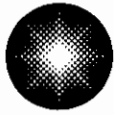


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## Constellation Energy

April 27, 2005

### VIA OVERNIGHT MAIL

Mr. James J. McNulty  
Secretary  
Pennsylvania Public Utility Commission  
Keystone Building  
400 North Street  
Harrisburg, PA 17120

**RE: Comments of Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc. on Proposed Regulations for the Provider of Last Resort Service in the Commonwealth of Pennsylvania, Docket No. L-00040169**

Dear Secretary McNulty:

In response to the Proposed Rulemaking Order issued in the above-captioned docket by the Pennsylvania Public Utility Commission containing proposed regulations for the Provider of Last Resort, please find the Comments of Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc.

Kindly date stamp and return the extra copy in the self-addressed stamped envelope. Please feel free to contact me with any questions.

Respectfully Submitted,

Lisa M. Decker  
Counsel  
Constellation Energy Group, Inc.  
(410) 468-3792

cc: Shane Rooney and Cyndi Page (via email)

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Rulemaking Re Electric Distribution Companies'  
Obligation to Serve Retail Customers at the  
Conclusion of the Transition Period Pursuant  
To 66 Pa. C.S. §2807(e)(2)

Docket No. L-00040169

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**COMMENTS OF  
CONSTELLATION ENERGY COMMODITIES GROUP, INC. AND  
CONSTELLATION NEWENERGY, INC.  
ON PROPOSED REGULATIONS FOR  
PROVIDER OF LAST RESORT SERVICE IN THE  
COMMONWEALTH OF PENNSYLVANIA**

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Dated: April 27, 2005

## **I. INTRODUCTION**

The Proposed Rulemaking Order issued by the Pennsylvania Public Utility Commission (“Commission”) and published in the Pennsylvania Bulletin on February 26, 2005,<sup>1</sup> contains proposed regulations (“Regulations”) for the Provider of Last Resort (“POLR”). The Regulations achieve a well-balanced approach to defining the obligations of the Electric Distribution Companies (“EDCs”) to provide default service and thus take a major step to advance the goals and objectives of the Electric Choice Act. These Regulations will work well to guide each EDC as it develops an implementation plan to provide default service at the conclusion of its transition period. Specifically, by requiring the EDCs to conduct competitive procurement processes to secure the electric supply necessary to provide default service, the Commission has ensured that customers who do not choose competitive retail supply will nevertheless benefit from competitive market forces at the wholesale level. At the same time, the Regulations provide for the continued development of competitive retail markets by ensuring that customers have the ability to choose alternative suppliers without switching restrictions or exit fees, and through the establishment of a framework for default service by the EDCs that reflects the full cost of that service.

Constellation Energy Commodities Group, Inc. (“CCG”) and Constellation NewEnergy, Inc. (“CNE”) (collectively, “Constellation”) appreciate the opportunity to offer comments and provide specific limited modifications to the Regulations. Constellation's proposed modifications are intended only to enhance the Regulations and thereby ensure that the implementation of the Regulations by the EDCs will be clear and unambiguous.

## **II. COMMENTS AND RECOMMENDED MODIFICATIONS**

**A. Section 54.185(a) and Section 54.188:** Section 54.185(a) requires each EDC to submit its implementation plan at least 15 months prior to the end of its transition period. Constellation requests that the Regulations be modified to urge, if not require, the EDCs to conduct open meetings attended by Commission Staff to solicit input from the affected stakeholders in their regions - including customers, electric generation suppliers (“EGSs”), and

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<sup>1</sup> PA Bulletin, Vol. 35, No. 9, February 26, 2005, pp. 1421-1434.

wholesale energy suppliers - as they develop their implementation plans. Such meetings will provide useful input to the EDCs and help ensure a smooth proceeding when the implementation plans are filed.

**B. Section 54.185(b):** This Regulation states:

Default service implementation plans shall comply with all Commission regulations pertaining to documentary filings, except when modified by this subchapter. The default service provider shall serve copies of the default service implementation plan on the Pennsylvania Office of Consumer Advocate, Pennsylvania Office of Small Business Advocate, the Commission's Office of Trial Staff, and the RTO or ISO in whose control area the default service provider is operating.

