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January 23, 2017

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

**Re: Petition of NRG Energy, Inc. for
Implementation of Electric Generation Supplier Consolidated Billing
Docket No. P-2016-2579249**

Dear Secretary Chiavetta:

Enclosed for filing please find the comments of the Energy Association of Pennsylvania to the Petition of NRG Energy, Inc. at the above-referenced docket. Please contact the undersigned if there are any questions with respect to the filing of these comments.

Sincerely,

A handwritten signature in blue ink that reads "Donna M.J. Clark".

Donna M.J. Clark
Vice President and General Counsel

Enclosure

CC Via US Mail: Karen Moury, Counsel for NRG
Office of Consumer Advocate
Office of Small Business Advocate
PUC Bureau of Investigation and Enforcement

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Petition of NRG Energy, Inc. for :
Implementation of Electric Generation :
Supplier Consolidated Billing : P-2016-2579249

**Comments of the
Energy Association of Pennsylvania in Opposition
To the Petition of NRG Energy, Inc.**

I. Introduction.

On December 8, 2016, NRG Energy, Inc. (“NRG”) filed a petition (“NRG Petition”) requesting the Pennsylvania Public Utility Commission (“PUC” or “Commission”) to initiate a proceeding that would result in a mandate for electric distribution companies (“EDCs”) to enable the implementation of supplier consolidated billing (“SCB”) by the second quarter of 2018 for a “qualified” electric generation supplier (“EGS”) that chose to provide SCB services. *See*, NRG Petition at paragraphs 15, 27, 70 – 75. The NRG Petition details a prescribed set of actions for the PUC to follow to reach the sought after remedy of SCB ostensibly on behalf of electric generation suppliers operating in Pennsylvania. *Id.* As requested by NRG, the Commission published notice of the petition in the *Pennsylvania Bulletin* on December 24, 2016.¹ The notification states that answers and/or comments must be filed by January 23, 2017 with reply comments due by February 22, 2017. The Energy Association of Pennsylvania (“EAP” or

¹ *See*, 46 Pa. Bulletin 8154.

“Association”), a trade organization that represents and promotes the interests of regulated electric and natural gas distribution companies operating in the Commonwealth, respectfully submits these comments on behalf of its EDC members.²

The NRG Petition would have the Commission mandate a flawed and illegal policy based on a flawed and illegal procedure. The Electricity Generation Customer Choice and Competition (“Competition Act”), *as amended*, 66 Pa. C. S. §§ 2801 – 2815 does not provide for SCB as a customer billing option nor does it grant statutory authority to mandate the implementation of SCB. Sections 2807 (c) and (d) of the Competition Act clearly provide that EDCs are to remain responsible for customer service functions, including billing for distribution service, meter reading, collections and complaint resolution. 66 Pa. C. S. §§ 2807 (c) and (d). The General Assembly policy declarations in section 2802 of the Competition Act provide, *inter alia*, that “[i]t is in the public interest for the transmission and distribution of electricity to continue to be regulated as a natural monopoly subject to the jurisdiction and active supervision of the commission. Electric distribution companies should continue to be the provider of last resort in order to ensure the availability of universal electric service in the Commonwealth unless another provider of last resort is approved by the commission.” 66 Pa. C.S. § 2802 (16). NRG has not and cannot cite to any statutory authority to support its proposal that the Commission establish a policy mandating EDCs to implement a SCB program that would be available at the request of an EGS.

² Citizens’ Electric Company; Duquesne Light Company; Metropolitan Edison Company; PECO Energy Company; Pennsylvania Electric Company; Pennsylvania Power Company; Pike County Light & Power Company; PPL Electric Utilities; UGI Utilities, Inc.-Electric Division; Wellsboro Electric Company; and West Penn Power Company.

Furthermore, any set of generally applicable rules established in the manner outlined in the NRG Petition³ to implement its proposed SCB program would be unenforceable as a matter of law and would result in un-promulgated regulations. Pennsylvania law is clear that government agencies, such as the PUC, may adopt policies that have the force of law either through a rulemaking or as a result of an adjudication. *Pennsylvania Human Relations Commission v. Norristown Area School District*, 374 A.2d 671 (Pa. 1977). The procedure detailed in the NRG Petition is not litigation and does not adhere to the procedures required under the law to promulgate regulations.⁴ Thus, even assuming *arguendo* that the statute provided authority for SCB as proposed by NRG, binding norms cannot be established under the steps outlined in the Petition.

