

COMMONWEALTH OF PENNSYLVANIA



OFFICE OF CONSUMER ADVOCATE

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January 10, 2014

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street  
Harrisburg, PA 17101

RE: Public Utility Commission Bonding  
Requirements for Electric Generation  
Suppliers; Acceptable Security Instruments  
Docket No. M-2013-2393141

Dear Secretary Chiavetta:

Enclosed for filing please find the Office of Consumer Advocate's Comments in the above-referenced proceeding.

If you have any questions, please feel free to contact me at the number listed above.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "A. Beatty".

Aron J. Beatty  
Assistant Consumer Advocate  
PA Attorney I.D. # 86625

Enclosure

cc: Brent Killian, Bureau of Technical Utility Services (TUS)  
H. Kirk House, Office of Special Assistants (OSA)

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BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Public Utility Commission Bonding :  
Requirements For Electric Generation : Docket No. M-2013-2393141  
Suppliers; Acceptable Security :  
Instruments :

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COMMENTS OF THE  
OFFICE OF CONSUMER ADVOCATE

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I. Introduction

On December 5, 2013, the Pennsylvania Public Utility Commission (Commission) entered a Tentative Order addressing the bonding requirements for Electric Generation Suppliers (EGSs) operating in Pennsylvania. Public Utility Commission Bonding Requirements for Electric Generation Suppliers; Acceptable Security Instruments, Docket No. M-2013-2393141 (Order entered December 5, 2013)(the Tentative Order). The Commission opined that the current bonding requirements, which require an EGS to provide security for 10% of annual gross receipts, “may be excessive in relation to the risk intended to be secured, may be unnecessarily burdensome and may present a barrier to entry into Pennsylvania’s retail electric market.” Tentative Order at 11.

The Office of Consumer Advocate (OCA) supports the Commission’s efforts to ensure that EGS credit requirements do not add needless expense and create a barrier to entry for competitive suppliers. In this regard the OCA agrees with the FirstEnergy Solutions’ comments identified in the Tentative Order, that the costs at issue here are ultimately “passed on to customers in the form of higher prices.” Tentative Order at 5. The OCA submits that bonding

requirements that do not properly reflect risks adversely impact customers through higher costs and fewer choices. The OCA is concerned, however, that the Commission has not identified all risks related to EGS service in its analysis for which a bond may be necessary. The OCA submits that the proper level of security should be designed to include protection for consumers from potential financial harm due to EGS default or EGS violations of its contractual obligations and consumer protection regulations that may result in a determination of customer restitution. The OCA submits these Comments with regard to the issue raised in the Tentative Order for the Commission's consideration.

## II. Level of Bonding Protection

In the Tentative Order the Commission has proposed to reduce the current requirement that an EGS post a bond for \$250,000 during its first year of operation and 10% of annual gross receipts during all subsequent years, to \$250,000 during its first year of operation and 5% of annual gross receipts during all subsequent years. Tentative Order at 11-12. The OCA supports the Commission's efforts to ensure that bonding requirements for EGSs do not create barriers to entry or produce undue costs that will ultimately be reflected in retail offers. The OCA agrees that bonding requirements should provide protections for parties that reflect actual risks. The OCA submits, however, that the Commission's Order does not reflect all risks that should be accounted for and that the 5% level recommended for adoption may need to be adjusted to account for all risks.

While not explicitly stated, the Commission appears to set 5% of gross receipts as the new bonding requirement based primarily on the gross receipts tax risk associated with each EGS's participation in the retail electric market. The Tentative Order details the risk of an EGS

failing to make timely payment of the Gross Receipts Tax (GRT) of 5.9% as a rationale for its 5% bonding proposal. The 5% proposed bonding requirement, therefore, appears to be designed to handle only the risk associated with non-payment of the GRT.

The OCA submits that there are additional risks that warrant similar protections. Importantly, consumers enter into EGS contracts that provide a variety of terms and benefits for both the EGS and the customer. Under the Purchase of Receivables model that has been adopted in the Commonwealth for residential customers, EGSs receive protections that payment will be made on behalf of the customer to the EGS by the EDC.<sup>1</sup> The OCA submits that bonding requirements should provide protections for customers should the benefits that they signed up for are not provided by an EGS in the case of a default or a failure to comply with their contractual terms and disclosure promises. These benefits could range from rebates that were promised but not provided, either in the form of credits or credit card style gift cards, to providing the supply of electricity in accordance with the contract, including any promised savings. The OCA submits that there are many types of offers and incentive arrangements between an EGS and customer, dictated by their contract terms, that could possibly be due to a consumer in the event of an EGS default or determination of violation. In addition, it is likely that in an instance of default or violation, there may be outstanding billing disputes where the customer is owed a refund, or even amounts unlawfully obtained from a customer in the form of prices that conflict with disclosure or contractual terms.