In order that sufficient notice be provided to interested parties, Constellation requests that this provision be expanded to require each utility to serve its implementation plans on all registered EGSs in its service territory, and thus be amended as follows:

Default service implementation plans shall comply with all Commission regulations pertaining to documentary filings, except when modified by this subchapter. The default service provider shall serve copies of the default service implementation plan, all subsequent revisions thereto, and any related compliance filings, on the Pennsylvania Office of Consumer Advocate, Pennsylvania Office of Small Business Advocate, the Commission's Office of Trial Staff, all registered EGSs in its service territory, and the RTO or ISO in whose control area the default service provider is operating.

**C. Section 54.185:** In the narrative section of the Rulemaking, the Commission made it clear that it is prepared to rule on proceedings brought by some of the Pennsylvania EDCs whose transition periods may end before the Regulations are in place.<sup>2</sup> Constellation understands that it may certainly be the case that some of the utilities need to formulate post transition plans before the Regulations are final. To the extent that the Commission contemplates the acceptance of plans that do not conform with the proposed Regulations, Constellation urges the Commission to approve such plans for the shortest possible time period so that the utilities will come into compliance with the Regulations as soon as possible.

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<sup>2</sup> See Rulemaking Re Electric Distribution Companies' Obligation to Serve Retail Customers at the Conclusion of the Transition Period Pursuant to 66 Pa. C.S. § 2807 (e)(2), Docket No. L-00040169, Provider of Last Resort Roundtable, Docket No. M-00041792, Proposed Rulemaking Order, issued Feb. 25, 2005, at paragraph E.

**D. Section 54.185(c), Section 54.183(b) and Section 54.187(b) and (c):** In Section 54.185(c), the Commission states that: “A default service implementation plan shall propose a minimum term of service of at least twelve months, or multiple twelve month periods, or for a period necessary to comply with subsection (f).” Sections 54.187(b) and (c) state that an EDC’s implementation plan must include fixed price service for residential customers and certain non-residential customers, but allows each EDC to propose, in its implementation plan and competitive procurement plan, the period of time, based on 12-month increments, that default service will be provided.

Section 54.183(b) specifies that an EDC may petition the Commission to be relieved from the default service obligation. For clarity, Constellation requests that Section 54.183(b) be modified to provide that an EDC may not discontinue its role as the default service provider until the conclusion of any contracts that it has executed pursuant to a Commission approved implementation plan. Specifically, Constellation proposes the following revision to Section 54.183(b):

An EDC may petition the Commission to be relieved from the default service obligation. In the alternative, the Commission may propose through its own motion that an EDC be relieved from the default service obligation. The Commission may approve such a request if it is in the public interest, provided that approval of such a request will not be effective prior to the end of any contracts that an EDC has entered into with wholesale suppliers for the purpose of fulfilling its obligations as a default supplier, pursuant to the approved implementation plan. In such circumstances, the Commission will announce through an order a competitive process to determine the alternative default service provider, which may be either an EDC or a licensed EGS.

In addition, Constellation suggests that Section 54.185(c) be amended to read as follows:

A default service implementation plan shall propose a minimum term of service of a least 12 months, or multiple 12 month periods, or for a period necessary to comply with Section 54.185(f); provided, however, that the Commission may approve a term of service of less than twelve months if it determines that such term of service is in the public interest.

Constellation requests this change so that the utilities are not restricted from filing for, nor would the Commission be prohibited from requiring, shorter contract lengths for some customer classes if the Commission determines that it would be appropriate, given the market conditions in a service territory.