For these reasons and as further detailed below, EAP asks the Commission to dismiss the NRG Petition as a matter of law and decline to follow the path proposed by NRG to establish a new regulatory program that would require EDCs to facilitate SCB at the discretion of a “qualified EGS choosing to provide SCB service”⁵ to its customers.

³ At paragraph 15 of the NRG Petition, the PUC is advised to initiate a process to create statewide uniform standards with an initial order issued by June 15, 2017 that would resolve technical and operation issues identified by NRG as “impacting SCB”, would direct the Electronic Data Exchange Working Group (EDEWG”) to develop the “necessary EDI protocols” and would form a SCB Stakeholder Working Group to be led by the Office of Competitive Market Oversight (“OCMO”). NRG directs the PUC to establish a timeline whereby the SCB Stakeholder Working Group would issue a report by September 30, 2017 addressing specific issues detailed by NRG. NRG Petition at paragraphs 15 and 72. A second Commission order would approve or resolve issues discussed in that report and would direct EDCs to file compliance plans by the end of January 2018 with implementation completed during the second quarter of 2018. NRG Petition at paragraphs 15, 73 – 75. The process envisioned by NRG does not resolve a particular dispute or case under the Commission’s quasi-judicial power nor does it adhere to Pennsylvania procedures for promulgating regulations. *See discussion infra* at Section IV.

⁴ *See*, Commonwealth Documents Law, 45 P.S. § 1102 *et seq.* and the Regulatory Review Act, 71 P.S. § 745.1 *et seq.*

⁵ *See*, NRG Petition at paragraph 27.

II. The NRG Petition Fails to Demonstrate the Need for SCB because Retail Electric Competition in Pennsylvania is Successful and Continues to Thrive.

The Association and its EDC members fully support the competitive retail market established in Pennsylvania under the Competition Act. As noted by PUC Chairman Gladys M. Brown at a December 2016 celebration marking the twentieth anniversary of the Competition Act, “[f]or two decades, Pennsylvania has stood on the national forefront of electric competition, putting the power of choice in the hands of consumers and giving them greater control of their electric bills. As a result of this historic legislation, millions of electricity customers have made choices and saved money, purchased renewable products and explored innovative new offers and plans.”⁶ The event highlighted messages from Pennsylvania’s current Governor Tom Wolf who proclaimed electric competition as an example of “Government That Works” and former Governor Tom Ridge who signed the legislation that enacted the Competition Act in December of 1996. PUC Chairman Brown further made public the results of a recent Commission survey⁷ demonstrating that 94% of the respondents are aware of their ability to shop for electric supply and that of those respondents, four out of ten have switched electric providers.⁸ The Chairman’s remarks in December also underscore that the competitive electric retail market in Pennsylvania has experienced fourteen consecutive months of sustained growth beginning in the fall of 2015

⁶ December 8, 2016 Press Release: PUC Marks 20th Anniversary of Electric Competition in PA; New Survey Shows High Levels of Customer Awareness and Satisfaction with Electric Choice, Touts 14 Consecutive Months of Growth, Announces Upgrades to Electric Shopping Website PAPowerSwitch. http://www.puc.state.pa.us/about_puc/press_releases.aspx?ShowPR=3794

⁷ Supra at fn 6. Survey titled *PA PowerSwitch Attitudes and Usage, October 2016* conducted by Pavone and GBH Insights between 9/20/16 and 9/28/16 obtained from PUC Office of Communications.

