

**Before The
Pennsylvania Public Utility Commission**

Rulemaking Re Amending Electric : Docket No. L-00030161
Service Reliability Regulations :
At 52 Pa. Code Chapter 57 :

**Response of
The Energy Association of Pennsylvania to the Commission’s
Proposed Rulemaking Order on Electric Reliability**

The Energy Association of Pennsylvania (“Energy Association”) on behalf of the eleven investor-owned electric distribution companies¹ (“EDCs”) in the Commonwealth files this response to the Commission’s Proposed Rulemaking Order on Electric Reliability, published in the *Pennsylvania Bulletin* on October 4, 2003, (hereafter “Reliability Rulemaking”).

Summary of Argument

The Energy Association would ask the Commission to recognize the success already achieved through the cooperative efforts of the Staff Internal Working Group, and the rest of the participants in this docket. There have been a number of areas of agreement that have resulted in the Commission being able to implement more consistent language and requirements across EDC’s of the same size.

The proposed changes agreed to with the Staff Internal Working Group and those agreed to in our Comments filed in Response to the Tentative Order, demonstrate that there have been some fundamental changes in the Commission’s approach to reliability. Yet there are some instances related to these proposed final rules that either (1) lack the clarity of the

¹ Allegheny Power, Citizens’ Electric Company, Duquesne Light Company, Metropolitan Edison Company, Pennsylvania Electric Company, PECO Energy Company, Pennsylvania Power Company, Pike County Light & Power Company, PPL Electric Utilities Corp., UGI Utilities Inc.-Electric Division, and Wellsboro Electric Company

Commission's previous changes, and/or (2) are not designed to impact reliability or the decision-making process surrounding reliability.

As the Energy Association noted in its comments related to the Tentative Order, the standard being proposed in the rulemaking is confusing or inconsistent. For example, the proposed rules in §57.194 are at odds with both the Tentative Order (page 11) and the Rulemaking Opinion (page 10). As such, the exact standard being applied to the industry is uncertain because the language contained in the Commission's Reliability based opinions and its proposed rules are inconsistent.

Some of the proposals have been previously rejected by the Commission, (5% worst-performing circuits), others such as budgeting by FERC account are simply not done by anyone in the industry, while still other proposals for quarterly financial data incorrectly suggest that somehow one can assess reliability, which is a long term effort, by short-term budget comparisons, statistics and reports. ²

Other suggestions and premises are not supportable when compared to, and analyzed against, actual operations. For example, a decreasing trend in operation and maintenance ("O&M") expenses does not automatically indicate a decreasing emphasis on reliability. The Commission's own analyses demonstrate the accuracy of this statement.

In the Commission's docket on Inspection and Maintenance Study of EDCs, Docket No. M-00021619³ the Commission attached its internal inspection and maintenance study dated August 27, 2002. In that study, the Commission's own staff found that transmission and distribution maintenance expenses, without tree-trimming, decreased for two companies, PECO and Duquesne, while increasing for all the other larger companies. As the Commission's

² As has been noted regarding service reliability that by its very nature, the statutory standard is not capable of definition with mathematical precision. Colonial Products Company v. Pa PUC 188 Pa. Super. 163,146A.2d 657.661 (1958).

³ Order Entered August 29, 2002

Appendices for the Tentative Order⁴ demonstrate, these two entities have some of the better achievements of the industry during the measured time period. Therefore, the Commission's own data does not support the underlying premise offered for increased reporting of financial information.

Another example of how changes in O&M can be impacted without negatively impacting reliability is the installation of a major capital improvement. Capital improvements often are justified by their reduction in O&M expenses. Furthermore, when installing major capital upgrades, the labor force will have a greater level of its time capitalized rather than expensed. Therefore, both during and after the installation of a capital project addressing reliability, the O&M expense levels may well decline, but the purpose is, nonetheless, to improve reliability.

The Commission seeks to obtain a tremendous amount of quarterly data which tends to fluctuate due to factors such as pressure from other projects, capital deployment, weather and a host of other variables that fail to demonstrate any reliability concerns that can be addressed. If the Commission is going to insist on such quarterly reports, the information must not be made available to the public, or the cost of providing electric service will increase as the EDCs compromise the ability to competitively negotiate and hold down costs. Furthermore, to do so would lead to erroneous conclusions, and easily misinterpreted information.

