

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION**

Investigation of Pennsylvania's
Retail Electricity Market:
Recommended Directives on
Upcoming Default Service Plans

I-2011-2237952

TENTATIVE ORDER ISSUED OCTOBER 14, 2011

FUTURE DEFAULT SERVICE PROCUREMENT PLANS

**COMMENTS OF AARP AND
THE PENNSYLVANIA UTILITY LAW PROJECT**

November 3, 2011

AARP and the Pennsylvania Utility Law Project (“PULP”) appreciate the opportunity to provide comments to the Commission on its Tentative Order issued October 14, 2011, which proposes to provide guidance to Pennsylvania’s Electric Distribution Companies (EDCs) on upcoming Default Service procurement plans.

AARP is a nonprofit, nonpartisan membership organization that helps people 50+ have independence, choice and control in ways that are beneficial and affordable to them and society as a whole. AARP has members residing in each of Pennsylvania’s counties and representing all segments of the socio-economic scale. Moreover, a substantial percentage of AARP’s members live on fixed or limited incomes and depend on reliable electric service for adequate heat, lighting, and powering life-saving medical devices. AARP has previously submitted comments in this proceeding and has actively participated in many of the technical conferences hosted by the Office of Competitive Market Oversight (“OCMO”).

PULP is a specialized statewide project of the Pennsylvania Legal Aid Network designated to assist low-income utility and energy residential consumers. For over 30 years PULP has represented the interests of low income Pennsylvanians in energy and utility matters through direct representation, statewide advocacy, and support and assistance to the staff and clients of local legal aid programs, non-profits and community-based agencies. PULP staff have been actively involved in the technical conferences hosted by OCMO, as well as the sub-group discussion on a retail opt-in auction.

Introduction

According to the Commission's Tentative Order, the purpose of providing guidance to the EDCs on their upcoming Default Service procurement plans is to establish "intermediate recommendations":

These intermediate recommendations are intended to achieve three goals: (1) to ensure that the upcoming default service plans do not hinder the ability of the Commission to implement changes that will be addressed within the Investigation; (2) to advise EDCs and other parties that they will be expected to amend proposed default service plans when possible to incorporate changes which may arise out of the Investigation; and (3) to provide guidance on default service plan components that the Commission believes can better facilitate the competitive marketplace.

Tentative Order at 3.

These stated objectives suggest that the Commission may seek changes to its policies and regulations governing Default Service procurement plans as a result of this ongoing Investigation into Retail Markets. Indeed, the Commission's Order opening this Investigation into Retail Markets stated that changes to the current Default Service model will be made:

Second, comments and testimony we have reviewed leave no doubt that the current default service model stands as a substantial barrier to market entry and competitive product offerings. Direct, RESA and Constellation all suggest substantial changes to the existing default service model. For example, Constellation suggests that default service should provide for a single rate for each rate class, leaving more sophisticated products to the competitive marketplace. Constellation Comments at 9. Direct offers similar suggestions. Direct Comments at 35-36. Several commenters suggest that, after a transition period, EDCs should not offer default service at all. *See, e.g.*, Direct Comments at 46, 56-59; RESA Comments at 18-21; Constellation Comments at 9-10.

Accordingly, we will direct that Phase II of the Investigation also examine the structure of the current default service model to determine what changes need to be made to that model to eliminate or at least minimize the impact of default service on the competitive retail market. We believe that the examination of the structure of the current default service model will have a longer term than the intermediate issues noted above.

And:

The second area to be examined is the current structure of default service. As we noted above, testimony and comments received during the first phase of this Investigation

conclusively establish that the current default service model stands as a substantial impediment to a robust competitive retail market in Pennsylvania. Accordingly, changes to that model are clearly warranted.

Opinion and Order, Docket No. I-2011-2237952 (July 28, 2011, at 8, 11, emphasis added)

At the same time that the Commission has embarked on an investigation of potential changes to the Default Service model currently being implemented by the EDCs, the Commission adopted final regulations to reflect recent amendments to Pennsylvania's statutory policies for retail electric competition. In its Final Rulemaking Order in Implementation of Act 129 of October 15, 2008--Default Service, And Retail Electric Markets (Docket No. L-2009-095604) adopted on September 22, 2011, the Commission correctly described and adopted regulations to implement the reforms to the Default Service procurement planning process that were adopted in Act 129:

In summary, under Act 129, electric power shall be procured through competitive procurement processes and shall include one or more of the following: (1) auctions; (2) requests for proposals; or (3) bilateral agreements. 66 Pa. C.S. § 2807(e)(3.1). Additionally, the electric power that is procured shall include a prudent mix of: (1) spot market purchases; (2) short-term contracts; and (3) long-term purchase contracts of more than 4 and not more than 20 years. 66 Pa. C.S. § 2807(e)(3.2). Long term contracts may not constitute more than 25% of projected load absent a Commission determination that good cause exists for a higher percentage to achieve least cost procurement. 66 Pa. C.S. § 2807(e)(3.2)(iii).