⁸ Shopping numbers or switching statistics track only those consumers who have left default service and/or switched from one EGS to another. As stated by Commissioner John Coleman at the 20th Anniversary celebration, the Commission should “respect the decision for people to be on default service.” The Competition Act includes default service as an option and, without tracking those customers who chose to remain on or chose to return to default service, shopping numbers or switching statistics tell an incomplete story. See, <https://www.youtube.com/watch?v=vocwpS17CsQ&feature=youtu.be> (PUC video titled “Dec. 8, 2016, Public Meeting = 20th Anniversary of Electric Choice”).

and that, as of November 30, 2016, “nearly 2.1 million Pennsylvania electricity customers (or 36.9 percent) currently receive their electric generation from a competitive supplier.”⁹

The success of the Pennsylvania competitive retail market has also been recognized by industry groups and leaders situated outside of the Commonwealth. The Annual Baseline Assessment of Choice in Canada and the United States (“ABACUS”) compiled by Distributed Energy Financial Group, LLC in 2014 and 2015 ranked Pennsylvania second in the United States and third overall in the residential retail market category.¹⁰ In October 2013, the Commission received an Outstanding Achievement Award for success in structuring competitive energy markets in Pennsylvania from the National Energy Marketers Association (“NEM”).

Further, over the last twenty years, the Commission has instituted numerous policies, regulations and programs to enhance and promote the competitive market in Pennsylvania. *See, e.g., Enrollment Procedures Applicable to EDCs and EGSs during the Phased-in Implementation of Direct Access*, 1998 WL 442686 (Pa. P.U.C. 1998) (Final Order); *Electric Retail Choice Issues Referred to Commission by Phase-In Committee and EDEWG; Use of Multiple Scheduling Coordinators*, 2000 WL 770539 (Pa. P.U.C. 2000) (Tentative Order) and *Final Order Re: Electric Retail Choice Issues*, 94 Pa. P.U.C. 188 (2000); *PPL Electric Utilities Corporation Retail Markets*, 104 Pa. P.U.C. 323 (2009) (Opinion and Order); and *Investigation of Pennsylvania’s Retail Electricity Market: Intermediate Work Plan*, 2012 WL 1066614 (Pa. P.U.C. 2012) (Final Order); and *Investigation of Pennsylvania’s Retail Electricity Market: End State of Default Service*, 303 P.U.R. 4th 28 (Pa. P.U.C. 2013) (collectively referred to herein as the “RMI Orders”). In addition to the *RMI Orders*, the Commission has worked to provide EGSs

⁹ *Supra* at fn.6.

¹⁰ <http://defgllc.com/publication/abaccus-2015-annual-baseline-assessment-of-choice-in-canada-and-the-united-states/>

with web portal access to customer account numbers to improve the ease of shopping for customers at public venues such as shopping malls, has promulgated accelerated switching regulations, has required EDCs to change consolidated customer bills to provide space for a shopping information box as well as EGS logos and messages and has required implementation of EDC mechanisms to provide “seamless moves” and “instant connects” for shopping customers.¹¹

The acknowledged success of the competitive retail market from Pennsylvania government leaders and policy makers and from national/international organizations, the awards and proclamations as well as the numerous mechanisms and programs implemented by the EDCs collectively belie the claims alleged in the NRG Petition. The shopping data collected and compiled by the Commission at PAPowerSwitch.com and also by the Office of Consumer Advocate mirrors findings that “Pennsylvania has a very dynamic competitive retail market”¹² and supports a conclusion that further enhancements are not necessary to “improve” the shopping experience. EAP contends that shopping among consumers is neither “stagnant” nor in need of another boost from regulators and disagrees with NRG that a “robust competitive market” equates to a ratepayer funded marketing push aimed at enabling suppliers to “establish a solid foundation for long-term relationships” with customers. *See*, NRG Petition at paragraphs 12 -14 and 23. The actual experience of customers and data available detailing the success of the competitive retail market in Pennsylvania undercuts the premise of the NRG Petition that the

¹¹ *See*, *EDC Customer Account Number Access Mechanism for EGSs*, Docket M-2013-2355751 (Final Order entered July 2013); *Final-Omitted Rulemaking Order: Standards for Changing a Customer’s Electricity Generation Supplier*, Docket L-2014-2409383 (Final Order entered April 2014); *Investigation of Pennsylvania’s Retail Electricity Market: Joint EDC-EGS Supplier Bill*, Docket M-2014-2401345 (Final Order entered May 2014); and *Investigation of Pennsylvania’s Retail Electricity Market*, Dockets I- 2011-2237952 and L-2014-2409383 (Opinion and Order July 2016).