**E. Section 54.185 (e):** Constellation supports inclusion of this Section, as it permits the Commission to require EDCs to file joint default service implementation plans. There are ten EDCs in the Commonwealth of Pennsylvania, and Constellation believes that there would likely be significant efficiencies that could be achieved if multiple EDCs combine their competitive procurement processes. These efficiencies would occur in several ways:

- Decreased costs associated with conducting the competitive procurement process.
- Standardized bidding rules and contracts that facilitate broader participation by wholesale suppliers, increasing competition, and potentially lowering customers costs.
- Consolidating utility implementation plan proceedings will encourage broader industry participation and reduce regulatory costs for all participants.

**F. Section 54.185 (g):** – Constellation recommends that this section be modified to allow the Commission to require any EDC to subdivide existing rate classes into separate customer groups for default service. Constellation recommends the following changes:

(g) The default service implementation plan must include a schedule of rates, rules and conditions of default service in the form of proposed revisions to its tariff. The default service provider may propose the use of the already effective retail customer classes in the EDC's service territory, or may propose a reclassification of retail customers. The Commission may require a default service provider to reclassify or subdivide existing rate classes if it is in the public interest.

Constellation believes that such flexibility is required to ensure that the current configuration of some rate classes does not preclude the creation of optimally-sized customer groups with varying default service features that may be appropriate, given the status of competitive market development, for that customer group.

**G. Section 54.185(i):** This section specifies that:

The default service implementation plan shall include reasonable credit requirements, or other reasonable assurances of any supplier of electric generation services' ability to perform, as approved by the Commission.

Constellation recommends two changes with respect to this proposed Regulation. First, Constellation agrees that it is appropriate that the suppliers should provide reasonable credit assurances to the EDCs. It is equally appropriate for the EDCs to provide reasonable credit assurances to the suppliers. Thus, Constellation requests that the Commission modify this regulation to require the EDCs' implementation plans to include reasonable credit assurances by the EDCs to their suppliers. Without such bilateral credit and collateral assurances, suppliers face increased risks that will increase their costs to provide generation service, and thus increase customers' costs.

Second, because the credit requirements applicable to EGSs are specified separately in the supplier tariffs of the various EDCs, Constellation requests that this Section be clarified as applicable to a supplier of default service, and that it is not applicable to an EGS.

To address these two issues, Constellation recommends that Section 54.185(i) should be amended to read as follows:

The default service implementation plan must include reasonable credit requirements or other reasonable assurances for both a ~~of any~~ supplier of electric generation services' ability supply for default service and the EDC to perform its default service supply obligation, as approved by the Commission.

**H. New Proposed Section 54.185(n):** Constellation recommends that the Regulation provide for a periodic policy review of the default service Regulations to ensure that the necessary modifications or adjustments to reflect changes in the competitiveness of the wholesale and retail markets are adequately reflected in the Regulations. This comprehensive policy review should provide the utilities and other stakeholders an opportunity to propose modifications to the Regulations that are in the public interest. Constellation proposes the following specific language for this new Section 54.185(n):

The Commission shall open a docket to review progress in and make any prospective changes in default service regulations at least once every five years. The Commission may require default service providers to establish similar periodic reviews of their individual implementation plans from time to time.

**I. Section 54.186(a)(1):** This section specifies that the default service provider is not required to conduct a competitive bid process for any hourly priced service that it provides to default customers. In other jurisdictions where utilities are required to provide hourly priced service to certain default customers, the electric generation supply service is subject to a

competitive bid process.<sup>3</sup> Constellation recommends that a similar requirement be included in these Regulations to ensure that all the wholesale electric generation services necessary to serve hourly priced customers are procured by the utility at a competitive price, especially given that default service includes products in addition to hourly priced energy, i.e., capacity and ancillary services.

**J. Section 54.186(d):** This section states that “the competitive procurement process may be subject to direct oversight by the Commission or an independent third party.” Constellation requests that this Regulation be modified to *require* direct oversight by the Commission or an independent third party that reports directly to the Commission. Careful monitoring of the bid process by the Commission or an independent third party will give all affected stakeholders assurance that the approved implementation plan is carried out properly and fairly. Moreover, to the extent that the Commission decides that an independent monitor is appropriate, Constellation believes that the independent entity should be selected by the Commission. Thus, Constellation recommends the following changes to this Regulation:

The competitive procurement process ~~may~~ shall be subject to direct oversight by the Commission or an independent third party. Any third party shall be selected by and report to the Commission. Commission staff and any third party involved in oversight of the procurement process shall have full access to all information pertaining to the competitive procurement process, and may monitor the process either remotely or where the process is administered. Any third party retained for purposes of monitoring the competitive procurement process shall be subject to confidentiality agreements identified in §54.185(k).