Finally, the October 17, 2003 letter from the Bureau of Consumer Services ("BCS"), unilaterally changes BCS's process for investigating informal complaints relating to reliability or quality of service. At best, this letter creates unnecessary confusion. At worst, this letter undermines the Commission's proposed rulemaking by establishing new rules, new standards, new reporting requirements, and new costs all without awaiting the results of this proceeding.

⁴ Tentative Order Docket M-00991220

The judicial decisions and philosophy reflected in DER v. Rushton Mining Company⁵ and Pennsylvania Human Relations Commission v. Norristown Area School⁶ clearly establish that a rulemaking is binding upon all of an agency's staff. BCS must await the outcome of the Rulemaking and then apply the Agency's adopted rules, regulations and standards to the customer complaint process. The BCS October 17, 2003, letter is premature and should be withdrawn.

The Proposed Revisions to 52 Pa. Code §57.194 Which Adds the Term "Performance Benchmarks" Should be Stricken or Amended to Clearly Distinguish the Consequences of a Failure to Meet the Performance Benchmarks from a Failure to Meet the Standards

The proposed revisions to §57.194(e) and (h) add the phrase "performance benchmarks" requiring that EDCs design and maintain procedures and take steps to achieve the benchmarks as well as the standards. In discussing these revisions, the Commission is clear that in the long term, performance trending toward the benchmark is the objective, but at the same time it should make clear that a failure to meet the benchmarks does not equate to a failure to meet the performance standard.⁷

The EAP agrees with the Commission that EDCs should manage their business to meet the long-term performance benchmarks. However, the distinction between the consequences of a failure to meet the standards and the failure to meet benchmarks is significant, however. Given the numerous variables outside the EDCs' control that can affect their respective

⁵ DER v. Rushton Mining Co., 139 Pa. Cmwlth. 648, 591 A.2d 1168, (1991)

⁶ 473 Pa. 334, 374A.2d 671 (1977)

⁷ "While clarifying our language to emphasize long-term performance at the benchmark level, we acknowledge that performance in a given year or so may vary from the benchmark. Therefore, we continue to find the concept of a performance standard to be a useful tool for monitoring performance in the near term. When performance on any measure falls outside the standard, Commission staff will engage in an additional review with the EDC to determine whether reliability performance is deteriorating, which could contribute to an EDC not maintaining benchmark performance in the long term." Reliability Rulemaking at 10.

reliability performance, it is critical to maintain the distinction between the performance standards and benchmarks targets. Yet with the proposed addition of the term “performance benchmarks,” Sections 57.194(e) and (h) could be reasonably interpreted to equate the benchmarks with the standard, thus eliminating this important distinction. Yet, the Commission clearly indicates its intent that the standards represent the minimal performance requirement. An EDC’s failure to meet the minimum threshold represented by the statutory standard constitutes non-compliance by the EDC, which may result in further investigation, fines or penalties. The benchmark, on the other hand, provides EDCs with an important and meaningful long-term performance target, while at the same time appropriately allowing a margin within which their performance is deemed acceptable. Thus, a failure to meet the long-term benchmark targets should not have the same consequences as non-compliance with a standard. Adding the phrase “performance benchmark” to Sections 57.194(e) and (h), however, eliminates the distinction between the consequences of a failure to meet the benchmark targets and a failure to meet the standard. The Commission noted with approval the Staff Internal Working Group recommendation to develop minimum performance standards -- Tentative Order, pages 3-4, Staff Recommendation III – 1, p.7. The Commission’s language in the Tentative Order⁸ is directly contrary to the proposed amendment to rule §57.194. In the Tentative Order, the Commission speaks to the need for greater review and additional reporting for failure to meet a performance standard. The Commission further emphasized the need to “*allow for some variability from the benchmarks because reliability performance is influenced by weather conditions and other factors that are inherently variable in nature.*”⁹ EAP respectfully suggests that the language be revised to clarify the distinction between a failure to meet the benchmarks and a failure to meet the standards.

⁸ Page 11

⁹ Ibid.