The "prudent mix" of contracts shall be designed to ensure: (1) adequate and reliable service; (2) the least cost to customers over time; (3) compliance with the procurement methodologies described above, i.e., through auctions, requests for proposals, or bilateral agreements. 66 Pa. C.S. §§ 2807(e)(3.4) and (e)(3.1).

When evaluating a default service plan, the Commission must consider the DSP's [referring to the Default Service Provider] obligation to provide adequate and reliable service to the customers and that the DSP has obtained a prudent mix of contracts to obtain the least cost on a long-term, short-term and spot market basis. The Commission is required to make specific findings that include: (1) the DSP's plan includes prudent steps necessary to negotiate favorable generation supply contracts; (2) the DSP's plan

includes prudent steps necessary to obtain least cost generation contracts on a long-term, short-term and spot market basis; and (3) neither the DSP nor its affiliated interest has withheld generation supply from the market as a matter of federal law. 66 Pa. C.S. § 2807(e)(3.7).

Final Rulemaking Order, Docket No. L-2009-2095604 (at 4,5)

AARP and PULP are concerned that the Commission's Tentative Order issued on October 14, 2011 may be interpreted or intended to suggest that "intermediate" guidance to the EDCs would differ from or supplement those adopted in law and now in final regulations adopted by the Commission to implement Act 129. Specifically, AARP and PULP oppose the Commission's recommendations to the EDCs for their upcoming Default Service procurement plans to the extent that those recommendations would conflict with or make it more difficult to implement the statutory and regulatory guidance concerning Act 129.

The Commission's recommendations appear to seek constraints on the EDCs' ability to devise a procurement plan that meets the needs of residential consumers in particular and sets in motion the intent to make future changes to Default Service policies that have not yet been identified. AARP and PULP are not aware of any authority granted to the Commission to change the legislative intent reflected in Act 129, or the recently adopted regulations as reflected in the Commission's October 14, 2011 Order, so as to implement "intermediate recommendations" for Default Service procurement plans. Any directive concerning the terms for a Default Service procurement plan should be developed in the context of either legislative changes or changes to the existing regulations and policies that conform to the statutory guidance. Until such time as statutory or regulatory modifications have been adopted, the Commission should not seek to impose changes to those policies by issuing "recommendations" to the EDCs that might conflict with the existing policies or impose additional constraints to the

EDCs' obligation to conform to the statutory directives. It is with these comments in mind that AARP and PULP now turn to the specific sections of the Commission's October 14, 2011 Order.

Default Service Plan Time Period. AARP and PULP oppose the Commission's recommendation that EDCs file default service plans that run for two years. In its recent Rulemaking Order, the Commission stated:

Based on the foregoing, we find no compelling reason to prescribe specific time periods for purposes of evaluating whether an EDC plan meets the standard of producing the "least cost to customers over time." As both PPL and OCA noted, the principal concern should be the evaluation of the competitiveness of the default service plan and whether the plan produces the "least cost to customers over time" and procures the best mix of products for the benefit of default service customers. We recognize that most default service plans encompass a 2-3 year period by virtue of how EDCs structure their procurement processes as well as to be consistent with the function of the wholesale markets. We are also aware that the need to incorporate long term contracts into the product mix results in a certain amount of product overlapping more than one default service plan term. We do not discern a need to establish precise time constraints that would unduly constrain the flexibility of DSPs to design a procurement plan that best fits the character of the customer base and the service territory. We will continue to evaluate on a case by case basis the adequacy of plans as they are currently filed with this Commission.

Final Rulemaking Order, at 44, emphasis added.

