RULES AND REGULATIONS

Title 52—PUBLIC UTILITIES

PENNSYLVANIA PUBLIC UTILITY COMMISSION

[52 PA. CODE CHS. 3 AND 5]

[L-980133]

Motor Carrier Property Applications

The Pennsylvania Public Utility Commission (Commission) on August 13, 1998, adopted a final rulemaking to discontinue publication of property carrier applications. Given the Commission's limited regulatory role of safety and insurance issues, it no longer serves a useful purpose to require publication of property carrier applications. The contact person is John Herzog, Assistant Counsel, Legal Division, Bureau of Transportation and Safety, (717) 783-3714.

Executive Summary

The Federal Aviation Authorization Act of 1994 preempted state regulation of motor carriers of property in the areas of rates, routes and service. 49 U.S.C.A. §§ 14501(c), 41713(b). Currently, the Commission's regulatory oversight of property carriers is limited to safety and insurance issues. In light of the Federal preemption, the Commission modified its regulations to reflect its changed regulatory role. See Regulation of Motor Carriers of Property, Doc. No. L-00950106.

Historically, property carrier applications have been published in the *Pennsylvania Bulletin* to afford existing carriers the opportunity to protest new entrants into the market. Since the Commission no longer regulates the rates, routes and service of property carriers, the rationale for requiring publication of applications no longer exists. Further, the protest mechanism is a vestigial process left over from the bygone era of economic regulation and should likewise be eliminated.

The proposed amendments were published in the May 9, 1998, edition of the *Pennsylvania Bulletin*, 28 Pa.B. 2143. No comments were filed.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5a) on April 28, 1998, the Commission submitted a copy of the final rulemaking, which was published as a proposed rulemaking at 28 Pa.B. 2143 (May 9, 1998) with a 30-day comment period and served to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House Committee on Consumer Affairs and the Senate Committee on Consumer Protection and Professional Licensure for review and comment. In compliance with section 5(b.1) of the Regulatory Review Act, the Commission also provided IRRC and the Committees with copies of all comments received, as well as other documentation.

In preparing these final-form regulations, the Commission has considered all comments received from IRRC, the Committees and the public.

These final-form regulations were deemed approved by the House Committee on Consumer Affairs on October 13, 1998, and approved by the Senate Committee on Consumer Protection and Professional Licensure on September 29, 1998, and were approved by IRRC on October 22, 1998, in accordance with section 5(c) of the Regulatory Review Act.

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

Public Meeting held
August 13, 1998

Order

By the Commission:

By Order entered March 3, 1998, the Commission initiated a proposed rulemaking to amend its regulations governing publication and protest of applications for motor carrier property authority. Specifically, the Commission proposed eliminating both the publication and protest processes for applications for motor property carrier authority.

On April 6, 1998, the Office of Attorney General issued its approval of the proposed amendments as to form and legality. On April 28, 1998, copies of the proposed amendments were delivered for review and comment to the designated standing committees of both Houses of the General Assembly and IRRC. The proposed rulemaking was published in the May 9, 1998 edition of the *Pennsylvania Bulletin*, 28 Pa.B. 2143. No comments to the proposed regulations were filed.

The catalyst for the Commission's proposal to eliminate the publication and protest processes was its changed regulatory role mandated by the Federal Aviation Authorization Act, which inter alia, amended the Interstate Commerce Act at 49 U.S.C.A. §§ 14501(c) and 41713(b). In effect, the Aviation Act preempted state regulation of rates, routes or service of property carriers. However, states do maintain oversight of safety and financial responsibility for property carriers.

In response to the Aviation Act, the Commission promulgated regulations consistent with its changed regulatory role. Docket No. L-00950106. Those regulations provided, in part, for the continuing publication of property carrier applications. Further, the regulations provided that protests to property applications on the basis of safety/fitness could be filed within 10 days of the date of publication of the application in the *Pennsylvania Bulletin*.

