, the large marketing companies that are likely to enter newly opened gas and electricity markets are themselves highly vertically integrated. Virtually all of these companies own gas and electric distribution companies, gas pipelines, oil and gas exploration and production companies, or energy services businesses, in addition to their retail marketing operations.

Affiliation with a regulated utility company does not necessarily confer market power. Allowing utility companies and their unregulated affiliates to share scale and scope economies is not anti-competitive or unfair. Critical to a determination that market power exists is that competitors not be able to enter the market. Regulation of the essential transmission and distribution systems is aimed directly at (1) making sure that potential competitors can enter the market if they make the (other) investments necessary to do so, and (2) preventing cost-shifting and cross-subsidization between a utility and its competitive affiliates. Further, having an efficiency-based advantage in competing in the marketplace, such as lower costs due to economies of scale or scope, does not confer market power. In a market economy every firm seeks to bring whatever unique advantages and resources it may have in providing services to customers. An economic advantage in satisfying the needs of consumers possessed by one competitor, but not by others, is not anti-competitive. The critical fac-

tor is whether competitors can enter the market.

B. Prohibitions and Restrictions on Resource Use and Sharing

Prohibitions, or lesser restrictions, of the affiliate's use of any resource—including brand names and logos—that accrue to the utility as a result of its historical status as a regulated company are often sought by proponents of handicapping of utilities. Some parties go so far as to assert that there should be no sharing of resources between the parent utility and its marketing affiliate. Instead, they insist that the affiliate should operate as a completely "stand-alone" company. Such policies would impose real costs on society. Protection of new entrants from the participation of the utility's affiliate because of the latter's low costs, or denying the affiliate the right to reflect those low costs in its competitive prices, would be inefficient and in flat violation of the goal and philosophy of current changes in competition law—which is to benefit customers through lower prices and higher-quality services.

Requiring the affiliated company to bear costs, as though it were a stand-alone operation, would flatly prevent those companies from bringing to competitive markets the advantages of genuine economies of scope that could be obtained through affiliate integration. Of course, rules about how resource sharing should be accounted for, so that monopoly ratepayers do not cross-subsidize competitive activities, remain necessary where there continues to be an associated regulated sector.

Marketers sometimes argue that the affiliate's use of a corporate name or logo might somehow deceive customers into confusing the affiliate with the related utility or parent. However, customers will not be deceived by such use. The affiliate's roots in the regulated company and/or other corporate affiliates are a major source of any legitimate competitive advantage the affiliate may possess. The name could convey a creditable history of service in the gas or electric industry. Many of the competitors in this industry

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share similar histories. The corporate name could also convey a sense of localism, which may be important to some customers. Allowing affiliates to use the same or similar names and logos can be beneficial to consumers, so long as a clear distinction between the regulated company and its affiliates is stated. Restrictions on such use actually reduce consumer welfare.

C. A Good Reputation is Not a Barrier to Entry

In some markets, the incumbent utility's good reputation will help its competitive position and act as a spur to other firms to increase their quality or introduce some attractive new aspect of service, including a lower price. Eliminating that incumbent as a readily identifiable firm will give a windfall to new entrants but it will do nothing for customers.

Realistic criteria for measuring barriers to entry should be used. While it is important to provide an assurance that entry into newly competitive markets is open, overly broad definitions of barriers to entry should not be used. While it is appropriate to open gas and electric retail markets to entry by efficient competitors, regulators need not subsidize the entry of inefficient competitors. Economies of scale and absolute cost advantages enjoyed by an efficient incumbent competitor should not be considered to be a problematic barrier to entry. The criterion should be consumer benefits, and it should be recalled that consumers benefit from the participation of efficient competitors in a market. So long as entrants have the opportunity to enter a market if they make the technological and other investments that are needed to do so, problematic barriers to entry do not exist.

The suggestion that customer loyalty will interfere with the working of the market is also wrong. Customer loyalty to a gas or electricity supplier is no more evidence of serious market failure

than is their loyalty to brand name products in the consumer goods sector. To deprive consumers of their ability to indulge this loyalty (by barring the company from the market or requiring it to conceal its identity) would destroy any benefit the customers derive from this commercial relationship.

Arguments about sharing a brand name seem to be based on the assumption that residential and small commercial customers will not be effective consumers of electricity, whether because they are excessively loyal to their traditional supplier, because they are poorly informed or confused, or simply because such customers are irrational. This seems an overly paternalistic view of the consumer; further, it strikes at the heart of the policy question of whether competitive markets are desirable. In other market sectors where competition has been introduced—including airlines and long-distance telecommunications—economists have been able to demonstrate overall welfare improvements and lower consumer prices with great certainty.[4]

The existence of a successful and well-regarded incumbent may be alleged to be a "barrier to entry" by some competitors, but it is a common phenomenon in many markets. Not surprisingly, marketers are the most strident advocates of policies that would disable incumbents. The large marketing companies that are likely to enter retail energy markets are themselves highly vertically integrated—hence the new term "integrated energy companies" to describe Enron, AES, Dynegy, and others.[5]

D. Ratepayers Have Not Paid for a Utility's Goodwill

It is sometimes argued that whether or not the affiliate is allowed to use the parent's name in its own service territory, the corporate name may have value in the marketplace and the affiliate should thus pay a royalty to the parent, which would be passed on to ratepaying customers of the regulated monopoly services. This is an unreasonable policy with no basis in the economics of either competitive or regulated markets.

Requiring royalty payments simply creates a transfer from the affiliate to the utility, and does not reflect a "reward" commensurate with any risk accepted by ratepayers. Ratepayers are entitled to "rewards" associated with assets for which they have accepted risk. This is the principle usually embodied in rate cases and it is related to the question of whether—and, if so, to what extent—ratepayers have a legitimate claim on the value of the utility's assets. There could be instances where ratepayers have earned an equitable interest in the assets of the utility as a result of having assumed some portion of the risk associated with the provision of electricity service. Such could be the case where the economic value of the assets exceeds their book value (so-called "negative stranded costs"). However, no records have been uncovered in research on this subject which suggest that a utility has ever been allowed to include "goodwill" or other intangible cost accounts in setting rates.

Utility customers are simply entitled to what they paid for: gas or electricity at prices that covered the company's operating costs plus appropriate depreciation and profit. There is no more entitlement to a share of the utility's intangible assets (e.g., its brand name) in this case than consumers are entitled to shares of McDonald's stock because they ate at McDonald's frequently. This question should be answered by determining (factually) how the "risk follows reward" principle has been applied. It is important to remember that ratepayers did not shoulder all risk. For example, the history of regulation has plenty of examples of regulators under-depreciating utilities' assets.

Second, there is no objective, or cost-based, means for setting royalty payments. It is simply a matter of deciding what rents to capture. As a result, interested parties would be likely to argue that legitimate profits earned by the affiliate in fair competition were instead the result primarily of use of the corporate name. Interest groups would presumably intervene in the utility's rate cases to appropriate substantial portions of these profits. Royalty payments would thus become little more than a back-door way to regulate (i.e., appropriate) the affiliate's profits.

There is no objective means for setting royalty payments.

VI. Implementing Disclosure Requirements

In addressing the relationship of an affiliated competitive service provider with its local distribution company, California[6] and a number of other states have developed rules that permit an affiliated provider to use the name or logo of its local distribution company with a disclaimer that clearly states: (1) the affiliated service provider is not the same company as the distribution company; (2) that the products offered by the affiliated service provider are not regulated by the regulatory agency; and (3) the safety, reliability, and cost of distribution service provided to customers of the affiliated service provider will be no different from that provided to customers purchasing from a provider not affiliated with the local distribution company.