¹² Retail Energy Supply Association. <https://www.resausa.org/states/pennsylvania>

Commission must mandate SCB to further improve that market.¹³ NRG's starting point that the market is in need of a further fix and that SCB is the cure is conclusory and unsubstantiated.

EAP contends that, in addition to the legal arguments stated below, the failure to adequately demonstrate a need for SCB supports an outright dismissal of the NRG Petition. EAP requests that the Commission refrain from committing any additional time or resources to the NRG proposal to mandate SCB at the expense of ratepayers.

III. The NRG Petition Fails to State a Basis for Relief and Should be Summarily Dismissed as a Matter of Law.

The NRG Petition is based on the unsubstantiated conclusion that SCB is necessary today to further enhance the market and is authorized as a third billing option under the Competition Act. NRG urges the Commission to follow a set of specific procedures outlined in the petition whereby EDCs would be mandated to take steps (and incur costs) necessary for implementation of SCB at the discretion of an EGS. NRG Petition at paragraphs 15, 26, fn. 44 and 27. The end result sought by NRG would be an additional ratepayer funded mechanism that is implemented by EDCs as a market enhancement without any mandatory support from or directive to utilize by EGSs.¹⁴ EAP contends that the General Assembly did not contemplate SCB as a third billing

¹³ At its core, the NRG Petition suggests that the Commission has not yet achieved the legislative intent of the Competition Act. EAP believes that the myriad Commission actions, proceedings and approved programs to date have implemented the intent of the General Assembly to provide retail customers direct access to the competitive market for the generation of electricity. *See*, 66 Pa. C.S. §§ 2802 (12) – (13) and *supra*. at p. 5 and fn. 10.

¹⁴ NRG's offer to utilize SCB "if the Commission moves forward with SCB, as structured herein" is not a substitute for the express statutory authority needed to implement the mandatory program set forth in the NRG Petition. NRG Petition at paragraph 24. It is doubtful that many other EGSs would opt to participate in such a program and forego the benefits of EDC purchase of receivable programs and the enhanced joint EDC-EGS bill previously prescribed by the Commission. *Investigation of Pennsylvania's Retail Electricity Market: Joint EDC-EGS Supplier Bill*, Docket M-2014-2401345 (Final Order entered May 2014). *Accord* data compiled concerning the use of EDC account number access mechanisms by EGSs where, as of April 2015, EDCs has spent nearly \$557,000 in the aggregate to implement such mechanisms and only 10 EGSs had actually used the mechanism. *NGDC Customer Account Number Access Mechanisms for NGSs*, Docket M-2015-2468991 (Tentative Order entered on April 9, 2015).

option nor authorize the Commission to mandate SCB. EAP further asserts that NRG lacks standing to pursue its proposed remedy.

A. The Public Utility Code Does Not Authorize Mandated Supplier Consolidated Billing as a Third Option for Customers.

NRG reasons that because the Competition Act supports a scenario where the Commission authorizes an EGS to serve as a default service provider¹⁵ and allows for the unbundling of services to separate charges for generation, transmission and distribution¹⁶, the Commission is necessarily empowered to mandate SCB at the option of the supplier. NRG Petition at paragraph 38. NRG supports its contention with citations to earlier orders wherein the Commission “indicated its belief” that SCB may provide another billing option to customers and stated that it would consider SCB at some point in the future. *See, RMI Orders* at p. 28 of the Tentative Order and at p. 68 of the Final Order. Neither of the RMI Orders, however, addressed the question of whether legal authority exists under the Competition Act to mandate EDCs to implement SCB at the choosing of an EGS. NRG fails to cite to a section of the Competition Act that provides the authority to direct implementation of SCB. EAP asserts that an examination of the Competition Act supports a contrary conclusion, i.e. that SCB is not identified as a billing option under the statute and that the statute does not empower the Commission to mandate implementation of SCB.

Initially, the statutory language at 66 Pa. C. S. §§ 2807 (c) and (d) establishes that the General Assembly intended for the EDC to retain certain functions relating to customer service including billing for distribution service, meter reading, collections and complaint resolution.