**K. Section 54.186 (b)(2)(vi):** The Commission has stated that a default supplier’s competitive procurement process shall include “bid evaluation criteria.” Constellation urges the Commission to modify this provision to read as follows:

Bid evaluation criteria that provide for winning bids to be selected solely on the basis of the price offered.

Pursuant to these Regulations, the implementation plan submitted by each EDC should specify all of the details of the service that the EDCs require and establish minimum eligibility criteria that must be met by all bidding participants. With that specificity in place before the

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<sup>3</sup> See *In the Matter of the Provision of Basic Generation Service for Year Two of the Post-Transition Period*, New Jersey Board of Public Utilities Docket No. EO03050394, issued Dec. 2, 2003.



bidding occurs, wholesale bidders compete solely on the basis of price, and there is certainty as to all the contractual terms and conditions that will apply to each winning bidder. This level of certainty about the bidding process and the contractual terms and conditions helps to ensure a high level of competition during the bidding process. Moreover, by eliminating the possibility that non-price criteria could be used to evaluate bids, the Regulation will more clearly ensure a fully non-discriminatory competitive procurement process.

**L. Section 54.186(f)(2):** This section provides that the Commission shall have not less than three days to review the results of each competitive procurement process to ensure that it has complied with the approved implementation plan. Constellation strongly urges the Commission to modify this regulation as follows:

The review period may not ~~be less than 3~~ exceed 2 business days.

Achieving the best possible price for customers in the competitive procurement process requires that the winning bids be determined and approved as soon after they are submitted as possible. Bids that must remain open for any length of time carry with them a risk premium and thus increased costs to customers. The shorter the open time period, the lower the risk premium. The same is true if the bid approval will be done by a date certain. Furthermore, a two-day review period is consistent with that in other jurisdictions that employ competitive procurement processes that are consistent with these proposed Regulations, such as Maryland and New Jersey. A two-day review period is adequate because all of the details of the bidding process and the contractual terms and conditions are established before the bidding occurs, making the review process a straightforward exercise in confirming that (i) the Commission approved competitive procurement process was followed without irregularity, and (ii) the bids were awarded properly.

**M. Section 54.187:** As a general matter, Constellation concurs with the Commission that default supply retail rates must reflect the full cost to provide customers a retail default supply service. The clear price signal that results from this approach is necessary to ensure that customers can make a rational choice when considering alternative competitive services. Ordering the utilities to initiate rate cases to fully unbundle these costs will serve to ensure such an outcome. However, Constellation notes that there are alternatives to full unbundling of rates, such as the administrative charge/true up procedures used in Maryland that were described

during the Roundtable discussions. To the extent that there is not enough time for a utility to complete a full rate case, such an alternative should be required to ensure that there is the functional equivalent of a full unbundling of costs. Therefore, Constellation offers the following exception to 54.187 (a)(2) by proposing a new regulation under 54.187 (a)(5):

In the event there is insufficient time to fully unbundle the retail costs for default service, the Commission may direct other interim mechanisms to ensure that the full cost of retail default service is reflected in the default service price.