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<sup>1</sup> The OCA would note that for EGSs using the POR program of a utility, there would be no customer deposit or advanced budget billing payment at risk. In a supplier billing, or dual billing situation, however, additional security would be needed to address the risks related to deposits, budget billing advanced payments and billing errors.

In addition, security may be needed to provide the Commission with payment for penalties or any other sanction ordered by the Commission. The OCA submits that the level of EGS bonding requirements should reflect the need for consumer protections, not just the protection of tax revenue.

Finally, in the Tentative Order the Commission notes the comments of parties concerned with the level of bonding requirements in other states as support for the Commission's proposed reduction of the bonding requirement from 10% of gross receipts to 5% of gross receipts. Tentative Order at 7-9. The OCA submits that the bonding level should not be established based on uniformity with other jurisdictions absent an analysis of the default risks involved with service in those jurisdictions.

The OCA has identified a number of risks in addition to the Gross Receipts Tax risk that suggest that a reduction from the 10% of gross receipts to 5% of gross receipts is not supported solely by consideration of the GRT in the Commission's consideration of any change to the current requirements.

### III. The Nature Of Acceptable Security Instruments

In addition to the issues of the level of EGS bonding, the Commission invited Comment on the nature of acceptable security instruments. Tentative Order at 12. The Commission opined that it appears to be reasonable to expand the types of security instruments that should be accepted by the Commission for an EGS to meet its licensing requirements. Tentative Order at 11. The Commission added two new methods for meeting the EGS security requirements, the first being a "Parental Guarantees" in a form acceptable to the Commission from a corporate parent that maintains an investment grade long-term bond rating. Tentative Order at 11. The second form would be "segregated cash accounts" callable only by the

Commission. Tentative Order at 11-12. Additionally, the Commission would allow a mix of all acceptable forms of security that, when combined, meet the proposed 5% of annual gross receipts threshold. Tentative Order at 12.

The OCA submits that each of these types of security appears to be reasonable, but cautions that it is important to ensure that the Commission maintains reasonable access to call on all security forms as needed and in a timely fashion. Attached to these Comments are the requirements in Maine for Commission access to security. These requirements are an example of language that allows the Commission ready access to the funds should they be required. See, Code Me. R. § 65-407 Chapter 305 (2006) (Section 3(e), attached as Appendix A).

#### IV. Implementation of Proposed Changes

In its Tentative Order, the Commission requests comment on the manner in which the proposed changes can be implemented under the current regulations. Specifically, the Commission requested input as to whether changes to the current regulations are required, or if the Commission can temporarily waive its regulations until a formal regulation change is completed. Tentative Order at 12. Additionally, the Commission requests comment on whether the Section 54.40(d) of its regulations allows the Commission the latitude to lower the security level from 10% of gross revenues to 5%. Tentative Order at 12.

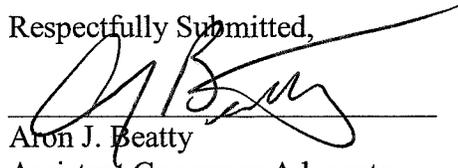
The OCA submits that the language contained in Section 54.40(d) of the existing regulations allows for a security level lower than 10% only on an individual basis where it has been justified by a requesting EGS. A blanket reduction for all EGSs is not contemplated or allowed as the current regulation is written. To the extent the Commission issues a waiver of its regulations to address this issue, the OCA submits that any waiver of the current regulations must be limited in scope and time. The OCA submits that a temporary waiver followed by a

timely rulemaking proceeding would be the appropriate method of implementing the changes that result from this process.

V. Conclusion

As discussed above, the OCA supports the Commission's efforts to achieve reasonable EGS bonding requirements that accurately reflect the costs and risks associated with EGS service. The OCA submits that the Commission should recognize that there are additional risks other than GRT collection that should be accounted for when determining the appropriate bonding requirements. When these risks are recognized with GRT, a reduction to 5% does not appear to be supported. The OCA further submits that the additional security instruments proposed by the Commission appear reasonable, provided any security is readily accessible to the Commission if needed. Finally, the OCA submits that any changes resulting from this proceeding require a timely rulemaking proceeding. The OCA appreciates the opportunity to provide these Comments for the Commission's consideration.

Respectfully Submitted,



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## APPENDIX A

**Chapter 305: LICENSING REQUIREMENTS, ANNUAL REPORTING, ENFORCEMENT AND CONSUMER PROTECTION PROVISIONS FOR COMPETITIVE PROVISION OF ELECTRICITY**

**SUMMARY:** This Chapter establishes licensing requirements for competitive electricity providers, which include marketers, brokers and aggregators. The Chapter includes procedural rules governing application for licensing, revocation and enforcement, and annual reporting provisions. The Chapter also establishes consumer protection rules applicable to competitive electricity providers.