Now, in this Tentative Order, the Commission appears to have determined that a 2-year default service plan is the preferred approach because it "will provide a reasonable time period to allow for implementation of any long term changes proposed in this Investigation." [Tentative Order at 4]. AARP and PULP disagree that there is any such basis for determining that upcoming Default Service procurement plans should reflect only a two-year period under the existing statutory and regulatory framework. Such an artificial constraint on the length of the Default Service procurement plan is likely to adversely impact the statutory obligation to develop a procurement plan that assures the "least cost to consumers over time." Rather, AARP

and PULP ask the Commission to eliminate this guidance to EDCs for their upcoming Default Service procurement plans and allow EDCs to file plans that in their judgment conform to the legislative and regulatory guidance that has been adopted.

Energy Contract Durations. The Tentative Order recommends that EDCs “limit or eliminate the existence of short term energy contracts extending past the end date of the default service plan time period.” The Tentative Order also recommends that the EDCs “limit the proportion of long term contracts that make up their default service plan energy portfolio” and “use already existing long term contracts from presently effective default service plans to satisfy compliance with the long term contract mandate of 66 Pa. C.S. §2807(e)(3.2)(iii).” [At 5]

AARP and PULP do not believe that this recommendation can be implemented consistently with the statutory requirements of Act 129 or the Commission’s recent regulations. Coupled with the previous recommendation to limit the Default Service plans to two years, this recommendation could seriously hamper the ability and duty of the EDC to evaluate and analyze a variety of contracts types and contract lengths to assure “least cost to consumers over time” as required by the law and the current regulations. In light of this overriding objective for Default Service procurement plans, there is no basis to support the Commission’s recommendations.

Retail Opt-In Auction. The Commission recommends that the EDCs “incorporate an opt-in auction program within their default service plans.” However, the Commission does not identify the specific format or design of an opt-in auction that should be incorporated, but recommends that the EDCs use, “as a starting point for prospective opt-in auctions, the format being discussed by a stakeholder sub-group in this Investigation when it is finalized.” [at 6]

AARP and PULP do not object to the consideration of an opt-in auction as a pilot program to be filed as a part of an EDC's default service plan if sufficient consumer protection policies are established by the Commission to govern any such opt-in auction. However, the Commission's Tentative Order does not identify those policies and does not appear to require that such policies be developed and approved prior to the development of an opt-in auction proposal.

While a variety of opt-in auction ideas and suggestions have been discussed by the stakeholder sub-group working on this project, PULP has been an active participant in the retail opt-in auction subgroup calls and submits that there is no consensus or final product yet developed by the sub-group to even be discussed fully by the larger working group in this Retail Markets Investigation. As such, there is no publicly available proposal for an opt-in auction that can be considered in light of the Commission's recommendation. The Commission should not give its approval to an opt-in auction without scrutinizing the details of any such proposal. This scrutiny, at a minimum, requires a careful and thoughtful consideration of the design, size, implementation steps, and associated consumer protections associated with a specific proposal.

For example, there are unanswered questions about the ability of low-income customers, enrolled in a number of the EDCs' customer assistance plans, to choose an alternative supplier whether by auction or otherwise. The uncertainties surrounding CAP customer shopping is one of the things that is scheduled to be discussed at future technical conferences and by a designated subgroup. It would be premature for the Commission to pass judgment on the merits of an opt-in auction without having the benefit of the details and necessary protections for CAP customers.

There are a number of other concerns that have not yet been finalized. For example, it is unclear what happens to customers who participate in the auction after the initial fixed-rate period. AARP and PULP submit that these customers should, absent an affirmative choice to

remain with the EGS, be returned to default service. Other participants in the opt-in auction Subgroup disagree. Given that the details of an auction are far from certain, AARP and PULP recommend that the Commission note the ongoing discussions of a possible opt-in auction concept by the stakeholders and urge the stakeholders to continue their work on this concept in time for EDCs to consider these discussions and resulting recommendations (assuming there is any consensus on these matters) in the development of the forthcoming default service plans.

Referral Program. The Commission states that referral programs “represent a viable means to educate customers about the retail electric market and may allow customers to achieve savings on their bill.” The Commission correctly recognizes the significant array of potential “referral programs” that have been discussed or that could be implemented and recommends that the EDCs incorporate a referral program and use, “as a starting point for prospective referral programs, the proposal being discussed by stakeholders in the Investigation.” [at 6]

While AARP and PULP agree that an EDC could include a referral program in their upcoming default service plans, it is not clear what type or kind of referral program is included in the Commission’s recommendation since there is no single “proposal” being discussed by the stakeholders. Rather, there are a variety of potential referral programs and educational initiatives being identified and discussed by the stakeholders. Therefore, like the foregoing discussion concerning the proposal for an Opt-in Auction, AARP and PULP object to the implication that there is “a” referral program under development at this time by the stakeholders or that there is sufficient consensus on this matter that could be used by the EDCs as guidance for the development of their default service plans.