**N. Section 54.187(a):** So that this Regulation is clear that the Commission intends that all default service costs should be collected from default service customers, Constellation recommends that this provision be amended to read as follows:

The costs incurred for providing default service shall be recovered from default service customers through the following mechanisms or charges:

**O. Section 54.187(a)(3) and Section 54.187(f):** These sections provide for the EDCs to recover the costs of compliance with alternative energy requirements, and demand side response and demand side management programs, respectively. It is not clear how alternative energy requirements or the provision of demand response and demand side management services by the EDCs to default customers will impact the EDCs' competitive procurement of wholesale energy services for those default customers. Constellation requests that Section 54.186 of the Regulations be modified to require the EDCs to identify in their implementation plans the extent to which compliance with the alternative energy requirements or the provision of demand response and demand side management services will be part of the wholesale service that it procures through the competitive procurement process set forth in Section 54.186. Constellation also requests that the Regulations be clarified to ensure that all of the EDC's costs to provide this service to default service customers will be borne by those default service customers and will not be subsidized by any other customers.

**P. Section 54.187(b) and (c):** Constellation recommends that these regulations be modified to specify that the EDC in its role as default provider be required to offer a "fixed rate *service*" rather than a fixed rate "*option*." Use of the phrase "fixed rate *option*" implies that the default provider may offer multiple types of service to customers in the same customer class. Constellation believes that the default provider should not be permitted to offer different forms

of default service options; rather, there should be just one default service offered to customers who need or want default service (keeping in mind that the default service offered to different classes of customers may have different features).

**Q. Section 54.187(d):** The Commission has proposed to grant the utilities the flexibility to offer a fixed price service to customers larger than 500kW. However, the utilities should not be in the position of offering multiple service options to customers in the same class. Thus, Constellation would request that the last sentence of this Regulation be modified as follows:

The default service provider may propose, as an alternative to hourly priced service but not in addition to hourly priced service, a fixed rate for these customers in its default service implementation plan.

**R. Section 54.187(e)(7):** Constellation is concerned that this proposed regulation may not be sufficient to capture all of the relevant retail service cost items listed in 54.187 (a)(2). For example, collection costs, customer service costs, and taxes are not listed in this proposed regulation. Constellation therefore recommends that the following language be substituted for 54.187 (e)(7):

Other reasonable and identifiable ~~administrative or regulatory~~ expenses consistent with § 54.187 (a)(2) applicable to hourly rate service.

**S. Section 54.188 (a) and (b):** Sections 54.188 (a) states that:

A default service implementation plan shall initially be referred to the Office of Administrative Law Judge for further proceedings as may be required.

Constellation believes this Section does not provide sufficient certainty to interested stakeholders that there will be a process established by which stakeholders may offer comments with respect to the default service implementation plans; such input is essential to ensure the continued development of competitive markets. Accordingly, Constellation recommends that the Section be revised as follows:

A default service implementation plan shall initially be referred to the Office of Administrative Law Judge for further proceedings ~~as may be required~~ which shall include the initiation of a proceeding and notice and opportunity for comment or an evidentiary proceeding, as determined by the Commission.

**T. New Proposed Section 54.189(f):** The Commission has determined at this time that the EDC should retain its role as the default service supplier, a decision that Constellation

supports at this stage in the development of competitive markets in Pennsylvania. In allowing the EDCs to be the default service provider, it is important, however, that there be appropriate safeguards to ensure that this incumbent advantage cannot be abused by placing additional barriers to competitive retail market development. Constellation therefore recommends that the Commission adopt a regulation forbidding the utility from marketing its default service. Constellation recommends the following regulation:

Other than such customer information and notification requirements as are ordered by the Commission with respect to the services set forth in the default service order, the EDCs shall in no way promote any default supply services or describe any of them as being superior or preferable to services supplied by competitive retail suppliers. EDCs shall also take no action that would result in the delay of a customer's decision to take competitive retail supply service, or result in a delay in an EGS obtaining the necessary usage information of a customer who consents to providing this information to the EGS.

### III. CONCLUSION

The Commission has issued a set of well designed Default Service Regulations and Constellation looks forward to working closely with the Commission and other stakeholders to ensure that the implementation of the Regulations brings the benefits of competitive markets to consumers. Constellation believes that the modifications suggested herein will enhance and clarify the regulations and urges the Commission to adopt them.

Respectfully submitted,



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On behalf of Constellation Energy  
Commodities Group, Inc. and Constellation  
NewEnergy, Inc.

Dated: April 27, 2005