**TABLE OF CONTENTS**

**§ 1 GENERAL PROVISIONS AND DEFINITIONS..... 5**

**A. Scope of Rule..... 5**

**B. Definitions ..... 5**

**§ 2 LICENSING REQUIREMENTS ..... 7**

**A. Entities Subject to Licensing Requirements ..... 7**

        1. Competitive Providers..... 7

        2. Transmission and Distribution Utilities ..... 7

**B. Application Requirements for Competitive Providers ..... 7**

        1. Evidence of Financial Capability ..... 7

        2. Evidence of Technical Capability..... 8

        3. Financial Security..... 8

        4. Disclosure of Enforcement Proceedings and Customer Complaints..... 10

        5. Evidence of Ability to Satisfy Portfolio Requirement..... 11

        6. Disclosure of Affiliates ..... 11

        7. Tax Registration ..... 11

        8. Applicant Information ..... 11

        9. Other Information ..... 12

the Commission determines that all obligations of the competitive electricity provider have been satisfied.

c. **Security Amount**

The initial security amount shall be \$100,000. The Commission may grant modifications of this amount commensurate with the nature and scope of the business the licensee anticipates conducting in Maine upon submission of information in support of the modification. A request for modification of the initial security amount may be made in conjunction with the filing of the license application. The required security amount will change each year and shall equal 10 percent of the licensee's annual revenues from sales of generation services to residential and small non-residential customers in Maine over the prior calendar year. Annual revenues for purposes of this provision do not include revenues from standard offer service.

d. **Use of Security Amounts**

Upon a finding that a licensee has violated a statute or regulation regarding the provision of service to residential or small non-residential customers, the Commission may direct that amounts from the financial security be distributed as follows:

- (i) to customers for a refund of security deposits or advanced payments paid to the competitive electricity provider;
- (ii) to customers for restitution of amounts paid in error or unlawfully obtained; or
- (iii) to the Commission for payment of administrative penalties or any other sanction ordered by the Commission pursuant to section 3 of this Chapter or other statutes or rules applicable to competitive electricity providers.

e. **Type of Security**

An applicant may satisfy the financial security requirements of this paragraph through an irrevocable letter of credit or cash perfected as security. Financial security documents must be in a form and contain language that is acceptable to the Commission.

- (i) **Letter of Credit.** An irrevocable letter of credit must unconditionally obligate the issuing financial institution to honor drafts drawn on such letters for the purpose of paying the obligations of the competitive electricity provider pursuant to Maine law and regulations and must specify that the issuing financial institution will notify the Commission 30 days in advance of the expiration or cancellation of the letter of credit.

The letter of credit must include the following language: that the letter of credit binds the issuing financial institution to pay one or more drafts drawn by the Commission as long as the draft does not exceed the total amount of the letter of credit; and that any draft presented by the Commission will be honored by the issuer upon presentation. The letter of credit must be issued by a financial institution with a minimum corporate credit rating of “BBB+” by Standard & Poor’s or Fitch or “Baa1” by Moody’s Investors Service, or an equivalent short term credit rating by one of these agencies, If, at any time, the corporate debt rating of an issuing financial institution drops below the above specified levels, the competitive electricity provider shall notify the Commission’s Director of Technical Analysis in writing and provide replacement security that satisfies the requirements of this Chapter.

- (ii) **Cash.** To satisfy the security requirement of this paragraph, cash must be perfected as a security interest. Cash and applicable interest shall be returned to the competitive electricity provider after all obligations are satisfied.

f. **Other Liability**

Liability of competitive electricity providers for violation of law, Commission orders or Commission rules is not limited by the security requirements of this section.

4. **Disclosure of Enforcement Proceedings and Customer Complaints**

a. **Applicability**

This paragraph applies to actions against the applicant and associated entities of the applicant. For purposes of this provision, an associated entity is any entity for which the applicant is a control person; any control person of the applicant; any entity under common control with the applicant; or any entity for which a control person of the applicant served as a control person at the time of the conduct that was the basis for the action. A control person is any person who serves as an officer or director of, or who exercises similar authority over, an entity or who possesses, directly or indirectly, voting power over 10% or more of the voting securities of the entity.

b. **Enforcement Proceedings**

An applicant must disclose all civil court or regulatory enforcement proceedings or criminal prosecutions commenced against it or an associated entity within the last six years prior to the date of the license application or currently pending that relate to or arise out of the sale of