Since passage of the Aviation Act and up to the time of the initiation of this rulemaking, there were approximately 2,214 new applications filed with the Commission for property carrier authority. Only one protest was filed, which was dismissed because it failed to address safety issues.

Given the Commission's limited regulatory role over property carriers, we conclude that it no longer serves a useful public purpose to require publication of property carrier applications. As noted, the Commission's oversight of property carriers is limited to safety and insurance issues. No property carrier application has been protested on these issues since passage of the Aviation Act. Further, since passage of the Aviation Act, the Commission has instituted a Safety Fitness Review program for new carriers and a Safety Audit program for existing carriers. We believe that these programs effectively carry out the Commission's charge to ensure that property carriers provide safe service in this Commonwealth.

In light of the foregoing, we will delete the publication requirement for motor carrier property applications. Further, we will eliminate the protest process for property

carrier applicants. As noted, no protests on the basis of safety/insurance have been filed to property carrier applications since passage of the Aviation Act. We believe the protest mechanism is a vestigial process left over from the bygone era of economic regulation. Currently, the protest process serves no useful purpose. Safety and insurance concerns are adequately addressed through the application process and the safety fitness review. We believe that deletion of the protest process in conjunction with the publication requirement eliminates an unnecessary step in the application process.

Accordingly, under section 501 of the Pennsylvania Public Utility Code, 66 Pa.C.S. § 501, the Commonwealth Documents Law (45 P. S. § 1201 et seq.) and 45 Pa.C.S. § 702(3), we hereby amend the regulations in 52 Pa. Code, as discussed previously and as set forth at 28 Pa.B. 2143; *Therefore,*

It Is Ordered:

1. The regulations of the Commission, 52 Pa. Code Chapters 3 and 5, are amended by amending §§ 3.381 and 5.51 to read as set forth at 28 Pa.B. 2143.

2. The Secretary shall submit a copy of this order, together with 28 Pa.B. 2143 to the Office of Attorney General for approval as to form and legality.

3. The Secretary shall submit a copy of this order, together with 28 Pa.B. 2143, to the Governor's Budget Office for review of fiscal impact.

4. The Secretary shall submit a copy of this order, together with 28 Pa.B. 2143, for formal review by the designated standing committees of both Houses of the General Assembly and by IRRC.

5. The Secretary shall deposit this order and 28 Pa.B. 2143 with the Legislative Reference Bureau for publication in the *Pennsylvania Bulletin.*

6. This regulation shall become effective immediately upon publication in the *Pennsylvania Bulletin.*

JAMES J. MCNULTY,
Secretary

(*Editor's Note:* For the text of the order of the Independent Regulatory Review Commission relating to this document, see 28 Pa.B. 5636 (November 7, 1998).)

Fiscal Note: Fiscal Note 57-196 remains valid for the final adoption of the subject regulations.

[Pa.B. Doc. No. 98-1905. Filed for public inspection November 20, 1998, 9:00 a.m.]

PENNSYLVANIA PUBLIC UTILITY COMMISSION

[52 PA. CODE CH. 57]

[L-970121]

Ensuring Customer Consent to a Change of Electric Supplier (Antislamming)

The Pennsylvania Public Utility Commission (Commission) on May 31, 1998, adopted a final rulemaking to establish regulations ensuring 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. The contact persons are Joseph Farley, Bureau of Consumer Services, (717) 787-5755 and Terrence J. Buda, Law Bureau, (717) 787-5755.

Executive Summary

On December 3, 1996, Governor Tom Ridge signed into law the Electricity Generation Customer Choice and Competition Act (act). The act revised the Public Utility Code, 66 Pa.C.S. § 101 et seq., by inter alia, adding Chapter 28, relating to restructuring of the electric utility industry. The purpose of the law is to permit customers to buy electric generation from their choice of electricity generation suppliers.

