

Tori L. Giesler, Esq.
(610) 921-6658
(610) 939-8655 (Fax)

610-929-3601

March 7, 2016

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

**Re: Rulemaking Re Electric Safety Regulations, 52 Pa. Code Chapter 57;
Docket No. L-2015-2500632**

Dear Secretary Chiavetta:

Pursuant to the Commission's Proposed Rulemaking Order entered November 19, 2015 in the above-captioned proceeding, enclosed herewith for filing are the Comments of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company.

Please contact me if you have any questions regarding this matter.

Very truly yours,



Tori L. Giesler

dln
Enclosures

c: As Per Certificate of Service

Pennsylvania Bulletin of the Proposed Rulemaking Order. The Rulemaking Order was published on February 6, 2016.

Metropolitan Edison Company (“Met-Ed”), Pennsylvania Electric Company (“Penelec”), Pennsylvania Power Company (“Penn Power”) and West Penn Power Company (“West Penn”) (collectively “the Companies”) respectively submit the following comments and recommended revisions in response to the Rulemaking Order.³

II. COMMENTS

The Commission cites throughout the Rulemaking Order to its provisions under Chapter 59 of its regulations establishing gas safety standards, referencing a desire to enact similar regulations applicable to electric distribution companies (“EDCs”). As a general matter, the Companies do not object to the establishment of counterpart provisions for EDCs. However, there are certain significant, inexplicable distinctions in those rules that have been proposed to be implemented as applicable to EDCs as compared to those established for the gas industry - which have existed for decades. It is only appropriate that any regulations established to be applied to EDCs mirror the scope and process outlined by those applicable to gas distribution companies, with the only distinctions to be found in the applicable safety codes. The Companies address each of those instances in the sections to follow, as well as provide additional recommended revisions

Section 57.1: Definitions

In order to accommodate and ensure proper clarity of the proposed new sections relative to electric safety, the Commission proposes to revise its definitions under Chapter 57 so as to create a new definition for “EDC – electric distribution company or electric utility”, as well as to replace the existing “Service Terminal” definition with a new “Service Point/Point of delivery” term. The

³ The Companies’ recommended revisions to the proposed rules are represented at various points through these comments in strikethrough for recommended deletions and underscore for recommended insertions.

Commission points to the fact that doing so would provide necessary clarity, modernization, and consistency with the NESC.

The Companies agree with the addition of “EDC – electric distribution company or electric utility” as a new definition, as well as the replacement of “Service Terminal” with a more appropriate term. Furthermore, the Companies agree with the alignment of that term with the specific definition used by the NESC, given EDCs’ obligations to comply with the NESC under Pennsylvania law and other provisions of Chapter 57. However, the Companies propose that to further clarify the definitions, the replacement term be limited to strictly “Service point,” which term is specifically used by the NESC and EDCs’ tariffs in Pennsylvania. To include a second term in addition to this may invite unnecessary confusion.

Finally, the Companies propose the addition of the term “National Electric Safety Code” to address questions of clarity and interpretation raised in their comments below. The proposed definition for this term is further outlined in that discussion, *infra*.

Section 57.28: Electric Safety Standards

(a) *Duties and responsibilities* |

The Rulemaking Order proposes to explain and clarify distinct maintenance and inspection responsibilities as between EDC and customer facilities. The Companies agree that the establishment of clear delineations of responsibility for this purpose is important, and suggest only minor language adjustments to subsection (a) of Section 57.28. Specifically, the Companies suggest the following language changes, which also account for the limited revisions to the definitions recommended above:

(a) *Duties and responsibilities*. The separation of duties and responsibilities between an electric utility and a customer with respect to the facilities utilized for electric service shall be effectively described in the electric utility’s tariff that is filed with and approved by the Commission.

(1) *Duty of electric Electric utility responsibility*. An electric utility shall use every reasonable efforts to properly warn and protect the public from danger, and shall exercise reasonable care to reduce the hazards to which employees, customers, the general public, and others may be subjected to by reason of its provision of electric distribution service and its associated equipment and facilities.

(2) *Customer responsibility*.

(i) A customer shall be responsible for the ownership, installation and initial inspection maintenance of the customer's electrical facilities beyond the service point.

(ii) A customer shall be responsible for periodically maintaining and inspecting electrical wiring and electrical equipment beyond the service point of delivery of electric supply.

(b) *Safety Code*

The Commission proposes to clearly establish and explain the minimum standards to which all EDCs are to be held under this subsection. As proposed, this includes: 1) Chapter 57 of the Commission's regulations; 2) the National Electric Safety Code ("NESC"); 3) an EDC's own internal company procedures; 4) the Underground Utility Line Protection Act ("PA One Call"); and 5) "all other applicable and governing state and federal laws and regulations."⁴ In comparison, the gas safety code found at Section 59.33 of the Commission's regulations reference only as the minimum safety standards those pipeline safety laws and regulations enacted and implemented by the federal government, which the Commission and its counterparts nation-wide are specifically tasked with enforcing.