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This disclaimer requirement, while perhaps reasonable, must be implemented in a practical way. For example, when should the disclaimer be provided? In California, the regulator has agreed to provide a limited exception from the code of conduct rule's disclaimer requirement for building signs, vehicles, employee uniforms and installed equipment. Behavioral rules, such as the disclaimer requirement, will require some ongoing oversight, and flexibility on the part of the regulator.

Regulators will need to keep a close eye on the possibility that new entrants will seek to "game" the regulatory process by filing complaints about trivial aspects of the utility affiliate's behavior under the standards of competitive practice (i.e., codes of conduct) in order to raise the utility affiliate's costs, which could harm customers by increasing regulatory costs. In addition, any penalties that are imposed on utility affiliates as a result of a violation of a code of conduct provision should be proportionate to the expected value of social costs resulting from that infraction. Most importantly, enforcement and penalty proceedings should not become a "back door" avenue to undoing the intent of the code of conduct.

VII. Conclusion

In many states, the standards of competitive practice (i.e., codes of conduct) that are supported by new entrants appear to be based on the presumption that utilities and their affiliates will engage in wrongdoing absent severe constraints on anticompetitive behavior. Rather than protecting against undesirable behaviors, these rules attempt to remove all risk of potential wrongdoing by imposing structural restrictions, regardless of the cost and in the complete absence of empirical evidence. Such rules will hinder rather than facilitate the development of consumer benefits.

Some proposed standards of competitive practice would make it nearly impossible for utility affiliates to capture available scale and scope economies to provide low-cost, high-quality competitive retail gas and electric service and other services to consumers. This is an ironic outcome, because forcing the traditional utilities to compete—and to become more efficient—has been one of the hallmarks of turning to greater reliance on market forces. Structural solutions—and flat prohibitions on sharing—should not be the first line of defense, since they necessarily sacrifice efficiencies and/or replace market outcomes with administrators' judgments. ■

Endnotes:

1. Roger Sherman notes that "[c]onsumer sovereignty requires that all economic activities ultimately be aimed at satisfying consumers." ROGER SHERMAN, THE ECONOMICS OF INDUSTRY (Boston: Little Brown, 1974), at 63.

2. Economic Report of the President (Government Printing Office, Feb, 1997) at 195

3. Karl McDermott, Ken Gordon, William E. Taylor, and Agustin J. Ros, *Essential Facilities, Economic Efficiency, and a Mandate to Share: A Policy Primer,* Edison Electric Institute, Jan. 2000.

4. Clifford Winston, *U.S. Industry Adjustment to Economic Deregulation*, J. ECON. PERSPECTIVES, Summer 1998, at 89–110.

5. In 1999, the ten largest energy marketers included Enron North America, Aquilla Energy, PG&E Energy Trading, Dynegy Marketing and Trade, Duke Energy Trading and Marketing, Southern Company Energy Marketing, Coral Energy Resources, Engage Energy, Koch Energy Trading, and Amoco Energy Trading. See FROST & SULLIVAN, NORTH AMERICAN WHOLESALE ENERGY MARKETING INDUSTRY, Report No. 7062-14, Jan. 2000.

6. On rehearing, the California Public Utilities Commission removed one of the statements from the disclaimer it requires be made when an affiliate of the utility uses the name or logo of the utility. The California PUC will no longer require utility energy service provider affiliates of San Diego Gas & Electric and its parent Sempra Energy Company to include in the disclaimer that "customers do not have to buy service from the affiliate to continue to receive quality regulated services from the utility." The PUC found that requiring this statement makes the disclaimer broader than necessary to meet its legitimate regulatory objectives under the standards adopted by the U.S. Supreme Court concerning First Amendment protections of commercial speech rights. San Diego Gas & Electric *et al.*, Docket no. 99-09-033, Order dated Sept. 2, 1999.

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ATTACHMENT KG-3 TO DECLARATION OF KENNETH GORDON IN SUPPORT OF THE PPL COMPANIES' COMMENTS ON PROPOSED RULEMARKING

Statutory Language In Effect In Those States That Currently Have Competitive Retail Electricity Markets And Do Not Require More Than A Disclaimer

1. **California**:

Pursuant to California Public Utilities Commission Decision 98-08-035, which was subsequently modified by Decision 06-12-029, the California Public Utilities Commission finalized and implemented the Affiliate Transaction Rules, which states, in part, the following:

F. **Corporate Identification and Advertising:**

1. A utility shall not trade upon, promote, or advertise its affiliate's affiliation with the utility, nor allow the utility name or logo to be used by the affiliate or in any material circulated by the affiliate, unless it discloses in plain legible or audible language, on the first page or at the first point where the utility name or logo appears that:
   a. the affiliate "is not the same company as [i.e. PG&E, Edison, the Gas Company, etc.], the utility,";
   b. the affiliate is not regulated by the California Public Utilities Commission; and
   c. "you do not have to buy [the affiliate's] products in order to continue to receive quality regulated services from the utility."

   The application of the name/logo disclaimer is limited to the use of the name or logo in California.
2. A utility, through action or words, shall not represent that, as a result of the affiliate's affiliation with the utility, its affiliates will receive any different treatment than other service providers.
3. A utility shall not offer or provide to its affiliates advertising space in utility billing envelopes or any other form of utility customer written communication unless it provides access to all other unaffiliated service providers on the same terms and conditions.

Order Instituting Rulemaking Concerning Relationship Between California Energy Utilities And Their Holding Companies And Non-Regulated Affiliates, Decision 06-12-029, Rulemaking 05-10-030, 2006 Cal. PUC LEXIS 460 (Ca. PUC December 14, 2006).

2. **Connecticut**:

The Connecticut Code of Conduct, Section 16-244h-5(g), of the Regs., Conn. State Agencies, states, in part, the following:

(1) An electric distribution company shall not trade upon, promote, or advertise its generation entity or affiliate's affiliation with the electric distribution company,

nor allow the electric distribution company name or logo to be used by the generation entity or affiliate in any advertisement or in any material circulated by the generation entity or affiliate, unless it discloses in plain legible or audible language, on the first page or at the first point where the electric distribution company's name or logo appears that:

(A) The generation entity or affiliate "is not the same company as [i.e. The Connecticut Light and Power Company, The United Illuminating Company], the electric distribution company,"; and

(B) "You do not have to buy [the generation entity or affiliate's] products in order to continue to receive quality regulated services from the electric distribution company."

The application of the name/logo disclaimer is limited to the use of the name or logo in Connecticut. Any written disclaimer shall be in bold print, and shall not utilize a typeface of less than eight points in size. Compensation for ratemaking purposes for the use of the electric distribution company's logo by a generation entity or affiliate shall be determined by the department in any rate case held pursuant to section 16-19 of the Connecticut General Statutes. The electric distribution company shall record any such use of its logo by its generation entity or affiliate.

(2) An electric distribution company, through action or words, shall not represent that, as a result of the generation entity or affiliate's relationship with the electric distribution company, its generation entity or affiliates will receive any different treatment than other service providers.

(3) An electric distribution company shall not offer or provide to any generation entity or affiliate advertising space in electric distribution company billing envelopes or any other form of written electric distribution company customer communication. The appearance of a generation entity or affiliate's name or logo on a customer bill to indicate the customer's choice of electric supplier shall not be considered trading upon or promoting the generation entity or affiliate's affiliation with the electric distribution company under subdivision (1) of this subsection, and shall not be considered joint advertising or joint marketing prohibited in subdivision (4) of this section. An electric distribution company shall offer each electric supplier the ability to display its name or logo or both on the customer bill, to indicate the customer's choice of electric supplier, under the same terms and conditions as those offered to the electric distribution company's generation entities or affiliates. The appearance of an electric distribution company's logo on a customer bill to indicate the provider of electric distribution services shall not require the disclaimers listed in subdivision (1) of this section.

Regs., Conn. State Agencies § 16-244h-5(g).