Section 2807(d)(1) of the act requires the establishment of regulations ensuring 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. The purpose of the regulations is to implement and codify this provision of the act.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on September 30, 1997, the Commission submitted a copy of the final rulemaking, which was published as proposed at 27 Pa.B. 5270 (October 11, 1997) with a 30-day comment period and served to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House Committee on Consumer Affairs and the Senate Committee on Consumer Protection and Professional Licensure for review and comment. In compliance with section 5(b.1) of the Regulatory Review Act, the Commission also provided IRRC and the Committees with copies of all comments received, as well as other documentation.

In preparing these final-form regulations, the Commission has considered all comments received from IRRC, the Committees and the public.

These final-form regulations were deemed approved by the House Committee on Consumer Affairs October 13, 1998, and approved by the Senate Committee on Consumer Protection and Professional Licensure September 29, 1998, and were approved by IRRC on October 22, 1998, in accordance with section 5(c) of the Regulatory Review Act.

Commissioners Present: John M. Quain, Chairperson, Joint Statement of Chairperson and Commissioners follows; Robert K. Bloom, Vice Chairperson; John Hanger; David W. Rolka, Statement follows; Nora Mead Brownell

Public Meeting held
May 21, 1998

Revised Final Rulemaking Order

By the Commission:

Introduction

At public meeting of April 24, 1997, the Commission issued an order adopting and directing publication of proposed regulations to ensure that customer consent is obtained prior to the change of a customer's Electric Generation Supplier (EGS). The proposed regulations were published at 27 Pa.B. 5271 (October 11, 1997) and a 30-day comment period set.

We received comments from the Pennsylvania Electric Association (PEA) on behalf of its member companies, from the Office of the Consumer Advocate (OCA), from the Enron Corporation (Enron), from PECO Energy (PECO), from GPU Energy (GPU), from PP&L, Inc.

(PP&L), from UGI Utilities (UGI), from the Pennsylvania Gas Association (PGA), and from IRRC. After reviewing these comments and making appropriate revisions, we issued a Final Rulemaking Order on February 27, 1998.

On April 3, 1998, PEA filed a Petition for Rescission and Amendment under section 703(g) of the Public Utility Code, 66 Pa.C.S. § 703(g), and § 5.572 (relating to petitions for relief following a final decision). According to section 703(g), "[t]he commission may, at any time, after notice and after opportunity to be heard as provided in this chapter, rescind or amend any order made by it." Section 5.572(b) and (e) require that the petition be served on each participant in the proceeding and that answers be filed and served within 10 days after service, respectively. Answers to the PEA petition were filed by the OCA, Enron, Conectiv Energy, New Energy Ventures, and Green Mountain Energy Resources, L.L.C.[1]

PEA Petition

In support of its petition, PEA asserts that the final-form regulations will involve significant operational and customer services problems that will effectively make switching an EGS difficult for EGSs, electric distribution companies (EDCs) and customers. According to PEA, regulations contained in the Final Rulemaking Order do not reflect the best practices and experiences learned from the Pennsylvania pilot programs. PEA explained that EDCs made ongoing changes to their systems, processes and procedures based upon their experiences in implementing the pilots, in combination with input from customers, EGSs and Commission staff.[2] PEA acknowledges that the following streamlined procedures utilized in the pilots are now in place:

1. The EDC accepts the customer's request for a new supplier, but indicates to the customer that the EDC must receive confirmation back from the new supplier either accepting or rejecting the request for service;

2. The EDC notifies the customer's existing EGS by an electronic data transfer of the customer's request to change suppliers; and

3. The EDC notifies the new EGS via electronic data transfer of the customer's request to initiate service. PEA explains further that the EGS must confirm the acceptance or rejection of the customers' request with the EDC by means of electronic transfer and the EGS will send all information needed, if a change is made, to the EDC by electronic transfer. PEA maintains that the electronic transfer represents a permanent record of the date and time the transaction was sent, as well as the information included in the transaction which enables both EDCs and EGSs to retain accurate records regarding a customer's change in supplier without the need for a paper record and, finally, is easily available to the Commission in the event a customer's selection is lost or delayed. Finally, PEA submits that the confirmation letter sent to the customer ensures that the customer is aware of the change and provides an opportunity to correct any errors.[3]

