

# STATEMENTS OF POLICY

## PENNSYLVANIA PUBLIC UTILITY COMMISSION

[52 PA. CODE CH. 69]

[M-971032]

### Electric Distribution Utility Rates, Rules, Regulations and Practices

The Pennsylvania Public Utility Commission (Commission) on December 18, 1997, adopted a proposed policy statement to state the Commission's interpretation of the effect of the enactment of Chapter 28 of the Public Utility Code upon existing or future rates, rules, regulations or practices of local distribution utilities and conformance with State policies, supervision and market power remediation requirements. The contact person is John Levin, Assistant Counsel, Law Bureau, (717) 787-5978.

*Commissioners Present:* John M. Quain, Chairperson; Robert K. Bloom, Vice Chairperson, Concurring in result; John Hanger; David W. Rolka; Nora Mead Brownell

Public Meeting held  
December 18, 1997

#### Proposed Policy Statement

*By the Commission:*

This proposed policy statement interprets the effect of 66 Pa.C.S. Chapter 28 and its provisions directing the establishment of a new, vibrant and effective competitive market in electricity generation in this Commonwealth by January 1, 2001 on those competitive issues which may be raised with respect to the rates, rules, regulations, conditions of service and practices of electric generation suppliers and electric distribution utilities.

With the passage of Chapter 28 on December 3, 1996, the General Assembly amended the Public Utility Code and established a comprehensive scheme for the restructuring of the Pennsylvania electric industry. Prior to the enactment of Chapter 28, electricity was provided by utilities which were essentially vertically integrated companies responsible for supplying generation, transmission and distribution of electricity to electricity customers within their service area. Interstate transmission rates and conditions of service were governed by the Federal Energy Regulatory Commission (FERC), under the Federal Power Act (16 U.S.C. §§ 791a—825r) while generation, intraState transmission and distribution services were regulated as to rates, terms and conditions by the Commission. Rates were generally determined by utilizing a traditional rate base/rate of return ratemaking methodology. The rate regulation in theory establishes just and reasonable rates and provides the regulated utility with an opportunity to recover its expenses and a fair return on its investment in public utility property devoted to the public service.

With the issuance of Order 888, Order No. 888, 61 FR 21,540 (May 10, 1996), FERC Stats. & Regs. ¶31,036 (1996), FERC restructured the transmission industry, opening it to equal and open access by anyone who might wish to transport electricity, setting the stage for the creation of a competitive market in electricity by anyone who had generation and wished to sell it. FERC also asserted jurisdiction over what were previously consid-

ered to be State regulated transmission facilities. In effect, FERC invited the states to establish a retail competitive market in electricity generation. Although Order 888 did not and could not direct states to create competitive energy markets within their borders, Pennsylvania was among the first states to do so. By creating a vibrant competitive market in electricity at the retail level, the General Assembly has adopted the position that competition yields greater benefits to the public than even the most diligent and careful rate regulation. At the same time, our Legislature recognized that transmission and distribution remain natural monopolies and will likely continue to be regulated in the traditional manner by the Commission.

An integral part of the Legislative scheme of Chapter 28 is its creation of certain rights and guarantees to customers and generation suppliers of equal, nondiscriminatory direct access to the transmission and distribution network. Another integral part of the scheme is the market power remediation provisions of 66 Pa.C.S. § 2811 (relating to market power remediation).

Essential to the Legislative scheme of Chapter 28 is the role that Federal public and private antitrust enforcement will play in the development of the new retail market. In essence, the Legislature has declared that many of the broad issues related to market power remediation will be the subject of public and private antitrust actions, 66 Pa.C.S. § 2811(a)—(c). We note that the Commission has relatively broad power to investigate and rule upon proposed mergers, consolidations, acquisitions or dispositions, 66 Pa.C.S. § 2811(e), and may entertain complaints by market participants regarding specific practices alleged to be in violation of the rights created by Chapter 28. At the same time, Chapter 28 has wrought fundamental changes in the Commission's authority to approve, oversee or sanction rates, rules, conditions of service or practices which are in violation of Chapter 28's Legislative scheme and which may also be in violation of the competition and antitrust laws of the United States.