3. **Illinois:**

Section 450.25 of the Public Utilities Title of the Illinois Administrative Code, states:

Section 450.25 Marketing and Advertising

(a) An electric utility shall neither jointly advertise nor jointly market its services or products with those of an affiliated interest in competition with ARES [Alternative Retail Electric Supplier].

(b) Nothing in subsection (a) shall be construed as prohibiting an affiliated interest in competition with ARES from using the corporate name or logo of an electric utility or electric utility holding company.

83 Ill. Adm. Code 450.25.

Section 452.240 of the Illinois Administrative Code, Advertising, Marketing, and Customer Retention Efforts, states, in part:

(a) An Integrated Distribution Company ("IDC")[1] shall not promote, advertise or market with regard to the offering or provision of any retail electric supply service.

(b) The advertising and marketing prohibition of subsection (a) shall not preclude an IDC from:

  (1) advertising or marketing permissible IDC services other than retail electric supply services;

  (2) using the electric utility company corporate name and logo in connection with the offering or provision of permissible IDC services;

  (3) engaging in advertising or marketing generally promoting the public image and good will of the IDC as a provider of transmission and distribution services;

83 Ill. Adm. Code 452.240.

4. **Maryland:**

Section 20.40.02.02.A of the Code of Maryland Administrative Regulations sets forth, in part, the following:

(1) A utility may authorize its affiliate to use advertising, which uses the utility's corporate name, trade names, trademarks, and logos.

(2) Disclaimer.

  (a) Except as provided in § A(3) of this regulation, when a utility authorizes an affiliate to use its corporate name, trade name, trademark, or logo in an

[1] In Illinois, an IDC is a transmission and distribution company that has the ability to offer certain tariffed electricity services. IDCs cannot discriminate or provide an unfair advantage over an alternative retail electric supplier.

advertisement for a core or non-core service, the utility shall require the affiliate to include a disclaimer in the advertisement.

(b) The disclaimer required under § A(2)(a) of this regulation is: "(affiliate name) is not the same company as (utility name), a regulated utility".[2]

COMAR 20.40.02.02.A.

5. **Massachusetts**:

Section 12.03: General Standards of Conduct, of the Commonwealth of Massachusetts Regulations states, in part:

> (13) Subject to 220 CMR 12.03(12), a Distribution Company may allow an Affiliate, including a Competitive Energy Affiliate, to identify itself, through the use of a name, logo, or both, as an Affiliate of the Distribution Company, provided that such use by a Competitive Energy Affiliate shall be accompanied by a disclaimer that shall state that no advantage accrues to customers or others in the use of the Distribution Company's services as a result of that customer or others dealing with the Competitive Energy Affiliate, and that the customer or others need not purchase any product or service from any Competitive Energy Affiliate in order to obtain services from the Distribution Company on a non-discriminatory basis. The disclaimer shall be written or spoken, or both, as may be appropriate given the context of the use of the name or logo.

220 CMR 12.03.

6. **Michigan**:

Section II.K. of Michigan's Code of Conduct provides that an electric utility or licensed alternative electric supplier (AES) offering regulated electric service "shall not allow its affiliates to use its logo unless the affiliate includes, in a clearly visible position and easily readable by customers, the following statement: (Affiliate name) is not regulated by the Michigan Public Service Commission.'"

Section II.L. of the code provides that, if an electric utility, its affiliate, or other entity within the corporate structure offers an unregulated service, any use of its logo "shall include the following statement: (Service) is not regulated by the Michigan Public Service Commission.'"

In the matter, on the Commission's own motion, to require The Detroit Edison Company to show cause why it should not be found in violation of the code of conduct adopted in Case

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[2] Note, Section A(3) of the regulation states:

> When a utility authorizes an affiliate to use its corporate name, trade name, trademark, or logo in an image advertisement, regulatory filing, or materials intended to provide information about corporate securities, the utility is not required to mandate that its affiliate include the disclaimer prescribed in §A(2) of this regulation.

No. U-12134, Case No. U-14072, 2005 Mich. PSC LEXIS 86 (Mi. PSC March 29, 2005); *see also In the matter of the approval of a code of conduct for Consumers Energy Company and The Detroit Edison Company*, Case No. U-12134, 2000 Mich. PSC LEXIS 523; 205 P.U.R.4th 508 (Mi. PSC December 4, 2000).

7. New Hampshire:

Section 2105.07, Corporate Identification, of the New Hampshire Code of Administrative Rules states:

(a) Subject to Puc 2105.07 (Joint Advertising and Marketing), a distribution company may allow an affiliate, including a competitive energy affiliate, to identify itself, through the use of a name, logo, or both, as an affiliate of the distribution company, provided that such use by a competitive energy affiliate shall be accompanied by a disclaimer stating that:
  (1) No advantage accrues to customers or others in the use of the distribution company's services as a result of that customer or others dealing with the competitive energy affiliate; and
  (2) The customer or others need not purchase any product or service from any competitive energy affiliate in order to obtain services from the distribution company on a non- discriminatory basis.

(b) The disclaimer referred to in (a), above, shall be written or spoken, or both, as is appropriate given the context of the use of the name or logo.

(c) The disclaimer referred to in (a), above, shall not be required where the name or logo is merely being used for identification of assets or employees and it is impractical to include such disclaimer, such as on the competitive energy affiliate's vehicles, business locations, equipment, employee business cards or clothing.

(d) A distribution company shall not provide to its competitive affiliates:
  (1) Advertising space in its billing envelopes used for regulated utility services unless it provides access on the same terms and conditions for all similarly situated non-affiliated suppliers; or
  (2) Access to any other form of written communication with distribution company customers unless it provides access, on the same terms and conditions, to all similarly situated non-affiliated suppliers.

N.H. Admin. Rules, Puc 2105.08.

8. New Jersey:

Section 14:4-3.5, Separation, of the New Jersey Administrative Code, stated in part:

(k) A related competitive business segment of a public utility holding company ("PUHC") shall not trade upon, promote, or advertise its relationship with the electric and/or gas public utility, nor use the electric and/or gas public utility's name and/or logo in any circulated material, including, but not limited to, hard copy, correspondence, business cards, faxes, electronic mail, electronic or hardcopy advertising or marketing materials, unless it discloses clearly and conspicuously or in audible language that:

1. The PUHC or related competitive business segment of the public utility holding company "is not the same company as the electric and/or gas public utility";
2. The PUHC or related competitive business segment of the public utility holding company is not regulated by the Board; and
3. "You do not have to buy products in order to continue to receive quality regulated services from the electric and/or gas public utility."

N.J.A.C. 14:4-3.5

9. **New York**:

New York is silent on an energy services company's ("ESCO") ability to refer or use similar branding and logo markings as a public utility. Instead, the New York State Public Service Commission relies upon its Uniform Business Practices Marketing standards that require an ESCO not to "engage in misleading or deceptive conduct as defined by State or Federal law, or by Commission rule, regulation or Order." NYS PSC Case 98-M-1343 (January 2011). New York has not enacted statutory language requiring a disclaimer.

10. **Ohio**:

Section 4901:1-20-16, Corporate Separation, of the Ohio Administrative Code states, in part:

(h) The electric utility shall ensure retail electric service consumers protection against unreasonable sales practices, market deficiencies, and market power. Employees of the electric utility or persons representing the electric utility shall not indicate a preference for an affiliated supplier. *All electric utilities shall, at a minimum, provide information in their transition filings so as to enable the commission to determine whether they have met their burden of proof to satisfy this paragraph as it relates to joint advertising between the electric utility and an affiliate, joint marketing activities between the electric utility and an affiliate, and the use of the name and logo of the electric utility.*

OAC Ann. 4901:1-20-16 (emphasis added).