Based on the member companies' experiences gained in the pilot programs, PEA submits that the most efficient method for a customer to select a supplier is for the customer to contact the EGS directly. PEA contends that the EDC should not be required to set-up or participate in a three-way call, as provided for in § 57.173 of the final-form regulations. PEA submits that EGSs must be allowed to process a customer request for a change of supplier. PEA explains the process as follows:

> When the customer contacts an EGS, the EGS gathers the information that the EDC will need to process the change in supplier, including the customer's name, service address, account number, the tariff or rate schedule of the new supplier under which the customer will be served, the contract date between the customer and new EGS, the customer's preferred billing option, and any sales tax exemption to which the customer is entitled. Within 5 days, the new EGS provides this information to the EDC via electronic data transfer. The EDC then sends a confirmation letter to the customer as early as the next business day after receiving the electronic data transfer transaction, but no later than 15 days prior to the next meter read date at which time the new suppliers' energy is scheduled to flow. The customer has 10 days to notify the EDC in the event the customer's selection of the new supplier is incorrect, or in any way in error.

(PEA petition, pages 7-8). Although not specifically identifying the period, "15 days prior to the next meter read," to send the confirmation letter as a departure from the "next business day" requirement in the final-form regulations at § 57.172, PEA is essentially requesting a substantial increase in this window to send out the letter.

Next, PEA objects to the requirement in § 57.173(1) which mandates that "the EDC must answer 90% of these transferred calls within 60 seconds." PEA first argues that the commenting parties did not have an opportunity to address this requirement and it would be inappropriate to unilaterally impose this requirement for the first time in a final rulemaking order. Secondly, PEA submits that the requirement is factually unsupported and, therefore, arbitrary and capricious. In fact, PEA asserts that the pilot programs have not provided any basis for concluding that telephone calls are not being answered in a timely manner. Lastly, PEA notes that EDCs are currently operating under a rate cap, and it would be inappropriate to require EDCs to incur additional costs.

PEA also finds fault with § 57.173(a)(3) which, inter alia, determines that when a written authorization is returned to the EGS, the EGS must furnish the EDC with a copy. Again, PEA emphasizes that this procedure is unnecessary since EGSs inform EDCs of their contact with a customer by electronic data transfer. Moreover, storing these documents imposes an undue burden on EDCs.

Answers to the PEA Petition

In answering the petition, the OCA agrees with many of the concerns raised by the PEA and certain aspects of the proposals presented in its petition. The OCA supports a procedure that focuses first on the customer's contact with the supplier and, therefore, agrees with the approach of PEA that has the EDC referring customers to suppliers or obtaining confirmation from the supplier that the supplier and the customer have an agreement. Furthermore, the OCA recommends that the regulations reference the obligation of the supplier to issue the necessary disclosures consistent with other applicable regulations. While the OCA submits that the petition

[1] Connectiv Energy, New Energy Ventures and Green Mountain Energy Resources, L.L.C. did not file comments in this rulemaking, but generally support the petition filed by PEA.

[2] PEA maintains that all the occurrences of slamming during the pilots took place in the early stages when new systems and procedures were being tested. The term "slamming" is generally referred to as switching a service provider without customer consent.

[3] The confirmation letter is identified in § 57.173(a)(2) and acts as additional notification to the customer of the proposed change of electricity generation supplier.

proposes an acceptable method of transmitting data between EDCs and suppliers, the OCA notes that the electronic record is not proof of the customer's approval of the switch. The OCA supports requiring suppliers to obtain a customer's consent either in writing, by verification obtained from an independent third party, or by means of electronic verification.