Utilities and other entities comprehensively regulated by states have long been largely immune from the antitrust laws of the United States, owing to a defense known as the state action immunity doctrine.

This defense (which has a parallel for Federally regulated monopolies), traces from *Parker v. Brown*, 317 U.S. 341 (1943), and immunizes action by a state-regulated entity which would otherwise be a violation of the antitrust laws if the action is 1) under a legitimate state policy which is expressly stated and clearly articulated and 2) is actively supervised by the state. *California Retail Liquor Dealers v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). A recent application of the doctrine to a Pennsylvania regulated utility may be found in a series of cases starting with *Yeager Fuel, Inc. v. Pennsylvania Power and Light Co.*, 804 F. Supp. 700 (E.D.Pa. 1992), *aff'd in part, rev'd in part*, 22 F.3d 1260 (3d Cir. 1994), on remand, 953 F.Supp. 617 (E.D.Pa. 1997).

It is the responsibility of utilities, in the first instance, to conform their rates, rules and practices to the laws of the Commonwealth and the United States. It should be recognized by all that the ground rules for regulation of electric utilities have been fundamentally altered by the enactment of Chapter 28. The proposed policy statement recognizes Chapter 28's effect upon the prior regulatory scheme and provides a way for utilities or others who

may wish to determine the effect of the changes to obtain an interpretation from the Commission as to whether contested or potentially contested rates, rules, regulations or practices are in conformance with the clearly articulated policies of the Commonwealth of Pennsylvania and are under continuing, active supervision.

Accordingly, under 66 Pa.C.S. §§ 501, 502, 504, 505, 506, 508, 701, 1301, 1304, 1501, 1502, 1505, 1701—1705, 2101—2107 and 2801—2811, and the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. § 1201 et seq.) and the regulations promulgated thereunder at 1 Pa.Code §§ 7.1—7.4, we propose adoption of the policy statement to read as set forth in Annex A.

*Therefore, It Is Ordered that:*

1. A proceeding shall be initiated to consider the proposed policy statement in Annex A.

2. This order and Annex A shall be published in the *Pennsylvania Bulletin*. Interested persons may submit written comments, an original and 15 copies, to Secretary, Pennsylvania Public Utility Commission, P. O. Box 3265, Harrisburg, PA 17105-3265, and shall have 30 days from the date the order is published in the *Pennsylvania Bulletin* to submit comments. Commentors are strongly encouraged, if suggesting changes or additions to the proposed policy statement, to supply alternative interpretive language. A diskette containing the comments in electronic format should also be provided to the Commission.

3. A copy of this order and Annex A shall be served upon the Office of Consumer Advocate, the Office of Small Business Advocate, the Office of Trial Staff, all members of the Competitive Safeguards Working Group, all jurisdictional electric companies, all licensed electric providers and the Pennsylvania Electric Association.

4. The Secretary shall submit this order and Annex A to the Governor's Budget Office for review of fiscal impact.

JAMES J. MCNULTY,  
*Secretary*

**Fiscal Note:** 57-194. No fiscal impact; (8) recommends adoption.

#### **Annex A**

### **TITLE 52. PUBLIC UTILITIES**

#### **PART I. PENNSYLVANIA PUBLIC UTILITY COMMISSION**

##### **Subpart C. FIXED SERVICE UTILITIES**

#### **CHAPTER 69. GENERAL ORDERS, POLICY STATEMENTS AND GUIDELINES ON FIXED UTILITIES**

### **POLICY AND SUPERVISION OVER ELECTRIC RATES, RULES, REGULATIONS AND PRACTICES**

#### **§ 69.421 Electric rates, rules, regulations and practices.**

(a) Utilities have long been subject to pervasive regulation by the Commonwealth with regard to their rates, rules, regulations and practices. With the enactment of 66 Pa.C.S. Chapter 28 (Act) (relating to restructuring of electric utility industry), the General Assembly has comprehensively restructured the electric industry and has decreed the establishment of an open and vibrant competitive market in electricity generation within this Commonwealth. While the Commission has certain obligations

and jurisdiction to enforce the rights and obligations of the provision of equal and nondiscriminatory direct access within this Commonwealth and to remediate excessive market power, the act provides that the General Assembly intends that much market power remediation litigation will be conducted in the courts of the United States through public and private actions.