The Proposed 5% Worst Performing Circuit Requirements is Unsustainable

The Commission has proposed to amend §57.192 to include a requirement for EDCs to report by circuit instead of by operating area.¹⁰ Specifically, the EDCs are being required to report on a quarterly basis their 5% worst performing circuits as calculated based upon the reliability indices and "other relevant factors".¹¹ The Energy Association would respectfully suggest that the proposed amendment to the rule is impermissibly vague, has already been ruled by this Commission to be of little or no value and has also been interpreted as such by other Commissions as well.

"Other relevant factors" is vague. Its impact is clouded by the broadening of the reliability test, processes, procedures and concerns set forth in the BCS letter of October 17, 2003. It is unclear to the industry whether the focus of the Commission is on the entire system, the 5% worst-performing circuits or random, individual complaints.

Providing a list of 5% of the worst performing circuits quarterly was rejected by this Commission in 1998.¹² As the Commission noted previously: "adding an identification of worst-performing circuits adds unnecessary complications to the regulations **without increasing** our ability to ensure the maintenance or improvement of system reliability."¹³ As the Commission eloquently stated, "For example, if only 1% of a utility's circuits fails to meet the reliability standard, focusing on the 5% worst-performing circuits is not useful. The concept is similarly inapt if 10% of a utility's circuits do not meet the performance standards. Thus, the concept of "worst-performing circuits" has been deleted from the regulations."¹⁴

¹⁰ Pennsylvania Bulletin, Volume 33 No. 40, page 4923, October 4, 2003

¹¹ Ibid

¹² Final Rulemaking to Amend 52 Pa Code Chapter 57, to ensure Electric Service Reliability, Docket No. L-00970120, Order entered April 24, 1998 (hereafter "Final Order")

¹³ Ibid, page 9

¹⁴ Ibid, page 9

The Commission in its first Final Rulemaking Order buttressed its rejection of worst-performing circuits reporting by noting that New York had utilized this requirement for a while but their conclusion was that this reporting requirement had become something of a post-review exercise in that utilities were merely compiling and documenting corrective actions that had already been taken. As such, the requirement had become a time consuming exercise of little benefit to the companies.¹⁵

As this Commission stated in its previous Final Order:

"We hesitate to impose excessive requirements upon the EDCs and to engage in what may be considered micromanagement."¹⁶

Whereas this Commission has previously rejected the reporting of quarterly statistics on worst-performing circuits much less permitting excessive micromanagement and paper compilation on remedial action already taken, the issue squarely before the Commission is what argument or evidence exists that supports resurrecting this expensive record keeping mechanism that does not address reliability? The Energy Association would suggest that there is no rationale provided to support a departure from the Commission's previous precedent or that this so called remedy will address anything that has arisen regarding reliability since that decision.

Quarterly Reports Do Not Provide Meaningful Insight Into An EDC's Performance Reliability and Should Be Eliminated From the Reporting Requirements

The Commission has proposed several amendments to the regulations governing electric service reliability, including revisions to the annual reporting requirements in Section 57.195 as well as the addition of quarterly reporting requirements as 57.195(e) and (f). Regarding the

¹⁵ Ibid, page 15, citing Order adopting Changes to Standards in Reliability and Quality of Service, Case 96-E-0979, issued February 26, 1997 (NYPSC)

¹⁶ Ibid, page 20

addition of the quarterly reporting requirement, the Commission stated that the quarterly reports will “provide more frequent information to the Commission about service reliability.” The Commission’s stated purpose in requiring such information is to “enable [it] to identify potential problems in a timely manner and monitor the EDC’s response to problems which may arise between annual reports” and to allow it to monitor the EDC’s activities, expenses and staffing levels to “ensure that sufficient resources are being devoted to the reliability of electric service.” Rulemaking Re Amending Electric Service Reliability Regulations at 52 Pa. Code Chapter 57, Proposed Rulemaking Order Published Pa Bulletin October 4, 2003 (“Reliability Rulemaking”) at 15. However, the monitoring of certain EDC activities on a quarterly basis does not provide meaningful insight into the EDC’s reliability performance.