As written, this subsection is overly broad. It is redundant and unnecessary to state within these regulations that the Commonwealth's EDCs are obligated to follow Chapter 57 of the Commission's regulations, PA One Call, and all other governing state and federal laws and regulations, generically. Those obligations exist with or without restatement of the obligations within the proposed rules. Further, restatement of those legal obligations within the Commission's regulations does not properly create an enforcement authority on behalf of the Commission with

⁴ Proposed Rulemaking Order Annex A, Section 57.28(b).

regard to those laws and regulations where such authority has previously been granted by the legislature to another entity, or where the legislature failed to grant such authority to the Commission. To the contrary, the Commission, as an administrative agency of the Commonwealth, is a creature of statute and has only those powers delegated to it by the legislature.⁵ Accordingly, the Commission cannot lawfully issue regulations that extend beyond the limits of its statutory authority.⁶ At a minimum, from a practical standpoint, to include this redundancy is likely to lead to enforcement confusion and uncertainty, as well as the possibility for conflicting enforcement actions and duplicative litigation. Therefore, in the interests of streamlining the proposed rules for clarity and ease of application, the Companies propose that subsections 57.28(b)(1), (4) and (5) be eliminated in any final proposed rulemaking.

National Electric Safety Code

Generally, the Companies agree that the adoption of the NESC as the minimum safety standard is appropriate, and is consistent with the existing statutory framework under which the Commission and electric utilities must jointly operate.⁷ Furthermore, the NESC is already referenced as the operational standard to which electric utilities are held at various points within the Commission's own existing regulations.⁸ However, additional clarification in the application of the NESC as a minimum standard would be helpful in ensuring that there is no confusion in the application of the proposed new rules.

⁵ *PECO Energy Co. v. Pa. P.U.C.*, 568 Pa. 39, 791 A.2d 1155 (2002) (“The power of the Commission is statutory, arising either from the express words contained in the enabling statutes or by a strong and necessary implication from those words, *Feingold v. Bell of Pennsylvania*, 477 Pa. 1, 383 A.2d 791 (Pa. 1977), and the legislative grant of power to act in any particular case must be clear.”).

⁶ *Pa. Dept. of Public Welfare v. Forbes Health System*, 492 Pa. 77, 422 A.2d 480, 482 (Pa. 1980) (Regulations “must be consistent with the statute under which they were promulgated.”). *Accord Popowsky v. Pa. P.U.C.*, 589 Pa. 605, 629, 910 A.2d 38, 52-53 (2006).

⁷ 66 Pa.C.S. §§ 2804(1)(ii) and 2807(a).

⁸ 52 Pa. Code §§ 57.82, 57.193, 57.194 and 57.198.

Specifically, the rule should clearly identify that the NESC is to be viewed as the minimum safety standard in the way that it was intended to be applied, as described in the current Section 1, Rule 013 of the NESC.⁹ Given the fact that the NESC is reviewed and updated every five years - a greater frequency than with which electric facilities are wholesale replaced - the Commission should ensure that its application of these standards to electric utility operations is consistent with the intent of the NESC in that the applicable standard to a set of facilities installed is that standard which was currently effective at the date of installation. While this interpretation has informed current industry practice to this point, the Companies believe that in any such rulemaking directly establishing the NESC as a cumulative safety standard, such clarification is key to avoiding conflicts in interpretation moving forward.

Furthermore, it must be recognized that a revision to the NESC, as it is updated from time to time, does not, by its own terms, become effective until at least the first day of the month after 180 days have passed following its publication date. This “grandfathering” period is applied in all instances where both design and approval began after the expiration of the period, for both new installations and extensions of existing installations. The intent behind this grandfathering period being that time is needed to allow electric utilities and governing bodies to update their copies, revise regulations, and internal procedures and standards (as well as to effectuate any necessary workforce training to follow) in response to the revisions which occurred with the new edition. Similar to the Companies’ concern with respect to ensuring clarity in the NESC edition to be considered as the governing edition mentioned above, clarity with respect to ensuring this grandfathering period is preserved is appropriate and would be beneficial in ensuring consistent interpretation in the proposed rules.

⁹ NESC Section 1, Rule 013, p.4 (2012 Edition).

For these reasons, the Companies propose the addition of the term “National Electric Safety Code (NESC)” to Section 57.1 so as to provide greater clarity when this term is referenced throughout Section 57.28 and the rest of the Commission’s regulations:

National Electric Safety Code or NESC – The current edition of the National Electric Safety Code (NESC) published by the Institute of Electrical and Electronic Engineers (IEEE) designated as the American National Standard (ANSI) C2 at the time of facility installation. The effective date of any edition of the NESC shall be 180 days after the publication date by the IEEE for application to new installations and extensions where both design and utility approval were started after the expiration of the 180 day period.