Section 4901:1-37-05, Application, of the Ohio Administrative Code states, in part:

(A) Consistent with section 4928.17 of the Revised Code, an electric utility that provides in this state, either directly or through an affiliate, a noncompetitive retail electric service and a competitive retail electric service (or a noncompetitive retail electric service and a product or service other than retail electric service) shall file with the commission an application for approval of a proposed corporate separation plan. The application shall include a narrative describing how the plan ensures competitive equality, prevents unfair competitive advantage, prohibits the abuse of market power, and effectuates the policy of the state of Ohio embodied in section 4928.02 of the Revised Code.

(B) The proposed corporate separation plan shall be a stand alone document that, at a minimum, includes the following:

. . . .

(6) A description of any joint advertising and/or joint marketing activities between the electric utility and an affiliate that the electric utility intends to utilize, including when and where the name and logo of the electric utility will be utilized, and explain how such activities will comply with this chapter.

OAC Ann. 4901:1-37-05.

11. **Oregon**:

Section 860-038-0520 of the Oregon Administrative Rules states the following:

An electric company may allow its Oregon affiliates and its competitive operations the use of its corporate name, trademark, brand, or logo in advertisements of specific electricity services to existing or potential consumers located within the electric company's service area, as long as the Oregon affiliate or its competitive provider includes a disclaimer in its communications. The disclaimer must be written in a bold and conspicuous manner or be clearly audible, as appropriate for the communication medium. The disclaimer must be included in all print, auditory and electronic advertisements.

(1) The disclaimer for an Oregon affiliate must state the following: Name of Oregon affiliate is not the same company as name of electric company and is not regulated by the Public Utility Commission of Oregon. You do not have to buy name of Oregon affiliate's products or services to continue to receive your current electricity service from name of electric company.

(2) The disclaimer for a competitive operation must state the following: 'You do not have to buy product/service name to continue to receive your current electricity service from name of electric company.'

Or. Admin. R. 860-038-0520.

12. **Rhode Island**

Like Illinois and New York (see above), Rhode Island permits electric utility affiliates to compete without requiring a disclaimer.

13. **Texas:**

Section 25.472 of Chapter 16 of the Texas Administrative Code states, in part, the following:

(h) Safeguards relating to joint marketing and advertising.

(1) Utility name or logo. Before September 1, 2005, a utility shall not allow the use of its corporate name, trademark, brand, or logo by a competitive affiliate, on employee business cards or in any written or auditory advertisements of specific services to existing or potential residential or small commercial customers located within the utility's certificated service area, whether through radio or television, Internet based, or other electronic format accessible to the public, unless the competitive affiliate includes a disclaimer with its use of the utility's corporate name, trademark, brand, or logo. Such disclaimer of the corporate name, trademark, brand, or logo in the material distributed must be written in a bold and conspicuous manner or clearly audible, as appropriate for the communication medium, and shall state the following: "Name of competitive affiliate is not the same company as name of utility and is not regulated by the Public Utility Commission of Texas, and you do not have to buy name of competitive affiliate 's products to continue to receive quality regulated services from name of utility."

16 TAC § 25.272.

14. **Virginia**:

The Virginia State Corporation Commission's Order adopting final rules governing retail access to competitive energy services in the electricity and gas markets states, in part, the following:

An affiliated competitive service provider may use the name or logo of its affiliated local distribution company in advertising and solicitation materials. A disclaimer shall be used when an affiliated competitive service provider offers services in the certificated service territory of its affiliated local distribution company. Such disclaimer shall clearly and conspicuously disclose that the affiliated competitive service provider is not the same company as the local distribution company. Disclaimers shall not be required, however, on company vehicles, clothing, or trinkets, writing instruments, or similar promotional materials. Upon complaint of any interested person, the Attorney General, staff motion, or on its own motion, the State Corporation Commission may, after notice and an opportunity for hearing, make a determination whether any such usage is misleading, and if so, take appropriate corrective actions.

In re Establishing Rules for Retail Access, 210 P.U.R.4th 423, 2001 WL 951581 (Va.S.C.C., Jun 19, 2001) (NO. PUE010013)

15. **Washington DC**:

Section 15-3902.4 of the District of Columbia Municipal Regulations states:

3902.4 Marketing/advertising material used by the core service affiliate claiming an association with the energy utility shall include a disclaimer that:

(a) The affiliate supplier is not the same company as the energy company, whose name or logo may be at least partially used;

(b) The prices and services of the affiliate supplier are not set by the Commission; and

(c) The customer is not required to buy energy or other products and services from the affiliate supplier in order to receive the same quality service from the energy utility.

DCMR 15-3902.4.

TAB
4

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

ADDENDUM A

MEMORANDUM OF LAW IN SUPPORT OF PPL COMPANIES' CONTENTIONS THAT THE TRADE NAME REGULATION PROPOSED IN § 54.122(3)(V) IS ULTRA VIRES AND UNCONSTITUTIONAL

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MEMORANDUM OF LAW IN SUPPORT OF PPL COMPANIES' CONTENTIONS THAT THE TRADE NAME REGULATION PROPOSED IN § 54.122(3)(v) IS ULTRA VIRES AND UNCONSTITUTIONAL

A. The Proposed Regulation Violates Federal And State Guarantees Of Free Speech.

Proposed regulation § 54.122(3)(v) prohibits electric supply companies ("EGS"), including PPL EnergyPlus, from having "the same or substantially similar name . . . as the electric distribution company ["EDC"] or its corporate parent," and requires EGSs to abandon any such name six months after the regulation's effective date. That proposed rule is not only unwise public policy, depriving consumers of truthful, accurate information that consumers find useful and disserving the state's goals of a vibrant marketplace where fully informed consumers choose their power suppliers, as demonstrated in the PPL Companies' comments filed today, but also, as shown below, violative of the free speech guarantees of the U.S. and Pennsylvania constitutions.

1. Trade names and other accurate facts concerning affiliation are protected speech not subject to state-imposed restrictions on the basis that consumers might make different decisions without such facts. Freedom of speech, to "fulfill its historic function in this nation, must embrace *all issues* about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940) (emphasis added). Trade names afford consumers information that they may use to make decisions that are important to their everyday lives, and are therefore speech entitled to First Amendment protection. *Sambo's Rests., Inc. v. Ann Arbor*, 663 F.2d 686, 694 (6th Cir. 1981) (holding that trade names are protected since they "convey[] information because of the associations that have grown up over time between the name and the level of price and the

quality of food and service," and invalidating a municipal attempt to require a business to forgo its name and assume a new one). "Facts, after all, are the beginning point for much of the speech that is most essential to . . . conduct human affairs." *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2667 (2011). Names convey facts, such as that a particular truck is made and backed by General Motors (or one of its affiliates) – or that a particular electric energy supplier is affiliated with PPL EU.

The bases on which lawful speech can be proscribed, if they exist at all, are few and narrowly drawn. Most importantly, for present purposes, is the fundamental rule, repeatedly applied by the courts, that the fact that speech might persuade is no basis for suppressing it. *See, e.g., Sorrell,* 131 S. Ct. at 2670 ("the fear that speech might persuade provides no lawful basis for quieting it"); *Allstate Ins. Co. v. Abbott*, 495 F.3d 151 (5th Cir. 2007) (same). As the Supreme Court held in the course of invalidating an FDA provision barring advertising particular compounded drugs, which the government had sought to defend on the ground that the information supplied to the public might lead to bad decisions,

> There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that [] information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.

Thompson v. W. States Med. Center, 535 U.S. 357 (2002).

As speech communicating information, trade names (and more generally information concerning corporate affiliation) are entitled to that same protection, and cannot be restricted on the basis that the public would be better served without the information they supply. *Sambo's, supra.* In circumstances analogous to those here, the Fifth Circuit struck down on free speech grounds a Texas law which prohibited insurance companies from recommending only affiliated body shops, reasoning:

> Consumers benefit from more, rather than less, information. Attempting to control the outcome of the consumer decisions following such communication by restricting lawful commercial speech is not an appropriate way to advance a state interest in protecting consumers.