AARP and PULP also offer information about the implementation of the referral programs being implemented by the New York electric utilities. These programs, in a variety of forms, have existed for many years. However, they have yet to have any significant impact on customer migration to alternative suppliers. Based on the most recent information published by the New York Public Service Commission, 21.6% of New York's residential customers were served by an alternative supplier as of April 2011. This migration participation rate varies among the electric utilities, but it has not significantly increased in recent years. The April 2010 statewide residential migration rate was 19.2% and the April 2009 residential migration rate was 17.5%.¹ These migration rates are lower than that currently in effect for PPL's residential electric customers who have selected an EGS without any intervention with a "referral program." As a result, AARP and PULP urge the Commission to carefully weigh the costs that a referral program that the EDCs would seek to impose on ratepayers in light of the potential or likely benefits in the form of stimulation of customer shopping.

The New York referral programs were reviewed by the New York Commission in 2009. Declaring its efforts to promote retail competition to be a success, the Commission stopped much of the ratepayer financing to promote switching to suppliers (called ESCOs in New York), requiring the cost of programs utilizing utility cooperation and expense to be borne by the suppliers and not the EDC ratepayers. A 2009 order describes Con Edison's referral program, as it had evolved to that point, and discusses the cessation of ratepayer funding for it, and shifts program costs to ESCOs.² Pennsylvania has not yet identified and adopted the necessary

¹ The New York Commission's electric migration statistics are available at: http://www.dps.state.ny.us/Electric-Gas_RA_Archives.html

² CASE 07-E-0523 – Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Consolidated Edison Company of New York, Inc. for Electric Service, ORDER CONCERNING ESCO REFERRAL PROGRAM, (Issued and Effective June 3, 2009).

program rules and consumer protections and it may be premature to summarily endorse the concept of referral programs as suggested by the Commission in its Tentative Order.

AARP and PULP recommend that the Commission note the ongoing discussions of a variety of referral programs by the stakeholders and urge the stakeholders to continue their work on this concept in time for EDCs to consider these discussions and resulting recommendations (assuming there is any consensus on these matters) in the development of the forthcoming default service plans. AARP and PULP also request the Commission to clearly state that EDC ratepayers should not subsidize the costs of any approved referral program and that consumer protections associated with the disclosures in the contract of the participating EGSs be adopted so that customers are not subject to “teaser” rates without clear notice that the upfront discount will not necessarily continue and customers will be informed of their terms of service, including price changes, during the introductory period.

Time of Use Rates. The Commission has described the statutory obligation imposed on “default service providers” to offer time-of-use (TOU) rates to customers with smart meters. However, the Commission proposes that EDCs consider contracting with retail electricity suppliers to provide this rate option by bidding out this rate option to an EGS.

The Pennsylvania statutory directive is as follows:

§2807(f) (5) By January 1, 2010, or at the end of the applicable generation rate cap period, whichever is later, a default service provider shall submit to the commission one or more proposed time-of-use rates and real-time price plans. The commission shall approve or modify the time-of-use rates and real-time price plan within six months of submittal. The default service provider shall offer the time-of-use rates and real-time price plan to all customers that have been provided with smart meter technology under paragraph (2)(iii). Residential or commercial customers may elect to participate in time-of-use rates or real-time pricing. The

default service provider shall submit an annual report to the price programs and the efficacy of the programs in affecting energy demand and consumption and the effect on wholesale market prices.

AARP and PULP interpret this provision to require the “default service provider”, which is the EDC unless otherwise ordered by the Commission, to prepare a “plan” to offer one or more time-varying rate options to residential customers with smart meters. Such a “plan” should seek to offer cost effective rate plans that will contribute to reducing peak load demand or overall energy consumption. As a result, it is not clear that only the traditional time-of-use rates should be considered in such a plan. In fact, AARP and PULP recommend that such plans evaluate a Peak Time Rebate option in which customers who reduce usage during critical peak events receive a credit on their monthly bill equal to the value of the peak load reduction times the volume of usage reduction the individual customer has implemented compared to a baseline usage level. This type of time-varying rate program relies on the use of smart meters to track the customer’s hourly usage during critical peak events. Furthermore, such a program could be “monetized” in PJM’s capacity auction market and the value of that peak load demand reduction used to fund the customer credits, as well as potentially result in additional value that is returned to all default service customers, thus eliminating the concern about lost revenues and cross subsidization that have hampered the development of more traditional TOU rate options.³