¹⁵ 66 Pa. C. S. §§ 2802(16) and 2803. *See also* 52 Pa. Code § 54.183.

¹⁶ 66 Pa. C. S. § 2804 (3).

This legislative intent is strengthened when sections 2807 (c) and (d) are read together with the declaration of policy at sections 2802 (16) and (17). In section 2802 (16), the General Assembly stated that transmission and distribution service would continue to be regulated and that the availability of universal electric service in the Commonwealth would not be altered regardless of the entity acting as the provider of last resort. In section 2802 (17), the General Assembly confirmed that “certain public purpose costs, including programs for low-income assistance, energy conservation and others” provided by public utilities should continue with “full recovery of such costs...permitted through a nonbypassable rate mechanism.” These sections support a statutory interpretation that the General Assembly intended the EDC to retain a billing role, providing a bill for transmission/distribution services plus other “public purpose costs” even as customers were enabled to shop for generation services.¹⁷

Additionally, the language at section 2807 (c) does not contemplate SCB. The legislature did not create a parallel mandate for the EDC to furnish billing data to the supplier of generation services so as to enable SCB. *See*, 66 Pa. C. S. § 2807 (c) (2). Section 2807 (c) provides that “[s]ubject to the right of the end-use customer to choose to receive separate bills from its electric generation supplier, the electric distribution company may be responsible for billing customers for all electric service, consistent with the regulations of the commission, regardless of the identity of the provider of those services.” (Emphasis added.) Section 2807 (c) (2) then details the process for consolidated billing where the customer receives a single bill, stating the “[i]f services are provided by an entity other than the electric distribution company, *the entity*

¹⁷ The basic tenets of statutory construction support this conclusion. *See*, Statutory Construction Act at 1 Pa. C. S. §§ 1901 -1991. *See also*, *Consulting Engineers v. Licensure Bd.*, 522 Pa. 204, 560 A.2d 1375 (Pa. 1989) (providing that individual provisions of a statute are to be interpreted, whenever possible, in a manner that gives effect to the entire statute).

that provides those services shall furnish to the electric distribution company billing data sufficient to enable the electric distribution company to bill customers.” (Emphasis added.)

Thus, if the customer does not choose dual billing, the clear intent of the General Assembly as evidenced by the language of the statute provides that the EDC may bill for all electric service (i.e., generation, transmission, distribution and other public purpose costs) and that an entity providing generation service is obligated to provide the EDC with the information necessary to bill the end-use customer. The law affords the customer the choice to receive separate bills or a single bill from the EDC and, where the customer opts for a single bill, authorizes the EDC to provide a consolidated bill and allows for the recovery of the necessary costs of providing that bill. The language ensures that the generation supplier will provide the EDC with the billing data necessary to charge for generation services so as to effectuate the choice of the customer. The General Assembly clearly intended for the customer to make the choice of how to be billed. It did not provide that discretion to the EGS.

The requirement that the EGS *shall furnish* sufficient billing data to the EDC confirms not only that it is the customer’s choice to determine how to be billed but that the General Assembly intended that a regulated entity would be responsible for consolidated billing. *Id.* Section 2807 (d) further reinforces this interpretation stating, in part, that “[t]he electric distribution company shall continue to provide customer service functions consistent with the regulations of the commission, including meter reading, complaint resolution and collections.”¹⁸

¹⁸ 66 Pa. C. S. § 2807 (d). NRG does not reference either sections 2807 (c) (2) or (d) in its legal analysis set forth at paragraphs 38 through 43 of the NRG Petition. The rules of statutory construction prescribe that “[e]very statute shall be construed, if possible, to give effect to all its provisions.” 1 Pa. C.S. § 1921(a). Further, NRG’s attempt to compare language found at section 2205 (c) of the Natural Gas Choice and Competition Act with that found at section 2807 (c) of the Competition Act as proof that the Competition Act allows for a mandate of SCB falls flat. The use of the work “may” at section 2807 (c) of the Competition Act allows for the EDC to provide a consolidated bill and cannot be interpreted as proof that the General Assembly intended that the EDC “shall” forego responsibility to bill customers if EGSs choose to offer a supplier consolidated bill. Accord, 66 Pa. C. S. §§ 2802 (9), (10) and (16).

