

THE PENNSYLVANIA UTILITY LAW PROJECT

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December 14, 2011

Via E-Filing

Secretary Rosemary Chiavetta
Pennsylvania Public Utility Commission
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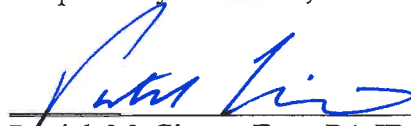
Re: Joint Comments of AARP, PULP, and CLS to the Tentative Order Entered November 14, 2011 regarding Interim Guidelines Regarding Standards for Changing a Customer's Electricity Generation Supplier, Docket No. M-2011-2270442

Dear Secretary Chiavetta:

Please accept for filing the Joint Comments of AARP, the Pennsylvania Utility Law Project and Community Legal Services, Inc. to the Commission's Tentative Order entered November 14, 2011 in the captioned matter.

Thank you for your assistance and please feel free to contact me directly should you have any questions.

Respectfully submitted,



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**PENNSYLVANIA
PUBLIC UTILITY COMMISSION**

Re: Interim Guidelines
Regarding Standards for Changing
A Customer's Electricity Generation
Supplier

Docket No. M-2011-2270442

TENTATIVE ORDER ENTERED NOVEMBER 14, 2011

**COMMENTS OF AARP
The Pennsylvania Utility Law Project
and
Community Legal Services, Inc.**

December 14, 2011

AARP, the Pennsylvania Utility Law Project (“PULP”), and Community Legal Services, Inc. (“CLS”) appreciate the opportunity to provide comments to the Commission on its Tentative Order entered November 14, 2011 that proposes changes to the existing regulations and guidelines applicable to a switch from an Electric Distribution Company (EDC) to an Electric Generation Supplier (EGS) or from one EGS to another.

AARP is a nonprofit, nonpartisan membership organization that helps people 50+ have independence, choice and control in ways that are beneficial and affordable to them and society as a whole. AARP has members residing in each of Pennsylvania’s counties and representing all segments of the socio-economic scale. Moreover, a substantial percentage of AARP’s members live on fixed or limited incomes and depend on reliable electric service for adequate heat, lighting, and powering life-saving medical devices. AARP has previously submitted comments on the various initiatives associated with the Commission’s Retail Markets Investigation, of which this proposal is a part.

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

CLS is a not for profit law firm that provides free legal service to the low income residents of Philadelphia. Each year, CLS receives hundreds of requests for legal assistance on utility issues. CLS’s Energy Unit represents individuals and client groups in utility matters,

advocates for affordable utility service on reasonable terms, and conducts community education on utility consumer rights.

Introduction

As stated by the Commission in its Tentative Order, the purpose of this initiative is to shorten the timeframe for a customer switching from default service to an EGS or from one EGS to another EGS. The Commission’s Tentative Order states that this initiative is a response to customer complaints and dissatisfaction with the current switching process.¹

The Commission has already adopted formal regulations which govern this switching process. These regulations were adopted in 1998 and are codified as 52 Pa. Code §57.171-§57.179. Pursuant to these regulations, to initiate a switch, when a contact occurs between a customer and an EGS to request a change, the EGS must notify the EDC of the customer’s selection by the end of the next business day following the customer contact, *see* 52 Pa. Code § 57.173(1), but the Commission has waived this provision when the customer’s service is not to start until some distant, future date. *See Petition of PP&L Energy Plus Company*, order entered June 29, 1999 at Docket No. P-00991673, 1999 WL 641179.

The regulations also require the EDC, upon receipt of the EGS’ notification, to mail a 10-day confirmation letter to the customer by the end of the next business day following receipt of the notification of the customer’s selection of an EGS. *Id.* at § 57.173(2). This letter states that it constitutes a 10-day waiting period and instructs the customer to contact the EDC if the customer did not authorize the switch to the EGS.² *Id.* Finally, the regulations state that the

¹ The Tentative Order does not contain information about the volume of such complaints, how many are from commercial or residential customers, or the time frame over which these complaints have been filed.
² As the Commission points out in its Tentative Order, the 10-day confirmation period is intended to allow customers with a reasonably sufficient time to cancel a switch that was not authorized as opposed to an additional contractual rescission period.

EDC must then make the change in supplier on the customer's account in the first feasible billing period following the 10-day waiting period. *Id.* at § 57.174

The regulations governing switching time-frames compliment those found at 52 Pa. Code §54.1-§54.9, which implement additional consumer protections including a 3-day rescission period following receipt of the EGS disclosure statement. 52 Pa. Code § 54.5(d). As explained in the Tentative Order, many EGSs wait until the expiration of this 3-day period before notifying the EDC of the enrollment, but they are not required to do so.