Under the approach recommended by AARP and PULP, there is no need to seek to hand this obligation off to an EGS or at least it may be premature to propose such an approach. Furthermore, it would be very difficult to design an auction or bidding program to provide a rate

³ AARP and PULP’s recommendation is based on the approved peak time rebate programs proposed by Baltimore Gas & Electric and Pepco in Maryland and approved as the basis for creating customer value associated with each utility’s smart meter installation proposals. See Case No. 9207 and 9208, available at the Maryland Public Service Commission’s website, www.psc.state.md.us

option to an unknown number of customers since it is not known how many residential and small commercial customers would choose such a rate option, particularly without knowing the exact prices that would be offered for such a rate. Alternatively, if the EDC designs a TOU rate option and promotes it to its customers, it would be unfair and inappropriate for the EDC to then bid out those customers to an EGS without the express permission of those customers.

Default Service Rate Adjustment Structure—Residential and Small Commercial.

The Commission’s current default service regulations require that the EDC adjust default service rates, including energy costs and reconciliations, no more frequently than quarterly. In other words, the rates could be adjusted less frequently, but not more frequently, than quarterly. The Commission recommends that the EDCs “contemplate the incorporation of semi-annual default service rate adjustments within their next default service plans.”

AARP and PULP agree with this recommendation. The legislative directive is to design the underlying default service portfolio to produce stable prices. The plans should avoid changing default service prices significantly, either quarterly or semi-annually, to reflect a more volatile and short term portfolio. If the longer term procurement plans and contract portfolio mix is designed to reflect stable prices and general wholesale market trends, rather than monthly or day-ahead market prices, a semi-annual price change would benefit both customers and the marketers who could create contract options with more certainty about the customer’s ability to compare the Price to Compare with the EGS offer.

Future Issues Identified Within the Investigation. The Commission’s Tentative Order states:

To the extent that such issues will not substantially affect wholesale bidders' analyses of future default service plans, the Commission wishes to remind EDCs that any issues addressed and resolved in the Investigation may be recommended or directed for incorporation within pending or approved default service plans. [at 8]

AARP and PULP object to this statement because it is likely to insert a significant level of uncertainty to the EDC and the potential bidders for approved portfolio contracts, adversely impacting future default service prices. While the Commission's statement appears to acknowledge that such an impact might occur by limiting its impact to those that "will not substantially affect wholesale bidders' analysis of future default service plans," the fact that any adverse impact may occur is of concern to AARP and PULP. Furthermore, it is highly unlikely that future recommendations resulting from this Investigation could be so specifically identified as having a "significant" or "insignificant" impact on future wholesale market prices for default service without an evidentiary hearing and far more analysis on the record than has occurred to date.

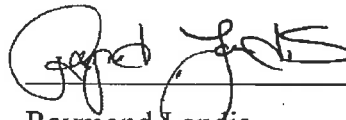
Therefore, AARP and PULP recommend that the Commission make clear that it will not impose changes in policies that may adversely impact current default service plans or the development of and implementation of the next round of default service plans so as to harm the obligation of the EDC to design and implement such plans to meet their statutory obligations. Rather, the Commission should assure all parties that any future recommendations will be implemented in such a manner so as not to adversely impact approved plans once they are adopted.

Any changes to pending or future default service plans should only be adopted with notice and opportunity for due process review and participation in the development of a record that would allow the Commission to understand the implications of any such change on the

EDC's statutory obligations to assure default service with a prudent mix of contracts that will provide "least cost to consumers over time."

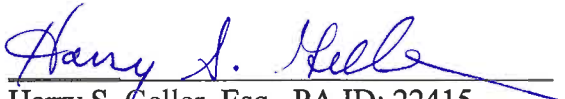
Respectfully submitted,

AARP



Raymond Landis
Advocacy Manager
AARP Pennsylvania
30 N 3rd St Ste 750
Harrisburg, PA 17101
Tel: (717) 237-6482
rlandis@aarp.org

Pennsylvania Utility Law Project



Harry S. Geller, Esq., PA ID: 22415
Patrick M. Cicero, Esq., PA ID: 89039
118 Locust Street
Harrisburg, PA 17101
Tel.: 717-236-9486
Fax: 717-233-4088
pulp@palegalaid.net

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