Read together, sections 2807 (c) and (d) provide that the EDC is to retain a billing relationship with its customers regardless of whether the customer chooses to switch to an EGS.

In contrast, NRG's suggestion¹⁹ that the legal authority for Commission mandated SCB arises from the approval of negotiated settlement agreements in individual EDC restructuring proceedings concluded in the 1990's evidences a bootstrap analysis and misinterprets the impact and effect of settlement agreements. Settlements resolve particular issues between specific parties and cannot be equated with statutory authority or legislative intent. The restructuring settlements were voluntary and necessarily did not address nor seek to resolve issues pertaining to whether the Competition Act supported a Commission mandate for EDCs to implement SCB as proposed in the NRG Petition. Moreover, the fact that current EDC tariffs do not uniformly provide for SCB and that SCB provisions have been stricken from tariffs with Commission approval supports the opposite conclusion, i.e. that SCB is not required by the General Assembly as a third billing option for customers.

Nor is NRG correct when it contends that the legal authority to mandate implementation of SCB is evidenced by the fact that EDEWG may have developed IT protocol to implement SCB between 1999 and 2002.²⁰ Legal authority necessary for the Commission to impose a uniform statewide set of rules to implement SCB in 2017 at the option of a "qualified EGS" cannot be found in prior collaborative proceedings held during the initial implementation of the Competition Act. Legal authority for the Commission to act must be based in a statute and implemented in a manner that establishes binding norms. *See discussion infra.* at Section IV. EAP contends that the failure of NRG to establish statutory authority for its requested remedy supports the dismissal of the NRG Petition as a matter of law.

¹⁹ *See*, NRG Petition at paragraph 40.

²⁰ *See*, NRG Petition at paragraph 42.

B. NRG Lacks Legal Standing Under the Competition Act to Pursue Its Proposed Remedy.

It is axiomatic that in order for a person to initiate a legal proceeding or lawsuit, standing must be alleged and established. Generally, standing exists where a person is sufficiently affected by the matter at issue and there exists a “case or controversy” that can be resolved by legal action. More specifically, the person must have “an injury in fact”, meaning actual or imminent harm (as opposed to conjectural or hypothetical) to a legally protected interest that is concrete and particular. The party must establish a causal relationship between the alleged harm and the challenged conduct and establish that the harm will be addressed by a favorable outcome, i.e. that the remedy requested will in fact address the injury and is not too speculative. *See, e.g. Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992).

The Competition Act was enacted in 1996, *inter alia*, to benefit “customers and to protect this Commonwealth’s ability to compete in the national and international marketplace for industry and jobs.” 66 Pa. C. S. § 2802 (7). At the time, rates for electricity in the Commonwealth were “on average higher than the national average” and the General Assembly opined that “[c]ompetitive forces are more effective than economic regulation in controlling the cost of generating electricity.” 66 Pa. C. S. §§ 2802 (4) and (5). Simultaneously, the General Assembly recognized that “[e]lectric service is essential to the health and well-being of residents, to public safety and to orderly economic development, and electric service should be available to all customers on reasonable terms and conditions.” 66 Pa. C. S. § 2802 (9). The General Assembly determined to “modify existing legislation and regulations and to establish standards and procedures in order to create direct access *by retail customers* to the competitive market for

generation of electricity while maintaining the safety and reliability of the electric system for all parties.” 66 Pa. C. S. § 2802 (12). (Emphasis added.) Nowhere in the twenty-one subsections of the declaration of policy found in section 2802 of the Competition Act did the General Assembly set forth an intent to benefit electric generation suppliers specifically and directly.