Many of the additional reporting requirements set forth in Section 57.195(e) request information that, when reported on a quarterly basis, is an unreliable means of gauging reliability performance. Generally the primary measure of performance is an annual target, which is why reporting such information on an annual basis, rather than a quarterly basis, is the more appropriate practice.

Reporting the reliability data that would be required by §§57.195(e)(3&5) on a quarterly basis applies statistical information, in some instances, using a smaller population of averages and values. Data reported using such small sample sizes is of little value in analyzing reliability performance in that it produces results that have high variability which can lead to potentially alarming, but nonetheless statistically invalid references. In its Tentative Order¹⁷ discussion, the Commission properly notes that smaller sample sizes result in higher standards of

¹⁷ Tentative Order and Request For Comments on the Proposed Guidelines and Policies regarding Standards for Electric Service Performance Reliability issued by the Commission at its Public Meeting held on June 26, 2003 (“Tentative Order”).

deviation.¹⁸ Hence, reliability data reported on an annual basis using the larger sample pool of an EDC's service territory, and including all the causes, is the more appropriate and useful means of monitoring reliability performance.

Another example of the ineffectiveness of quarterly reporting are the budget and resource allocation data requirements. Budget and maintenance targets are generally created for an annual period. This is generally to assist in the management of business activities. Quarterly budget information is not driven solely or even predominantly by reliability assumptions. Rather, comparison of budget and resource allocations numbers from quarter to quarter increases the potential for misinterpretations, invalid conclusions and false alarms, rather than any meaningful analysis of reliability performance. The focus should be the reliability, and not the accuracy, of budgeting.

Quarterly reporting of budget and resource allocation information (such as that required by §57.195(e)(6-11)) relates more to the EDC's management of the business as a whole, than to its management of reliability performance and as such, requesting this information is unwarranted because it will not *actually* assist the Commission in meeting its stated objectives. Having information available on targeted budget and maintenance performance for a particular quarter will not provide the Commission meaningful insight into whether an EDC is designating adequate resources to reliability. Nor will it provide the Commission information as to the impact of that budget or maintenance performance on the reliability measures.

Micromanagement of overall EDC operating decisions can only be justified by identification by the Commission of an actual problem with reliability performance and therefore belongs not in a quarterly report but in an audit process designed to address identified problems.

¹⁸ See Tentative Order at 10 discussing the impact on deviation of smaller sample sizes; and Tentative Order at 15 discussing variances and accurate trend analysis.

Quarterly reports which reflect rolling 12-month indices and major outages in terms of the indices of CAIDI, SAIFI and SAIDI are satisfying. Those provisions contained in §57.195 (e) and (f) focusing on budgetary, financial and personnel information should be eliminated, or in the alternative, moved to §57.195 (g).

Much of the Information Required by the Proposed Revisions to 52 Pa. Code §57.195 is Confidential and Proprietary in Nature and Should Not be Made Available to the Public

The Energy Association supports some of the amendments to the *annual* reporting requirements. As proposed however, the reporting revisions require several new items, such as contractor terms, many of which are confidential and proprietary in nature. Additionally, while the Energy Association believes that *quarterly* financial/budgetary reporting is unnecessary to the Commission's ability to more closely monitor reliability performance, if the quarterly reporting requirements are ultimately approved as part of the final regulation, certain portions of this information should not be available to the public.

Specifically, information regarding budgets, performance relative to those budgets, use of contractors and resources in general, staffing levels and call-out rates (the information required by §§57.195(b) 4-12; corresponding items in §57.195(c); and §§57.195(e)(4-11) and (f) relating to worst circuit performance) should not be made available to the public. For example, if contract-spend information is made available to the public, the result likely will be higher construction and maintenance costs because it will undermine the individual EDCs' effective bargaining. Also, staffing levels and call-out rates are often items of negotiation in labor contracts. Having the Commission or the public privy to such data negotiations does not provide any benefit to reliability.

Regarding the issue of staffing levels, there has been no establishment of a direct link between the number of staff and reliability. For example, technology and better equipment have led to greater reliability. The installation of reclosers reduces the scope of outages. SCADA Systems and other technology allow EDCs to pinpoint where outages have occurred in a far more expedited time-frame than the older procedure of sending manpower out into an area to locate an outage. Therefore, technology and advancements in its deployment often replace staff. The technology and equipment employed are to achieve greater reliability and lower O&M expenses.