This system, which includes EGS and EDC responsibilities, has effectively operated for more than 10 years and has been included in plain language descriptions of the Commission's customer education materials, utility shopping instructions, and educational materials issued by other agencies concerning how to shop in Pennsylvania retail electricity market and the customer's consumer protections to prevent slamming.

Overall Recommendations

AARP, PULP and CLS support strong consumer protection policies to prevent slamming and improper or erroneous enrollments of a residential customer to an EGS or from one EGS to another. These consumer protections have proven important in the regulation of generation suppliers in Pennsylvania and other states, particularly when there is a pattern or practice of customer complaints that indicate that the EGS has not properly disclosed the nature of the transaction, when customers are misled about the contact and purpose of the EGS solicitation, and when the EGS has failed to manage its sales force and ensured proper compliance with the relevant consumer protection regulations.

AARP is aware of formal investigations in Pennsylvania, New York, Illinois, Delaware, Maryland, Georgia, and other states in which customer complaints about slamming and

misrepresentation have resulted in significant reforms, license revocation, and fines. Many of these investigations have focused on door-to-door marketing programs that rely on independent contractors as sales agents and whose actual conduct is often not properly managed or supervised by the EGS management. As a result, any changes to Pennsylvania's consumer protection regulations should be done with careful attention to the intended as well as the unintended consequences. AARP, PULP and CLS support the current Pennsylvania regulations and submit that there has been no documented evidence that these regulations do not work, that they are actually impeding the development of a robust competitive retail electric market, or that customers are dissatisfied with these procedures.

That said there is always room for improvement based on actual experiences. Therefore, AARP, PULP and CLS support changes to the EDC and EGS electronic communication protocols to enhance or make the enrollment process more efficient and timely. AARP, PULP and CLS support additional consumer education messages by the EDC and EGS, as well as on the PaPowerSwitch.com website about the enrollment process and the timing of enrollment. Furthermore, AARP, PULP and CLS would support a shortened EDC confirmation letter from 10-days to 5-days to more carefully overlap with and compliment the EGS's obligation to issue a three-day right of rescission if this proposal is explored in a formal rulemaking as indicated below. Finally, where an EDC has installed and activated smart meters, AARP, PULP and CLS support the concept of mid-cycle switching. With smart meter technology there should not be any barrier to changing a customer's EGS at any time and without regard to meter reading and billing schedules since the EDC can obtain a customer's usage information on a daily basis and prorate the customer's forthcoming monthly bill with usage charged at the EDC or default

service rate and that portion of the monthly usage charged to the new EGS rate for generation supply.

However, AARP, PULP and CLS do not support the scope and scale of the Commission's proposed changes to existing consumer protection regulations as proposed, particularly with regard to the elimination of the confirmation letter and the proposed account transfer letter issued by the EDC.

The following comments reflect specific concerns on certain proposed Interim Guidelines as set forth in the Tentative Order. To the extent that our comments do not address specific Interim Guidelines, AARP, PULP, and CLS do not oppose those proposals. Specifically, AARP, PULP, and CLS do not oppose Interim Guidelines H, I, and J and consider these proposals as appropriate explanations of already adopted regulations.

Interim Guideline D. Waiver of Regulations.

The Commission's Tentative Order proposes to adopt significant changes to the 10-day confirmation letter by eliminating the letter completely and relying entirely on the 3-day right of rescission letter that is sent by the EGS. Instead of a confirmation letter, the EDC would be required to send a "customer account transfer letter" to the customer. The authority of the Commission to make such a significant change to its formally adopted regulations through a Tentative Order as opposed to a formal rule making is not clear. The Commission's Tentative Order does not explain why such a dramatic waiver of existing regulations should be adopted. Furthermore, the Tentative Order provides no criteria to be considered or threshold to meet prior to the Commission acting to waive its duly adopted regulations.

The regulations that the Commission proposes to waive (52 Pa. Code §§ 57.173-174) were adopted pursuant to the procedures set forth in the Commonwealth Documents Law, 45

P.S. § 1101 *et seq.*, and were published in the Pennsylvania Bulletin on November 20, 1998. *See* 28 Pa.B. 5770. In general, the purpose of the Commonwealth Documents Law is to promote public participation in the promulgation of a regulation. To that end, an agency must invite, accept, review and consider written comments from the public regarding the proposed regulation or changes thereto. Specifically, the Commonwealth Documents Law requires the Commission to issue a notice of proposed rulemaking before amending its regulations. Section 1201 states, in relevant part: “Except as provided in section [1]204 an agency shall give, in the manner provided in section 405 (relating to additional contents of temporary supplements) public notice of its intention to promulgate, *amend or repeal* any administrative regulation.” 45 Pa. C.S. § 1201 (emphasis added).