Allstate Ins. Co. v. Abbott, 495 F.3d at 167.

The very basis of the protection of trade names afforded by state and federal law is experience that consumers make decisions as regards with whom to do business in part on the basis of information as to the identity or affiliations of potential suppliers of goods or services. Undoubtedly, when NBC (which was subject to extensive FCC regulation) determined to create a cable news channel, its decision to use the moniker "MSNBC" was based on an assessment that many viewers would be drawn by a favorable public experience with NBC News. Similarly, when the Fox Entertainment network determined to create its own cable news network, it presumably used the "Fox News" name for similar reasons. It would have been a clear violation of freedom of speech for the FCC to have decreed that those news networks could not be named with names that were "substantially similar" to the existing regulated networks. And the result would not have been different had the FCC been importuned by CBS, or AMC or TBS to adopt such a restriction in the interests of avoiding view confusion or aiding a competitive market by giving all parties an even start. That the use of "Fox News" or MSNBC" might have some effect – attracting some viewers based on prior good experiences, repelling others based on accumulated distrust or dislike – is not a justification for promulgating a restriction like § 54.122(c)(v), but compelling reason for rejecting it. *See Sorrell* and the other cases cited *supra*.

Not only does prohibiting PPL EnergyPlus from using its current name and requiring a new one abridge its right to communicate effectively the fact of its corporate relationship with PPL Electric Utilities (the distribution company) and PPL Corporation (their corporate parent). Of at least equal importance, it deprives Pennsylvanians of the accurate and non-misleading information that the trade name disclosing the affiliation would have conveyed. Those relationships are facts which many consumers would find informative, useful, pertinent to the decisions they need to make concerning which supplier to select. Some electricity users may find the information a reason to select a supplier other than PPL EnergyPlus. Others may find the information a reason to select PPL EnergyPlus. Either way, the dispositive point is that *to the extent that the trade names of PPL Energy Plus or its competitors communicate information concerning corporate affiliation, that information is truthful and not misleading. It is therefore protected speech, not subject to state-imposed restrictions on the basis that consumers would or might make different (or better) decisions without it.*

Although the case authority cited above applies to the First Amendment, Pennsylvania law is even *more protective* of free speech interests and more hostile to speech regulations. The Pennsylvania Supreme Court has held that Article 1, Section 7 of the Pennsylvania Constitution provides broader protections of expression than the related First Amendment guarantee in a number of contexts, including commercial speech. *See Bureau of Prof'l & Occupational Affairs v. State Bd. of Physical Therapy*, 728 A.2d 340, 343-44 (Pa. 1999) (commercial speech in form of advertising by chiropractors entitled to greater protection so long as not misleading); *Ins. Adjustment Bureau v. Ins. Comm'r*, 542 A.2d 1317, 1324 (Pa. 1988) ("Article I, Section 7, will not allow the prior restraint or other restriction of commercial speech by any governmental agency where the legitimate, important interests of government may be accomplished practicably in another, less intrusive manner").

2. <u>§ 54.122(3)(v) cannot satisfy the heightened scrutiny to which it is subject as a content-based and speaker-targeted restriction of speech</u>. The challenged regulation imposes restrictions that are both content-based and speaker-targeted. The proposed rule limits the speech of certain suppliers but not others; and it proscribes only a particular category of fact – the fact of affiliation with a Pennsylvania "electric distribution company or its corporate parent," not any other affiliations. It therefore "follows that heightened judicial scrutiny is warranted." *Sorrell, supra*, 131 S. Ct. at 2664; *see also id.* at 2665-67. And as *Sorrell* noted, "[i]n the ordinary case it is all but dispositive to conclude that a law is content-based." 131 S. Ct. at 2667.

The need for heightened scrutiny is not eliminated or reduced because the burdened speech has some "economic motive." Just last year in *Sorrell*, the Supreme Court yet again rejected "commercial motive" as a reason for not applying heightened scrutiny, as it has repeatedly. 131 S. Ct. at 2664–65 ("A consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue. . . . While the burdened speech results from an economic motive, so too does a great deal of vital expression").

The PUC's proposed rule is plainly invalid under heightened scrutiny. The notice proposing § 54.122(3)(v) identifies no substantial governmental interest supporting the regulation at all, much less one that is directly advanced by the regulation and tailored to serve it. *See Sorrell*, 131 S. Ct. at 2668–69 (citing cases). Indeed, any attempt to justify the rule under that standard would collapse at the outset, since the entire discussion in the proposed rulemaking (42 Pa. B. 7961) offers no justification for why § 54.122(3)(v) is necessary or even important, only a tautological description of what it does. The entire discussion of 54.122.3(v) in the Pennsylvania Bulletin of February 11, 2012 (page 6) is this:

> This new subsection was added pursuant to the Commission's Motion to examine whether EDC-affiliated EGSs should change their names so as to be dissimilar from both the EDC affiliate and the corporate parent. We have found that this requirement varies in different jurisdictions. We propose that both the affiliated and non-affiliated EGSs be required to change their names to be dissimilar to the EDC."

A regulation restricting speech offered without any justification at all is necessarily invalid under *Sorrell, Thompson,* and their predecessors and progeny. As the Court noted in *Sorrell,* "[i]n the ordinary case it is all but dispositive to conclude that a law is content-based," 131 S. Ct. at 2667, and here there is no proffered justification for restricting truthful speech at all.

Nor can any compelling interest be hypothesized. It would be impossible to conclude that any interest in enhanced competition is "compelling", when no state in an analogous deregulated context imposes any comparable restriction. All the other states with competitive electric supply markets lack any such rule.

Nor has the PUC offered any study, or evidence, or anything at all to demonstrate that the legislative goals underlying deregulation of the energy supply market in Pennsylvania can only or can best be served by keeping consumers in the dark as to any relationship that the supply companies have to corporate parents or affiliates. Federal and state law both recognize the right to use trade names and the valuable benefits they afford to consumers and commerce generally. The PUC has not identified any interest that Pennsylvania may have in depriving consumers of information concerning the corporate affiliations of EGSs, and the PUC has also not justified this regulation's necessarily or explained why the normal rules should not apply (under which more speech, rather than rules prohibiting speech, is the preferred approach for advancing substantial governmental interests as regards consumer information).

3. <u>§ 54.122(3)(v) would be invalid even if the *Central Hudson* standard for purely commercial speech applied</u>. The Supreme Court has occasionally applied a somewhat less demanding test, first applied in *Central Hudson Gas & Elec. Corp. v.* PSC, 447 U.S. 557 (1980), for commercial speech that "does no more than propose a commercial transaction." *See, e.g., United States v. United Foods, Inc.,* 533 U.S. 405, 409 (2001). That test does not apply here, however, because it was crafted only for "speech which does '*no more* than propose a commercial transaction.'" *See, e.g., Virginia State Bd. of Pharmacy v. Citizens Consumer Council*, 425 U.S. 748, 762 (1976) (emphasis added); *see also Bd. of Trustees of State of N.Y. v. Fox*, 492 U.S. 469, 474 (1989) (discussing whether "pure speech and commercial speech" were inextricably intertwined, so that "the entirety must . . . be classified as noncommercial"); *see also Sorrell,* 131 S. Ct. at 2667 (strongly suggesting that the *Central Hudson* test does not apply to regulations, like the one here, that are content- or speaker-based).

Since the proposed PUC regulation here applies across the board – not only in sales pitches, but forbidding PPL Energy plus from using that name *all the time,* whether when petitioning the legislature, or working with the Executive branch on environmental or energy-saving issues, or appearing on local news shows – the *Central Hudson* test is inapplicable.