NRG cannot allege a legal right to initiate this proceeding and cannot establish that the remedy sought, a mandatory regulatory program for EDCs to implement SCB at the choosing of a qualified EGS, will address an actual harm suffered by EGSs. In the absence of an identified, concrete and particular protected interest provided under common law or under a federal or state law, NRG’s contentions that its prior “participation” in the RMI proceedings, its “commitment” to the Pennsylvania retail market or its willingness to “utilize this option to improve its position in the retail market and enhance the services provided to retail electric consumers in Pennsylvania” do not create legal standing where none exists. *See*, NRG Petition at paragraphs 22 – 24. The absence of SCB does not create an “injury in fact” or actual harm to NRG. Neither does its desire to better its position in the market or directly bill its customers for “unique products and services” create a “case or controversy.” NRG and all EGSs already have the ability to directly bill for products or services offered and have various means available to build the desired “long-term relationship” with customers. The Competition Act does not create any legal rights for EGSs by which the standing necessary to initiate a claim such as that sought by the NRG Petition can be established. As such, EAP contends that the NRG Petition should be dismissed as a matter of law.

IV. The Procedure Proposed by NRG to Establish Binding Norms is Unlawful and Would Result in Un-Promulgated Regulations.

Through its petition, NRG requests that the Commission initiate an administrative proceeding; seek public comments and utilize working groups to examine and possibly resolve a variety of technical, operational and policy issues; and issue interim and final orders that prescribe compliance filings by EDCs to implement SCB based on a set of uniform statewide standards and protocols. *See*, NRG Petition at paragraphs 15, 69 – 75. NRG proposes that the Commission act first to direct implementation of SCB and then “initiate any proposed rulemakings, grant any waivers of existing regulations and issue any interim guidelines that have been found to be necessary.” *Id.* at paragraph 73. *See also, id.* at paragraph 72, fn. 88. The intended outcome of this proceeding would establish binding norms via a process contrary to that permitted under Pennsylvania law and, as such, the Commission should decline to “set in motion the proposed plan”²¹.

The Supreme Court of Pennsylvania has held that an administrative agency, such as the Commission, may only establish binding norms through a rulemaking or an adjudication. *See, Pennsylvania Humans Relations Commission v. Norristown Area School District*, 374 A.2d 671 (Pa. 1977). The proceeding initiated by NRG is not a rulemaking, as the process suggested does not follow the procedures set forth in the Commonwealth Documents Law, 45 P.S. § 1102 *et seq.* and the Regulatory Review Act, 71 P.S. § 745.1 *et seq.* for promulgating regulations. Nor did the filing of this petition initiate a litigated proceeding that states a cause of action in which the Commission can exercise its quasi-judicial powers to resolve an actionable dispute or provide a legally authorized remedy. *Accord discussion supra.* at Section III and *see generally, Insurance*

²¹ NRG Petition at p. 33.

Co. of North America v. Commonwealth, Insurance Dept., 327 A.2d 411 (Pa. Cmwlth. 1974).

Even assuming *arguendo*, that legal authority exists for the imposition of SCB, the NRG Petition sets forth a framework that circumvents both the litigation and rulemaking processes available to the Commission to establish binding norms.

Efforts by an agency to establish broad mandatory policies for an entire industry such as those contemplated by the NRG Petition are in the nature of regulations, and agencies may not legally avoid the process of adopting regulations. *See, Department of Environmental Resources v. Rushton Mining Co.*, 591 A.2d 1168 (Pa. Cmwlth. 1991), *appeal denied*, 600 A.2d 541. The process proposed by NRG to achieve its stated remedy is flawed and any order resulting from that flawed process would fail to establish an enforceable binding norm for the electric utility industry.


Accordingly, EAP requests the dismissal of the NRG Petition and asks the Commission to refuse consideration of a request that thwarts the protections afforded by the Commonwealth Documents Act and the Regulatory Review Act, i.e broad public notice and input from the general public on any proposed regulations, agency consideration of comments, and a review for legality by the Office of Attorney General followed with a review by the Independent Regulatory Review Commission and the legislative standing committees. While time consuming, the legal adoption of regulations insures that the rules are cost-effective and reasonable and confirms that they are consistent with the agency's statutory authority and the intent of the General Assembly.

V. Conclusion

For the reasons stated above, EAP respectfully requests that the Commission dismiss the NRG Petition as a matter of law and decline to follow the improper and unlawful path laid out in NRG's proposal for mandatory supplier consolidated billing.

Respectfully submitted,


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Date: January 23, 2017