AARP, PULP, and CLS submit that none of the reasons provided in section 1204 of the Commonwealth Documents Law, which would allow the Commission to forgo a formal rulemaking in order to amend or repeal its duly promulgated regulation, are applicable here. That section provides,

Except as otherwise provided by regulations promulgated by the joint committee, an agency may omit or modify the procedures specified in sections [1]201 and [1]202, if:

- (1) The administrative regulation or change therein relates to: (i) military affairs; (ii) agency organization, management or personnel; (iii) agency procedure or practice; (iv) Commonwealth property, loans, grants, benefits or contracts; or (v) the interpretation of a self-executing act of Assembly or administrative regulation; or
- (2) All persons subject to the administrative regulation or change therein are named therein and are either personally served with notice of the proposed promulgation, amendment or repeal or otherwise have actual notice thereof in accordance with law; or
- (3) The agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefore in the order adopting the administrative regulation or change therein) that the procedures specified in sections [1]201 and

[1]202 are in the circumstances impracticable, unnecessary, or contrary to the public interest.

45 Pa. C.S. § 1204. The circumstances surrounding the issuance of the Tentative Order certainly do not indicate that either §1204 (1) or (2) applies. Furthermore, there is no indication that the formal rulemaking process is “impractical, unnecessary, or contrary to the public interest.” To the contrary, ensuring that customers are not switched to an EGS without their affirmative consent is a matter of significant public import.

To be clear, AARP, PULP and CLS agree that certain reforms in the manner in which the EDC and EGS communicates enrollment requests should be undertaken, particularly requirements on EGSs to more specifically inform their prospective customers about the timeframes for enrollment and implementation of their new price for generation supply service. Furthermore, AARP, PULP and CLS understand that there may be a need to make the switching process more efficient and, if possible, result in enrollments that reflect the customer’s intent in a timelier manner. However, we do not agree that significant changes to the existing regulations should be undertaken at this time without a formal rulemaking process that can consider evidence and input from a wide range of stakeholders and obtain the formal approvals pursuant to the Pennsylvania Administrative Procedures Act, the Commonwealth Documents Law, and the Regulatory Review Act.

Nonetheless, AARP, PULP and CLS offer the following comments directed to the substance of the Commission’s proposal. These comments should not be viewed as waiving our objections to this process, but rather as our preliminary positions on the issues outlined in the Tentative Order.

Interim Guideline E. Meter Read Date

The Commission proposes that an EGS should, to the extent possible, obtain information about a customer's meter read date so that the EGS is able to advise a customer about the date that the customer's account will be switched. AARP, PULP, and CLS support this Guideline. Much of the impetus for the issuance of these Interim Guidelines is the anecdotal assertion that customers who have already elected to switch are frustrated by the delay in having the switch from the EDC to the EGS occur. Certainly having the EGS explain, at the time the request to switch is made, when the anticipated switch date will occur would mitigate much of this customer confusion and frustration.

Interim Guideline G. Customer Receipt of Written Disclosure Statement; Start of 3-Day Contract Rescission Period

The Commission proposes to retain the rebuttable presumption that a disclosure statement and notification of the right of rescission is received by a customer 3 days after properly deposited in the U.S. mail. The Commission should consider the potential implications of widespread public reports that historical delivery periods for First Class U.S. Mail are going to be significantly impacted by proposed budget cuts, reductions in processing centers, elimination of Saturday delivery, etc. According to press reports, most first class letters will be delayed up to one business day as a result of these changes scheduled to be implemented in 2012. While AARP, PULP and CLS do not oppose a mail-box rule, the Commission should consider the implications of the changes to U.S. Mail service prior to deciding on the length of time that is appropriate for a rebuttable presumption to be invoked.

Interim Guideline K. EDC Transfer of Customer Account.

This Guideline implements the Commission's changes to existing regulations concerning the customer contacts with the EGS, the 10-day waiting period for a customer to respond to an

EDC confirmation letter, and the time-frame requirements associated with this confirmation letter. The Commission's Tentative Order labels this 10-day letter as "unnecessary." (Tentative Order at 19.) However, the Commission does not identify why this letter is unnecessary. Nor does the Order identify any analysis of slamming complaints, any EDC experience with responses to the 10-day letter, or any other factual evidence to support this conclusion. AARP, PULP and CLS object to the conclusion contained within the Tentative Order that this letter is "unnecessary" without the Commission first providing the evidence or analysis it relied upon to support this conclusion.