Even if *Central Hudson* were applicable, moreover, § 54.122(3)(v) would not pass muster. A restriction survives *Central Hudson* only if the State can show "at least that the statute directly advances a substantial governmental interest ... the measure is drawn to achieve that interest"; "There must be a 'fit between the legislature's ends and the means chosen to accomplish those ends;"[4] and the law must not be aimed as suppressing a disfavored message. *Sorrell*, 131 S. Ct. at 2667-68 (citing cases). Those standards are not met here.

First, the PUC's own submission indicates no substantial purpose at all, other than the tautological one of making the name of an EGS dissimilar from both the EDC affiliate and the corporate parent. Difference for difference sake is not a "substantial governmental interest." Absent any substantial purpose, it is impossible as well to find that the proposed regulation has a close or tight fit to a substantial governmental goal.

Moreover, given the related regulation in sub-part 3(b)(iv) that requires a disclaimer rather than an outright prohibition and that already addresses any legitimate concerns that the PUC staff may have (none of which have been articulated so far), it would seem that the insistence on promulgating a regulation that goes farther and absolutely prohibits the use of a trade name with any similarity to an EDC trade name is evidently aimed at suppressing a disfavored message. The insistence on going further – not alleviating any potential misimpression with a disclaimer, but prohibiting any trade name communicating true facts of affiliation – is hard to explain other than as an attempt to prevent consumers from obtaining the useful information that such trade names would in fact supply.

Proposed rule § 54.122(3)(iv) requires an EGS, among other things, to feature a disclaimer stating

> that the EGS is not the same company as the EDC and that a customer need not buy the EGS's services or products in order to continue receiving services from the EDC. By requiring a disclaimer, the Commission attempts to minimize customer confusion and eliminate any deceptive practices that may occur when an EGS uses the EDC's service-mark or trademark.

EnergyPlus already employs such a disclaimer. More generally, as discussed in the annexed PPL comments, many, albeit not all, of the PUC's proposed disclaimer requirements in Section 3(b)(iv) are reasonable and PPL does not oppose them, and in fact PPL already complies with many of those disclaimer requirements.

EnergyPlus has not seen any basis, and is aware of none, for concluding that consumers are confused by the similarity of trade names of electric energy suppliers in Pennsylvania with trade names of electric energy distribution companies – or that, if there were any such confusion, disclaimers such as those required by § 54.122(3)(iv) would not be sufficient to alleviate it. The proposed rulemaking cites no study or other evidence indicating that the disclaimer approach of § 54.122(3)(iv) has been ineffective, or is likely to be so. Without a showing that there is in fact some harm requiring addressing through the restriction effected by § 54.122(3)(v), however, which would not be adequately eliminated by those disclaimer requirements in § 54.122(3)(iv) that are reasonable, the proposed restriction cannot survive scrutiny.

B. <u>The PUC Lacks The Statutory Authority To Enforce The Prohibition In Proposed § 54.122(3)(v) Because The Legislature Did Not Grant The PUC The Power To Prohibit Trademark Use In This Manner And Several Other Public Bodies Are Already Tasked With This Matter</u>.

The PUC lacks the statutory authority to enforce the proposed trademark prohibition in § 54.122(3)(v) because (1) the PUC is a statutory creation whose powers are strictly limited to those granted by the legislature; and (2) based on relevant precedent, and because trademarks are already regulated by other governmental bodies, courts will find that the PUC lacks jurisdiction to enforce this prohibition.

1. <u>The PUC does not have the statutory authority to prohibit the trademark use envisioned by § 54.122(3)(v)</u>. The powers granted to the PUC by the Pennsylvania General

Assembly are strictly limited to those enumerated in Part I of Title 66 of the Pennsylvania Consolidated Statutes, which is entitled the Public Utility Code ("the Code"). As forcefully stated by the Pennsylvania Supreme Court, the "power and authority to be exercised by administrative commissions must be conferred by legislative language clear and unmistakable. *A doubtful power does not exist* . . . . [The commission] should act within the strict and exact limits defined." *Process Gas Consumers Grp. v. Pennsylvania Pub. Util. Comm'n*, 511 A.2d 1315, 1319 (1986) (emphasis added) (citing *Green v. Milk Control Comm'n*, 16 A.2d 9, 9 (1940)); *see also Swarthmore v. Pub. Serv. Comm'n*, 121 A. 488, 490 (1923) ("The only safe and proper roads for administrative bodies like the present commission to travel are those plainly marked by the acts of assembly defining their duties, and to these the courts must confine them . . . ."); *Pickford v. Pub. Util. Comm'n*, 4 A.3d 707, 713 (Pa. Commw. Ct. 2010) ("As a creature of legislation, the Commission possesses only the authority the state legislature has specifically granted to it in the Code.").

Further, the PUC "was not intended to be a super board of directors for the public utility industry forcing upon the regulated companies general concepts of the public interest." *N.A.A.C.P. v. Pennsylvania Pub. Util. Comm'n*, 290 A.2d 704, 708 (Pa. Commw. Ct. 1972) (citing *Bell Tel. Co. of Pa. v. Driscoll*, 21 A.2d 912, 916 (1941)). The PUC's powers are strictly confined to those it was granted, and it is not permitted to create prohibitions like the one at issue here, geared towards protecting the general public interest with no connection to an explicitly granted power. *Id.*

The PUC's jurisdiction is confined to the "regulation and control of public utilities in determining the cost and service to the public." *Fairview Water Co. v. Pennsylvania Pub. Util.*

Comm'n, 502 A.2d 162, 166 (1985). The PUC's express powers are set forth throughout the Code, and the general powers are described in Sections 501 and 1501. Section 501, which grants the PUC the power to enforce its expressly enumerated powers as well as those necessary and proper in the exercise of said powers, provides that:

> [i]n addition to any powers expressly enumerated in this part, the commission shall have full power and authority, and it shall be its duty to enforce, execute and carry out, by its regulations, orders, or otherwise, all and singular, the provisions of this part, and the full intent thereof . . . . 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. CONS. STAT. ANN. § 501. In turn, Section 1501 grants the PUC the authority to regulate the "service" and "facilities" of public utilities under its aegis:

> Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public.

66 PA. CONS. STAT. ANN. § 1501. "Service" is defined as "any and all acts done, rendered, or performed, and any and all things furnished or supplied, and any and all facilities used, furnished, or supplied by public utilities . . . in the performance of their duties under this part to their patrons, employees, other public utilities, and the public." 66 PA. CONS. STAT. ANN. § 102.

The Code contains no express grant of power pertaining to the prohibition of trademarks. In fact, no provision comes close, and, in order to enforce the proposed trademark prohibition in § 54.122(3)(v), the PUC would need to fall back on the general powers described in Sections 501 and 1501. These general powers enable the PUC to regulate only the rates, services, and facilities of public utilities. *See Fairview Water*, 502 A.2d at 166; 66 PA.CONS. STAT. ANN. § 1501. *The trademark prohibition in § 54.122(3)(v) has no relation to the regulation of rates,* *facilities or service*; reading that authority so broadly would empower the PUC to regulate everything a public utility does vis-á-vis consumers, an impermissibly broad construction. The law is clear that the PUC's powers are not unlimited, and, in fact, that they are strictly confined to those expressly granted by the legislature. Therefore, the broad language contained in Sections 501 and 1501 must be read in conjunction with the powers explicitly granted to the PUC, *see Fairview Water*, 502 A.2d at 166, and there is no explicit grant of the power to prohibit trademark use in the manner contemplated by proposed regulation § 54.122(3)(v).[1]

Courts have been quick to restrain the PUC from overstepping its statutory bounds. *See, e.g., Fairview Water*, 502 A.2d at 167 (holding that the PUC lacked jurisdiction to determine the scope and validity of an easement); *Pickford*, 4 A.3d at 713–14 (holding that the PUC lacked jurisdiction to regulate issues relating to water quality); *Country Place Waste Treatment Co., Inc.*, 654 A.2d 72, 76 (PA Commw. Ct. 1995) (holding that the PUC lacked jurisdiction to regulate matters relating to odors emanating from a sewage treatment plant); *Filoon v. Pennsylvania Pub. Util. Comm'n*, 648 A.2d 1339, 1342 (Pa. Commw. Ct. 1994) (holding that the PUC lacked jurisdiction over banking and banking practices); *N.A.A.C.P.*, 290 A.2d at 711 (holding that the PUC lacked jurisdiction to regulate employment discrimination).[2] In the above

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[1] Nor can the PUC rely on Section 2807(d)(2), located in Chapter 28 of the Code, which is entitled "Restructuring of Electric Utility Industry," and empowers the PUC to require entities 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." 66 PA CONS. STAT. ANN. § 2807(d)(2) (emphasis added). A provision authorizing regulation in the service of providing "accurate customer information" cannot plausibly be stretched to authorize regulations prohibiting the denial of accurate information, which is precisely what § 54.122(3)(v) does.