(1) Utilities and other comprehensively State-regulated entities have long been largely immune from the antitrust laws of the United States, owing to a defense known as the "state action immunity" doctrine.

(2) This defense traces from *Parker v. Brown*, 317 U. S. 341 (1943), and immunizes action by a state-regulated entity which would otherwise be a violation of the antitrust laws if the action is pursuant to a legitimate state policy which is expressly stated and clearly articulated and is actively supervised by the state. *California Retail Liquor Dealers v. Midcal Aluminum, Inc.*, 445 U. S. 97 (1980). A recent application of the doctrine to a Pennsylvania regulated utility may be found in a series of cases starting with *Yeager Fuel, Inc. v. Pennsylvania Power and Light Co.*, 804 F. Supp. 700 (E.D.Pa. 1992), *aff'd in part, rev'd in part*, 22 F.3d 1260 (3d Cir. 1994), on remand, 953 F.Supp. 617 (E.D.Pa. 1997).

(3) It is the responsibility of utilities, in the first instance, to conform their rates, rules and practices to the laws of Pennsylvania and the United States. It should be recognized by all that the ground rules for regulation of electric utilities have been fundamentally altered by the enactment of the Act. This section recognizes the Act's change of public policy and provides a way for utilities or others who may wish to determine the effect of these changes to obtain an interpretation from the Commission as to whether specific rates, rules, regulations or practices are in conformance with the clearly articulated policies of the Commonwealth and are under continuing, active supervision.

(b) It is the responsibility of every electric utility to conform its tariffs, rates, rules, regulations or practices to the policy of the Commonwealth to create and promote the formation of a vibrant and effective competitive market in electric generation, and to provide equal and nondiscriminatory direct access to the transmission and distribution network in this Commonwealth.

(c) Existing or proposed tariffs, rates, rules, regulations or practices of electric distribution utilities that are, in any manner, repugnant to the right of equal and nondiscriminatory direct access or tend to unlawfully reduce competition in the retail and wholesale electric energy market in this Commonwealth are, within the meaning of the state action immunity doctrine, contrary to the policy of the Commonwealth and are not actively supervised by the Commission.

(d) Existing or proposed rates, rules, regulations or practices of electric generation suppliers are not prescribed, within the meaning of the state action immunity doctrine, under any policy of the Commonwealth nor does the Commonwealth or the Commission actively supervise these rates, rules, regulations or practices.

(e) A person may, by filing a petition for declaratory order in the manner stated in subsection (f), request that the Commission issue a declaratory order as to whether any tariff, rate, rule, regulation or practice of any electric distribution utility is pursuant to state policy and is

actively supervised by the Commission. Blanket requests or requests lacking specificity will not be entertained.

(f) Petitions for declaratory orders shall, in addition to complying with § 5.42 (relating to petitions for declaratory orders) contain the following:

(1) Specific identification of the tariff, rate, rule, regulation or practice sought to be declared as in compliance with the policies of the Commonwealth and subject to the active supervision of the Commonwealth.

(2) Detailed identification and evidence of policies of the Commonwealth relied upon and identification of all

evidence tending to establish active supervision by the Commonwealth.

(3) Identification of all known litigation, whether anticipated, pending or resolved, that involves the specific provision that is the subject of the application.

(4) Evidence of proof of service of the petition upon all parties or potential parties to the known regulation.

[Pa.B. Doc. No. 98-450. Filed for public inspection March 20, 1998, 9:00 a.m.]