Enron has expressed reservations over the PEA proposal. While supporting reliance on electronic orders and elimination of the need for signed authorization from the customer to either the EGS or EDC, Enron opposes PEA's proposal to extend the 10-day confirmation period to 15 days. Enron has additional concerns if the Commission requires a signed authorization from the customer to verify the change of supplier.[4] Under these circumstances, Enron submits that the teleconferencing requirement option set forth in the final-form regulations must be implemented along with Enron's recommendation that the EDC service representatives be available from 9 a.m. until 9 p.m., 7 days a week, as opposed to 8:30 a.m. to 6 p.m. during the week. Furthermore, Enron emphasizes that the Commission does have the authority to impose standards dictating the availability of EDC service representatives since the regulation may modify the proposed text as long as the final regulations "do not enlarge its original purpose." See 45 Pa.C.S. § 1202.

Enron proposes extending the availability of the EDC service representatives to accommodate residential customers when they are most likely to make a change. In addition, Enron argues that the confirmation period is too long thus inconveniencing the customer switching suppliers. Enron recommends reducing the period to 3 business days or 5 calendar days with the EDC being required to implement the switch at the next meter read.[5] Moreover, Enron prefers the elimination of all signed authorizations relying instead on electronic orders as proposed by PEA. Enron agrees that when a customer contacts the EDC to make a selection, the customer should either be referred to the EGS or the EDC should confirm the customer's selection with the EGS. However, Enron opposes the extension of the confirmation period from 10 days to 15 days.

Enron submits that section 2807(d)(1) does not require a signed authorization but only "written evidence." Based on its interpretation, Enron believes that an electronic order printed by the EGS can satisfy the "written evidence" requirement of the act. If a signed authorization is required, Enron objects to the authorization being submitted to the EDC based on confidentiality concerns.

Standard for Rescission and Amendment

Section 703(g) of the Public Utility Code gives us the authority to reconsider our orders under appropriate circumstances. 66 Pa.C.S. § 703(g). However, the standard for determining whether we should exercise that authority to grant a petition for reconsideration was articulated in *Duick v. Pennsylvania Gas and Water Company*, 56 Pa.P.U.C. 553 (1982), wherein the Commission stated that:

> A Petition for Reconsideration, under the provisions of 66 Pa.C.S. § 703(g), may properly raise any matters designed to convince the Commission that it should exercise its discretion under this code section to rescind or amend a prior order in whole or in part. In this regard, we agree with the court in the *Pennsylvania Railroad Company* case, wherein it was said that:
>
> > Parties . . . cannot be permitted by a second motion to review and reconsider, to raise the same questions, which were specifically considered and decided against them.
>
> What we expect to see raised in such petitions are new and novel arguments, not previously heard or considerations which appear to have been overlooked or not addressed by the Commission.

Id. at p. 559. The arguments presented in PEA's petition satisfy this standard. In issuing the final rulemaking order, we did not thoroughly consider the ramifications of the practices and procedures implemented in the pilot programs, nor did we thoroughly consider the utilization of electronic data transfers to change suppliers.

Analysis

Section 2807(d)(1) of the Public Utility Code directs the Commission to ". . . 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." We agree with Enron's interpretation of this provision of the act which supports the PEA petition. Section 2807(d)(1) of the Public Utility Code does not mandate the existence of a signed authorization to change a supplier and a printed electronic transfer order can satisfy the "written evidence" requirement of the act. In addition, we never intended that the proposed regulations implementing this statutory provision preclude the use of electronic data transfer as a means of communication between the EDC and the EGSs to process the customer request. Moreover, there is no requirement in the proposed regulations that the EDC maintain a paper record—the electronic transfer order can remain with the EGS.

In other words, each EGS will process all customer requests electronically, and inform the appropriate EDC in the same manner. In turn, the EDC will provide written confirmation to the customer, and will also confirm the customer's request with the appropriate EGS. Thereafter, power will flow from the selected EGS to the customer beginning with the next successive billing period. We hasten to add, however, that our adoption of this procedure is conditioned upon the EGS retaining the appropriate records, in an accessible manner, consistent with the proposed regulations in § 57.179. Furthermore, PEA requests an extension of the "next business day" requirement of § 57.173(a)(2) to allow sending the confirmation "no later than 15 days prior to the next meter read date" (PEA Petition, page 6). PEA has neglected to provide any support for this request to amend the regulation in this manner. Enron objects to this change and provides compelling support that extending the confirmation period may unreasonably delay a customer's selection. Finally, we further find that a 3-business day or 5-calendar day confirmation period, as proposed by Enron, is not an adequate period of time for customers to fully assess their change in supplier and recognize whether a slam has occurred.[6]