[2] *See also Process Gas*, 511 A.2d at 1321 (holding that the PUC lacked the statutory authority to order a surcharge on industrial consumers of natural gas in order to fund residential conservation programs because execution of the PUC proposal would require the "legislative powers of taxation and appropriation," and "[t]hese powers are not within the PUC's delegated authority."); *Feingold v. Bell of*

cases, the PUC was prevented from acting outside the bounds of its statutorily granted authority. Likewise, here, because the PUC does not possess the statutory authority to prohibit a trademark use, it cannot promulgate or enforce § 54.122(3)(v)

Because courts are in complete agreement that the PUC's powers are strictly limited to those it was granted, and because the legislature did not see fit to grant the PUC jurisdiction over the prohibition of trademarks, the PUC does not have the statutory authority to enforce proposed prohibition § 54.122(3)(v). *Fairview Water*, 502 A.2d at 166; *Country Place Waste Treatment Co., Inc.* at 654 A.2d at 75–76.

2. The PUC is not the appropriate body to regulate trademarks. Courts are more likely to find that the PUC is acting outside its statutory authority when the subject matter of the action or regulation is firmly within the province of another governmental agency. Here, the PUC lacks jurisdiction over matters pertaining to trademark prohibitions and consumer confusion because: (a) the PUC lacks the necessary expertise to determine whether trademarks are similar or likely to cause consumer confusion and the proposed prohibition would require the PUC to interpret trademark laws with which they are not experts; (b) other governmental bodies *are* authorized to regulate trademarks and they are endowed with a wealth of specialized knowledge that renders them the more appropriate regulatory bodies; and (c) if both the PUC and

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Pennsylvania, 383 A.2d 791, 794 (1977) (holding that the "statutory array of PUC remedial and enforcement powers does not include the power to award damages to a private litigant for breach of contract by a public utility"); *Rovin v. Pennsylvania Pub. Util. Comm'n*, 502 A.2d 785, 786–87 (Pa. Commw. Ct. 1986) (upholding a PUC order that held that the PUC lacked jurisdiction over a claim by a dentist regarding fluoridated drinking water because no statutory language authorized the PUC to regulate water quality in that manner); *Virgilli v. Sw. Pennsylvania Water Auth.*, 427 A.2d 1251, 1254 (Pa. Commw. Ct. 1981) (holding that the PUC did not have jurisdiction over a contract dispute between a water authority and a water company and noting that the Code "does not grant the PUC general supervisory power over contracts involving public utilities."); *cf. Duquesne Light Co. v. Pennsylvania Pub. Util. Comm'n*, 63 A.2d 466, 469 (Pa. Super. Ct. 1949) (holding that the PUC did have jurisdiction to reclassify a utility company's service and to fix the rate to be charged).

these other bodies are allowed to regulate trademarks, there is the potential for parallel and duplicative proceedings and inconsistent rulings.

First, the PUC lacks the requisite experience and knowledge to make determinations regarding whether a trademark use should be prohibited because trademark law is a complex and highly specialized field of law. A typical analysis of a trademark infringement claim involves a multiplicity of factors including, *inter alia*, assessments of the strength and uniqueness of trademarks, the similarities between trademarks, the sophistication of the end consumer, the relationship of the goods in the consumer's mind due to the similarity of function, and the trademark user's intent. *See, e.g.*, *Interpace Corp. v. Lapp, Inc.*, 721 F.2d 460, 463 (3d Cir. 1983); *Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492, 495 (2d Cir. 1961). The PUC has little or no experience in the complicated field of trademark law.

Further, the PUC itself has held that because allowing it to exercise jurisdiction over a claim relating to negotiable instruments would necessitate interpretation of the Uniform Commercial Code, the PUC lacked jurisdiction. *See generally Bell v. Philadelphia Gas Works*, No. C-20043326, 2005 WL 6502735 (Penn. P.U.C. July 14, 2005). The situation here, involving jurisdiction over trademark prohibitions, is analogous.

Repeatedly, courts that have determined that the PUC lacks jurisdiction have relied on the fact that other governmental bodies are already tasked with regulating the area in question. *See, e.g.*, *Country Place Waste*, 546 A.2d at 76 (holding that the PUC lacked jurisdiction over claims relating to air quality because, among other factors, the Pennsylvania Department of Environmental Resources has jurisdiction over issues relating to air pollution); *Rovin*, 502 A.2d at 786–87 (same, but relating to water quality); *N.A.A.C.P.*, 290 A.2d at 708–12 (relying, in part, on the fact that the Pennsylvania Human Relations Commission has "explicit power" over issues relating to workplace discrimination in holding that PUC lacked jurisdiction).

Here, the state and federal court system, the Pennsylvania Department of State, the Federal Trade Commission ("FTC"), and the U.S. Patent and Trade Office ("PTO") are already tasked with trademark regulation and enforcement. These bodies have the expertise and authorization to regulate and prohibit particular trademarks and enforce trademark laws. For this reason, respectfully, they are categorically more qualified than the PUC to make decisions as to the propriety of a particular trademark and whether it is likely to cause consumer confusion and should be prohibited.

Third, and finally, the PUC should not be permitted to prohibit trademark uses because doing so engenders a likelihood of duplicative and parallel proceedings and possibly inconsistent results. As just mentioned, trademarks are currently regulated by the Pennsylvania Department of State, the FTC, and the PTO, and trademark disputes are adjudicated in state court, federal court, before the FTC, and before the PTO.[3] It would be inefficient for the PUC to begin regulating in this area as well, especially due to the risk that the PUC could reach a different result than that reached by another body that has more expertise in a parallel proceeding.

Because courts look to whether a different governmental body with specialized expertise is tasked with regulating the area in question in determining whether PUC has jurisdiction, and because the judiciary, the Pennsylvania Department of State, the PTO, and the FTC already regulate trademarks, these facts also strongly support the conclusion that a court would find that

[3] For example, the FTC is tasked with preventing "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce." *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611 (1946) (citation omitted). This squarely overlaps with the purpose of the proposed trademark prohibition.

the PUC does not have sufficient jurisdiction to enforce the trademark prohibition in proposed § 54.122(3)(v).

C. The Proposed Trademark Prohibition Would Effect A Regulatory Taking Of The "PPL EnergyPlus" Trademark.

Proposed regulation § 54.122(3)(v) prohibits electric supply companies, including PPL EnergyPlus, from having "the same or substantially similar name . . . as the electric distribution company or its corporate parent," and thus would require PPL EnergyPlus to completely abandon all use of its brand name. This constitutes a regulatory taking of the federally registered "PPL EnergyPlus" trademark, and for this reason as well the PUC should strike § 54.122(3)(v) from the proposed regulation.

The Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." U.S. CONST. amend. V. The Supreme Court distinguishes between two types of takings: physical and regulatory. *See Yee v. City of Escondido*, 503 U.S. 519, 522 (1992) (differentiating between claims of physical occupation and regulation). A regulatory taking occurs when a significant restriction is placed on the use of property such that "justice and fairness" require that compensation be given. *See Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962). Within the branch of regulatory takings, the Supreme Court has promulgated two tests for finding a regulatory taking: the *per se* test as outlined in *Lucas v. SC Coastal Council*, 505 U.S. 1003 (1992), and the three-part factual inquiry described in *Penn Cent. Transp. Co. v. NYC*, 438 U.S. 104 (1978). For the reasons stated below, the proposed regulation would constitute a regulatory taking under both tests.

1. Trademarks are intellectual property capable of regulatory taking. As an initial matter, trademarks and other forms intellectual property are protected by the Takings Clause of

the Fifth Amendment. *See, e.g., Bronco Wine Co. v. Jolly*, 29 Cal. Rptr.3d 462, 495 (Cal. Ct. App. 2005) ("brand name[s have] long been considered protected property within the meaning of the takings clause"); *see also Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003–1004 (1984) (trade secrets are property rights protected by the Takings Clause); *Philip Morris, Inc. v. Reilly*, 312 F.3d 24, 36 (1st Cir. 2002) (applying the *Penn Central* takings analysis to trade secrets).

In *Monsanto*, the Court held that trade secrets qualify as the type of property protected by the Takings Clause because they exhibit many of the "sticks in the bundle of rights that are commonly characterized as property," including the right to exclude others, the right to assign or sell one's interest in property, and the fact that a trade secret "can form the *res* of a trust." *Monsanto*, 467 U.S. at 1002–03, 1011–13. The *Monsanto* Court specifically highlighted the notion that the right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Monsanto*, 467 U.S. at 10011–12; *see also College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999) ("The hallmark of a protected property interest is the right to exclude others"). Trademarks (including trade names) exhibit all the above hallmarks of property, including the right to exclude others and the right to assign or otherwise transfer. Critically, the right to exclude others, the "hallmark of a protected property interest," is the primary function of trademarks. *See K Mart Corp. v. Cartier, Inc.*, 485 U.S. 176, 185–186 (1988) ("Trademark law . . . confers private rights, which are themselves *rights of exclusion*. It grants the trademark owner a bundle of such rights") (emphasis added). Thus, indisputably, trademarks are a protectable property interest under the Takings Clause.

2. The proposed regulation constitutes a *per se* regulatory taking under *Lucas*. In *Lucas*, the Supreme Court held that a regulation constitutes a *per se* taking when it "denies all economically beneficial or productive use."[4] *Id.* at 1015. Proposed § 54.122(3)(v) would deny PPL EnergyPlus all economic and productive use of the federally registered "PPL EnergyPlus" trademark because PPL EnergyPlus would be prevented from using its trade name in any fashion. *See Lucas*, 505 U.S. at 1015. PPL EnergyPlus would also be totally prohibited from using the "PPL EnergyPlus" brand, a name under which the company has acted and accumulated goodwill for approximately fifteen years. Therefore, proposed regulation § 54.122(3)(v) would deprive PPL EnergyPlus of all "economically beneficial or productive use" of its brand name, and this constitutes a *per se* regulatory taking.

3. The proposed regulation also constitutes a regulatory taking under *Penn Central*. Proposed regulation § 54.122(3)(v) would also constitute a regulatory taking under the three-part factual inquiry outlined in *Penn Central,* under which courts evaluate (1) "[t]he economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action." *Penn Central*, 438 U.S. at 124.

a. The economic impact of compelling PPL EnergyPlus to cease using its name would be enormous. The first element of the *Penn Central* test looks to the economic impact of the regulation on the property. *Penn Central*, 438 U.S. at 124. A regulation does not

[4] In *Lucas* the *per se* test was applied to a physical invasion of real property. *Lucas*, 505 U.S. at 1015. As courts have recognized, however, the *Lucas* test should also be applied to personal property including intellectual property. *See, e.g., Nixon v. United States*, 978 F.2d 1269, 1285–1286 (D.C. Cir. 1992) ("Hence, the Government's inference that the per se doctrine must be limited to real property is without basis in the law, and we see no reason to give it one. One may be just as permanently and completely dispossessed of personal property as of real property. Any distinction along these lines would be purely artificial.")

constitute a taking when the "regulation only diminishes rather than eliminates property value, or prohibits the property's most beneficial use." *Bronco Wine*, 29 Cal. Rptr.3d at 498 (citing *Andrus v. Allard*, 444 U.S. 51, 65–66 (1979)) (internal citations omitted)

The proposed regulation would force PPL EnergyPlus to completely abandon its well-known and famous trademark. The economic impact of this would be large, and would damage in multiple ways PPL EnergyPlus's relationship with existing and prospective customers. First, PPL EnergyPlus would have to spend millions of dollars in a rebranding effort. Second, current and prospective customers who would be more likely to purchase electricity from PPL EnergyPlus due to the brand's long history and because of its affiliation with the well-known, prominent, and respected PPL Corporation, would no longer be able to quickly ascertain the connection between the companies. Because the prohibition would totally prevent PPL EnergyPlus from using its name, the regulation would not merely "diminish[]" the value of PPL EnergyPlus's trademark or prohibit the "most beneficial use" of the mark, but completely strip the property of any value and prohibit *all* uses of the name with regard to PPL EnergyPlus's commercial operations. *See Andrus*, 444 U.S. at 65–66. Thus, forcing PPL EnergyPlus to cease using its trademark and sacrificing the name's goodwill in the marketplace will have a massive negative economic impact with absolutely no corresponding benefit. That is the fundamental hallmark of an impermissible taking.

b. The proposed regulation would greatly interfere with PPL EnergyPlus's investment-backed expectations in the "PPL EnergyPlus" name. The second element of the *Penn Central* test considers the extent to which the regulation interferes with "distinct investment-backed expectations," which are reasonable. *Penn Central*, 438 U.S. at 124;

PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 83 (1980). Here, PPL EnergyPlus has reasonably invested tens of millions of dollars in the PPL EnergyPlus name in order to distinguish itself from its competitors and build a strong and distinctive brand. PPL EnergyPlus's investment in the PPL EnergyPlus trademark fosters the eminently "reasonable . . . expectation" that PPL EnergyPlus would be able to benefit from the promotion of its own brand name. *See id.* Proposed regulation § 54.122(3)(v) would undo PPL EnergyPlus's efforts to promote its brand, and, therefore, greatly interfere with PPL EnergyPlus's distinct investment-backed expectations.

c. The character of the proposed regulation points to its impermissibility. The third and final element of the *Penn Central* test examines the character of the government action in light of the rule that a taking "may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Central*, 438 U.S. at 124 (internal citation omitted). Here, the character of the proposed regulation is shown by its effective application only to suppliers related to larger companies. All suppliers are not required to change their trade names; only the disfavored, targeted ones are. That is precisely the kind of regulation whose unequal burden, and invidious purpose, justifies the conclusion that it is an impermissible taking. Moreover, by depriving consumers of truthful, accurate information (that there is a corporate heritage and affiliation) which many consumers would find useful, the proposed regulation directly disserves the public interest. *See* comments to § 54.122(3)(v) and the annexed Gordon Affidavit for a comprehensive discussion regarding this issue. In other words, the purported purpose of proposed regulation § 54.122(3)(v) is at odds with what would be its actual effect, and the actual effect of the PUC's proposed actions will actually harm the public.

Because the proposed prohibition in § 54.122(3)(v) would constitute a regulatory taking under both the *Lucas* and the *Penn Central* test, the PUC should strike § 54.122(3)(v) from the proposed regulation, and rely exclusively on a reasonable disclaimer requirement, rather than a prohibition on the use of information-supplying trade names, to advance the public interest.