One significant additional concern that must be addressed, even with the addition of this recommended term to the definitions found in Section 57.1, is the fact that there are many points throughout the Pennsylvania Code (including but not limited to the Commission’s own regulations) which adopt the specific language of or various editions of the NESC as the standard by which utility operations will be measured for a discrete purpose. For instance, major portions of the NESC 5th Edition (1948) were adopted as part of Chapter 39 of Title 34 – Labor and Industry, and incorporated as part of the regulatory language. Another example which more directly points to the edition adopted as an ongoing standard is found within the Commission’s own regulations at Section 63.23, which specifically adopts the 1981 edition of the NESC as the standard by which construction and maintenance shall be performed. Without an creating an exception to Section 57.28, the Commission will be establishing conflicting standards within its own regulations, as well as compared to those of other agencies. This creates a situation that may automatically force an electric utility to act in violation of one regulation over another. Therefore, the recommended

course of action is that an exception be written into the proposed standard so as to ensure such conflict will not arise, as reflected in the Companies' suggested edits below.

Electric utility internal company procedures

Subsection (b)(3), while not redundant, presents other practical and legal implications and should also be eliminated. As a practical matter, including EDC internal practices and procedures creates multiple concerns. First, each EDC has separate and distinct internal practices and procedures which may be documented. In many instances, and unlike the NESC, these are not established as hard and fast rules, but rather "guidelines" that are outlined with the intent that they be applied as appropriate, with appropriate consideration given to the unique conditions in the field, the particular location and facilities, the application of the NESC to that individual location, the particular point in time, etc. An EDC's field employees are a group of highly trained and skilled individuals who are expected to bring their experience, training and expertise to bear to individual field scenarios, while interpreting the requirements of the NESC as applied to those individual circumstances. To demand adherence to some practices would result in the elimination of this necessary discretion and remove solutions from an EDC workforce's toolbox. Such a rule would prevent EDCs from making appropriate interpretations under the NESC and identifying alternatives to meet the objectives contemplated within both the NESC and the very rules proposed by the Commission itself.

Further, there is no consideration given within the rule as proposed to account for the fact that changes to an EDC's internal practices and procedures may be revised from time to time, which revisions take time and training to fully communicate and establish throughout an EDC's workforce. This is a similar concern to that which is explained above with regard to application of the NESC which must be addressed.

Additionally, the language of the regulation neither limits the application of the regulation to those practices and procedures which are safety-oriented (which is the purported purpose of this Rulemaking Order), nor does it establish any consistency between EDCs. That is, to establish such a regulation would create compliance requirements unique to each and every EDC, which requirements have the possibility of changing quite frequently depending on the intervals at which an electric utility reviews and revises its own practices and procedures. In doing so, each EDC would be held to compliance standards that are distinct from, and may be more stringent than, that of its counterparts. This raises numerous concerns from a due process perspective, as well as presents serious concerns when one considers the nature of an investor owned utility's need to balance the competing obligations it has to its customers, regulators, employees, the public, and the investor community.

Finally, it is presumed that the goal of the proposed rulemaking at issue is to clarify and establish rules to further the safety interests of the Commission, the EDC community, utility customers and employees, and the general public. However, the unintended effect of the codification of an EDC's practices and procedures may be to chill any existing efforts to go above and beyond minimum requirements within these practices so as to not implicate those practical concerns noted above. Furthermore, from a legal standpoint, the proposition that an EDC's own internal practices and procedures may be effectively codified and held up as a regulatory standard to which they must perform not only has the potential to implicate existing civil law principles as they stand relative to duties and liability, but also interferes with an electric utility's management discretion in direct violation of controlling legal precedent.

The practical effects outlined here are surely not in the best interests of customers, the public, or the EDCs and their employees, and undoubtedly not the intent of the Commission in

proposing such rules. Furthermore, the legal implications of the rule as proposed presents serious questions that are likely to lead to confusion, due process concerns, and conflicts of law, to name a few concerns, and therefore have the potential to ultimately lead to protracted litigation. For these reasons, subsection (b) of Section 57.28 as proposed should be revised to read as follows:

(b) *Safety code.* ~~A jurisdictional EDC shall comply with all of the following~~ The minimum safety standards: for all electric utilities in this Commonwealth shall be those

~~(1) The regulations established by § 57.1 et. seq. (as amended) (relating to electric service).~~

~~(2) The standards established by the National Electrical Safety Code (NESC), except where a conflicting standard or version of the NESC has been specifically adopted. In such instances, the specific standard or edition shall control.~~

~~(3) The procedures established by the electric utility and set forth in the EDC's internal company procedures.~~