Thus, the Energy Association requests that language providing for the appropriate protection of such items should be added to the regulations to assure that such information is not made available to the public. Designating the information to be confidential/proprietary in nature and assigning protection from publication to such information does not undermine the Commission's plan to issue an annual statement of reliability report in that the Commission can still report such information in the aggregate.

Publication of such information is fraught with the potential for distortion, misinterpretation and the possibility of harm to the utility. Absolute numbers can never give a complete picture. The numbers alone do not tell the reader anything about the appropriateness of the business decisions behind those numbers. Publication of such information allows the public the opportunity to casually draw completely invalid inferences and conclusions from the information about the EDC's business practices and the Commission's regulation of such. Where there has been no previously identified problem with the EDC's provision of service, this information is not needed by the Commission. The exposure of the EDC's business decisions, practices, staffing and finances to unwarranted scrutiny, evaluation and comment puts the EDC

in the defensive position, irrespective of good performance and is especially unfair to EDCs who consistently meet their reliability targets.

The potential for abuse, should this information be made public, is illustrated by a recent Washington Post article. The article discusses the impact of resource allocation by local utilities on the total number of outages resulting from Hurricane Isabel.¹⁹ The author of the article used reported budget, resource and maintenance allocation information to draw invalid conclusions about the utilities' reliability performance, to criticize the utilities' management of resources and to question the actions of the relevant administrative authorities in their regulation of such utilities. The information utilized by the author was precisely the type of information requested by the Commission in its annual and quarterly amendments to Section 57.195 (worst circuit information, staffing levels, monetary budget and expenditures on certain maintenance activities). Many of the conclusions drawn by the author and his quoted analysts were based on a simple comparison of spend or staffing levels as reported by the utilities over as long as a ten-year period. The article essentially postulated in a highly political manner that reductions in staffing levels and maintenance spending (especially tree-trimming) significantly contributed to the outages related to the hurricane. However, it appears that the only information used in drawing these conclusions was the information reported to the Commission, which provided very basic statistics regarding the reductions. The author does not appear to have had any other information as to what may have precipitated the reductions or any insight into why these management decisions were made, information that cannot be gleaned from reports of this nature. So, even though the reductions could have been the result of efficiencies created by other changes (such as better technology, or more efficient use of other resources),

¹⁹ Matthew Mosk, Peter Whoriskey, *Utilities Held Down Spending on Upkeep, Regulators didn't order Upgrades Before Isabel*, Washington Post, October 17, 2003 at A01.
<http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId=A38385-2003Oct16¬Found=true>

the utility was subject to nationwide public scrutiny and criticism because information contained in the reports like the one that would be required by the newly revised §57.195 was made available to the public.²⁰

This example illustrates how publication of information such as this, containing the final but basic management decisions made by a utility, could very easily result in the misinterpretation, abuse, or manipulation of such information to the detriment of the utility industry and potential ripple effect upon the Commission's ability to properly perform its function. It also demonstrates why it is imperative that this information be given confidential treatment and not be made available to the public.²¹

It would be unnecessarily problematic for each EDC, every time it filed its annual report, to also file a request pursuant to 52 Pa. Code §5.423 asking that this information be given protection and not be available for public inspection. Therefore, the Energy Association requests that this Commission add language to Section 57.195 providing that the information required by §§57.195(b) 4-12; corresponding items in §57.195(c), will not be available for public inspection or review and will not be made part of any report available to the public except to the extent that such information is reported in the aggregate as part of the Commission's annual report on the state of reliability.

Further, if it is ultimately determined that the quarterly reports will be required, the Energy Association would request that this Commission add language providing that this information also will not be available for public inspection or review and will not be made part of any report available to the public.

²⁰ A classic example of the problems caused by having a little knowledge was the articles focus on so called reduction in tree trimming to somehow show negligence when the problems were largely caused by the uprooting of trees both inside and outside the utility right-of-way.

²¹ This Commission correctly observed that "No utility can guard against live trees outside of its maintained right-of-way being uprooted during severe weather conditions and falling upon electric lines." Baker v. Penelec, p. 14.