Furthermore, the assertion that "A consequence of eliminating the 10-day waiting period is the elimination of the confirmation letter that the EDC sends to the customer that initiates the waiting period" (Tentative Order at 12) is not justified. One does not necessarily follow the other. The Commission should explore whether the 10-day waiting period is too long – though, as noted above, no evidence of these reasons were provided in its Tentative Order. Based on evidence gathered through a formal rulemaking process, the Commission may then seek to propose a shortened confirmation period. However, the fact that 10 days *may* be too long does not mean that there is no need for a confirmation letter at all.

This is particularly true given that not all shopping transactions are the same. A customer could on his or her own call an EGS without solicitation because of information gathered from PAPowerswitch.com or from the OCA. In this case, there is certainly less of a need for a confirmation letter because of the manner in which the customer chose to switch. Additionally, a customer could respond to a mailing received by an EGS, in which case a confirmation letter seems more important. On the other hand, a switch could result from a visit at a customer's home

by a door-to-door marketer. This situation, in our view, has a much greater possibility of undue influence, mistake, or slamming.

By eliminating the letter completely, the Commission is eliminating a very important safeguard in this process and the manner in which the Commission proposes to implement this change through a waiver of the adopted regulation is of concern. While the occurrence of unauthorized transfer of service is likely much smaller than the thousands of legitimate transfers that occur, AARP, PULP and CLS submit that preventing unauthorized transfers is an essential component of an effectively functioning retail electric market. The Commission's previous determination that the EDC-issued confirmation letter is an important safeguard to prevent slamming and unintended enrollment orders should not be overruled at this time and in this manner.

Interim Guideline L. Customer Notice of Account Transfer.

This Guideline proposes that the EDC issue an "account transfer letter" to inform the customer about the transfer of the customer's account to an EGS. The term "transfer" is not appropriate and is confusing in the context of the Pennsylvania retail electric market. More appropriately, the customer has "enrolled" with the EGS to provide generation supply service and the Guideline should be rewritten to describe this more narrow purpose of the customer's authorization.

In Appendix B the Commission proposes a sample letter, which is designed "so that it does not create the impression that the customer is being given an opportunity to reconsider his or her selection of EGS." (Tentative Order at 20) The customer is told to contact "his or her EGS" using the information in the EDC letter or the EGS disclosures. However, this approach fails to correctly respond to the situations in which the customer does not understand that he or

she has selected or approved an EGS, but receives this letter stating that his or her account will be enrolled with an EGS. In such a situation, the customer should not have to call the EGS to complain about this switch or enrollment. The customer should be able to call the EDC and allege that the account has been enrolled in error and/or that the customer has no knowledge of such an enrollment being authorized by the customer of record. The customer who is alleging an enrollment in error or because of fraudulent conduct will not have an EGS disclosure statement and will not understand the meaning of this letter as proposed in Appendix B.

Pursuant to Pennsylvania law, a customer has a right to file a dispute with the EDC about an alleged error or improper enrollment with an EGS. The Commission's proposed approach appears to eliminate or discourage this statutory right. 66 Pa. C.S. §2807 states:

(d) Consumer protections and customer service.--The electric distribution company shall continue to provide customer service functions consistent with the regulations of the commission, including meter reading, complaint resolution and collections. Customer services shall, at a minimum, be maintained at the same level of quality under retail competition.

(1) The commission shall establish regulations to ensure that an electric distribution company does not change a customer's electricity supplier without direct oral confirmation from the customer of record or written evidence of the customer's consent to a change of supplier.

66 Pa. C.S. § 2807 (d) (Emphasis added.)

Finally, AARP, PULP, and CLS do not object to a customer's ability to agree to accept communications from the EDC concerning enrollment with an EGS for generation supply service electronically. However, the Commission's guidelines should require the EDC to specifically amend its electronic billing and notice procedures to include this type of notice and inform customers of this change and obtain authorization and approval from the customer about this change prior to implementing this option. This type of authorization could be done

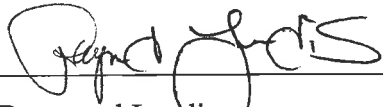
electronically as long as the customer responds to the EDC notification and agrees to the change, either through electronic mail or at the EDC's website.

Conclusion

AARP, PULP and CLS thank the Commission for this opportunity to Comment on its Tentative Order dated November 14, 2011 and urges the Commission to abandon its proposal to eliminate the confirmation letter and 10-day waiting period without first initiating a formal rulemaking process that would thoroughly explore the role of the EDC confirmation letter and the impact of potential changes, including a shortened time period, for this important safeguard for consumers.

Respectfully submitted,

AARP



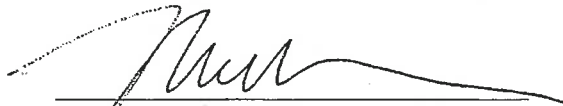
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Dated: December 14, 2011