~~(4) The standards established by the Underground Utility Line Protection Act (PA One-Call or Act 287) at 73 P.S. §§ 176 et. seq. (relating to excavating and demolition).~~

~~(5) All other applicable and governing state and federal laws and regulations.~~

(c) *Enforcement*

Subsection (c) of this section deviates in certain significant respects from that which is in place under the gas safety regulation. Specifically, the enforcement subsection directly references not only inspections but also EDC obligations within the context of an investigation, as well as proposes to require the production of “raw data.” While it is unclear what the Commission intends by the inclusion of “raw data,” its separate inclusion of “supplemental data” – the only data provision required under the gas safety regulation – would imply that the Commission views this as a distinct subset of information. Paired with the discussion offered in the Rulemaking Order, it has been assumed for the purposes of these comments that this is intended to require data be provided on site during inspections. Nowhere in the Rulemaking Order is there a discussion of any inadequacies identified in the gas safety regulation as effective today which would explain the difference in language.

The Companies raise concerns with respect to both of these deviations. First, as the Companies understand the term “raw data” to be intended, such a provision would require electric utilities to provide unverified, in some cases unrecorded data on site at any inspection that the Commission’s Electric Safety Division inspectors might be holding. This is problematic for a number of reasons. Data presented on site may be offered without verification, analysis and evaluation for accuracy and completion. Further, it would have to be provided without context or documentation. There are many existing reporting requirements applied to EDCs today associated with day to day operations, including but not limited to accident, maintenance, storm, and reliability metric reports. In all of these instances, it has been recognized that “on the spot” data may not be accurate or appropriate for review of an EDC’s performance, and as a result, reasonable timeframes following collection of that data were established to allow the electric utilities to perform their own investigations and confirm data. No explanation has been provided in the Rulemaking Order that justifies a deviation from this typical practice. Furthermore, EDCs are not currently obligated to provide such “on the spot” data to any other agency, authority, or party without a documented request. Given the language of the Commission’s Rulemaking Order which implies this information is to be shared with the Bureau of Investigation and Enforcement (“I&E”) for purposes of pursuing investigations, it is only appropriate that electric utilities be given the same rights and protections in reviewing and documenting any data shared as those rights and protections offered to their gas utility counterparts.

Furthermore, a legal process is already in place to enforce electric and all other utilities’ compliance with any requests made by I&E during investigations. The Companies’ expectation based on a reading of the Rulemaking Order is that those requests referenced by the proposed subsection (c) are relative to those made specifically by the Electric Safety Division and its

investigators. Given that “investigations” are initiated and administered by I&E attorneys via communications with the utilities’ attorneys, it is unnecessary and inappropriate to additionally reference investigations within this provision. This concern also only underscores the fact that, to the extent it is contemplated that this information be shared with I&E by the Electric Safety Division, utilities be given the due process right of attorney representation and review for any information that may find its way into the hands of Commission prosecutors with the intent of initiating an investigation.

For these reasons and to ensure fairness and consistency when paired against the gas safety regulation, the Companies propose the following revisions to subsection (c):

(c) *Enforcement.* ~~An EDC~~ Each public utility shall be subject to inspections, investigations, and enforcement actions as may be necessary to assure compliance with this section. The facilities, books, and records of ~~an electric~~ each public utility shall be accessible to the Commission and its staff for the inspections and investigations. ~~An electric~~ Each public utility shall provide the Commission or its staff the ~~raw data, reports, supplemental data, and information necessary as it shall from time to time request~~ for the administration and enforcement of this section.

(d) *Records*

Generally, the Companies do not object to the provisions of subsection (d) as proposed, except to the extent that the requirement to provide a report for each reportable accident is restated. While this does not appear create any conflict within the Commission’s regulations or the Companies’ obligations, the inclusion of this language is redundant, restates an existing legal obligation, and deviates unnecessarily from the language applied to the gas industry under its counterpart safety standards. Therefore, the Companies propose the following minor revision:

(d) *Records.* An EDC shall keep adequate records as required for compliance with the safety code set forth in subsection (b). ~~An electric utility shall submit reports for each reportable accident under § 57.11 (relating to accidents).~~ The records shall be accessible to the Commission and its staff.

III. CONCLUSION

Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company appreciate the opportunity to provide comments on the Proposed Rulemaking Order and will continue to collaborate with the Commission and the industry on this important topic.

Respectfully submitted,

Dated: March 7, 2016



Tori L. Giesler
Attorney No. 207742
FirstEnergy Service Company
2800 Pottsville Pike
P.O. Box 16001
Reading, PA 19612-6001
Phone: (610) 921-6658
Fax: (610) 939-8655
Email: tgiesler@firstenergycorp.com

Counsel for:
Metropolitan Edison Company,
Pennsylvania Electric Company,
Pennsylvania Power Company and
West Penn Power Company