The Commission should amend its rulemaking or postpone the effective date of the BCS letter of October 17, 2003, as there are contradictions between the Letter and Rule §57.197.

The use of a rulemaking proceeding is to put a number of issues before the public and the regulated industry and through comment and openness to achieve a furthering of the public interest. The Commission has chosen this regulatory course regarding electric reliability. This pleading and that of others are being offered in response to the Commission's request to modify its **existing** regulations at 52 Pa. Code §57.191-57.197.

BCS filed a letter dated October 17, 2003 which seeks to impose certain reporting requirements, certain categories for perceived shortfalls in reliability and the establishment of a new process for the processing of informal complaints that assert a relationship to reliability.

Certainly BCS has certain oversight responsibilities regarding consumer complaints. However, the October 17th letter does create some confusion with this rulemaking proceeding. Furthermore, the fact that BCS is a part of the Staff Internal Working Group which was the source of the information gathering and proposed rules in this rulemaking suggests that their concerns were included in the proposed rules.

The Commission proposed that there would be no adjustment to its Rule §57.197, yet it is clear to the Energy Association that the proposed BCS process and requirements relate to the very reliability investigations and enforcement covered by the proposed non-amended Rule §57.197. The October 17, 2003 letter sets forth categories of reporting which differ from those required in the rules proposed in this docket:

A BCS categorization of something as ill defined as "excessive/numerous service outages or, for example, persistent service delivery problems" causes difficulty. The outage could be caused by a major event, it could be already addressed by the focus on the 5% worst-

performance circuits or the situation could have arisen from circumstances beyond the EDCs control.²² All of these difficulties arise because BCS was premature in its October 17th letter. The BCS requirement for action plans on individual complaints occurs at a time when the Commission is moving the reliability focus to first the entire EDC system, as opposed to operating areas, and then to 5% worst-performing circuits, rather than individual complaints. Another difference is evidenced in the BCS suggestion that an infraction finding could result under 66 Pa. C.S.A. Section 1501 when the Commission is encouraging an approach of filing additional information rather than finding an infraction for the mere non-compliance of one index in one quarter.

The language in the October 17, 2003 letter, therefore, sets forth standards, rules, procedures and processes that are new and extremely vague. The Energy Association is concerned that individual EDCs are being held to multiple vague and potentially inconsistent standards at least as to remediation and reporting. BCS forbearance until post-rulemaking is in order.

Conclusion

The Commission's proposed rule change in §57.194 is at odds with its language in both the Tentative Order and Proposed Rulemaking. In a rulemaking, the regulated entity is entitled to know exactly what standard is being proposed. This clarity of purpose and direction is absent, where as here, there is confusing and at times contradictory language that goes to the fundamental cornerstone measurement of reliability.

The information requested in §57.194 could lead to a higher level of costs because it may undercut an EDC's ability to negotiate effectively with contractors and employees. The

²² Examples include: an automobile accident, a man-made disaster, a terrorist attack, a flood, a tornado, an earthquake, a fire, or an act of war.

EDCs have endeavored to work with the Commission's staff to improve the consistency of information provided to the Commission. Some of the Commission's requested data, such as the aforementioned contractor and employee data, become negative if provided openly to all concerned.

Our concern over the public availability of some of the proposed documentation relates to either the additional cost arising from the limitation of our discretion or the likelihood that data will be taken out of context in the public arena. In either event, neither the public interest nor reliability is improved.

Reliability performance is a long-term proposition that is not appropriately evaluated in quarterly increments. In quarterly filings there is an increased potential for misapplying data to reach invalid conclusions. Accuracy in budgeting is not a measure of reliability.

The release of quarterly information to the public has complications for all in that easily misinterpreted information will be revealed to the detriment of the EDCs, the Commission, and the public at large.

Finally, the new definitions, new processes, new criteria and new standards proposed by BCS in their October 17, 2003 letter are being applied in an inappropriate fashion outside the rulemaking process thereby complicating the actual rules being applied and raising the specter of sanctioning or worse for ill defined or contradicting standards. The BCS' proposals are squarely against the Commission's decision not to amend §57.197.

Respectfully submitted,

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