We conclude that the 10-day period for confirmation should stand. Any provision for additional order processing time after conclusion of the 10-day period is a matter specific to the information systems of the EDC and shall

[4] Enron also requests an elimination of the requirement that a valid written authorization be for the "sole purpose" of confirming a customer switch so as to allow a signed contract to satisfy the written authorization requirement. See 52 Pa. Code § 57.176.

[5] Enron believes that the selection process must be simple, efficient, and timely since customers will want their selection implemented immediately.

[6] It should also be noted that the 10-day customer rescission period includes the period of time the letter is in the mail.

be disposed of on an individual case basis or through our standards for electronic data transfer and exchange.

PEA similarly proposes that the EDCs should not be required to set-up or participate in a three-way telephone conference call to confirm a customer's request for a change of EGS as the regulations require. It is the PEA's position that the customer can give the oral confirmation to the EGS. The EGS will then process the request through the EDC via an electronic transfer within 5 days. The confirmation letter is sent to the customer by the EDC as early as the next business day after receiving the electronic data transfer.

Upon further reflection, we shall modify our earlier rulemaking to eliminate the requirement that the EDC provide three-way conferencing to facilitate customer interactions with the customer's EGS. Such a requirement does appear too expensive and time consuming. Furthermore, it is a less effective manner to facilitate the interactions when compared to electronic data transfer. Moreover, elimination of this requirement has the corollary effect of removing the business standards associated with the three-way conferencing set forth in § 57.173, which has been removed in Annex A.

Conclusion on PEA Petition

Essentially, PEA argues that customers should be required to directly contact an EGS to initiate, terminate or change their supplier. Based upon the experience gathered in the pilot programs, as well as the conclusions reached in the Electronic Data Working Group, such a procedure appears reasonable and thus shall be adopted. In reaching this conclusion, we are particularly persuaded by PEA's argument that such a requirement will simplify data gathering, and draw clear lines of responsibility for the accuracy and processing of customer information.

Finally, we are compelled to emphasize that these regulations must and will be vigorously enforced to ensure the success of the customer choice program. The regulations will serve to minimize, if not eliminate, instances of "slamming." Should the violations occur, however, and be supported by substantial evidence in an on-the-record proceeding, we will not hesitate to render appropriate fines or revoke the license of the offending EGS. As a result, we encourage and expect all participants to faithfully adhere to both the spirit and letter of these regulations. The following is a section by section summary of the comments which were received and the changes that resulted, consistent with our disposition of the PEA petition.

§ 57.171. Definitions.

The PEA, PECO and the IRRC recommended that a definition section be incorporated into the regulations. In addition, IRRC recommended that the regulations define Electric Distribution Company and Electric Generation Supplier along with the acronyms "EDC" and "EGS." IRRC also urged that the terms or acronyms be used consistently throughout the regulation. In the interest of clarity, we agree and have included a definition provision. We also consistently use the defined terms or acronyms in the provisions throughout the regulations.

§ 57.172. Customer Contacts with the EDC.

This section appeared as § 57.171 in the proposed rulemaking. The PEA made several recommendations relating to the wording of this and other provisions. In those instances where the recommended wording changes reflect the statute or add clarity we have adopted the recommendations.

The PEA, PECO and GPU also recommended that we revise the requirement whereby customers would be asked to supply their Social Security numbers (SSNs). We have addressed this recommendation through the action we have taken on the PEA petition. The regulations will require customers to initiate their EGS selection with the chosen supplier. Therefore we have eliminated the requirement that customers supply their SSNs to the EDCs.

In Enron's view, we should also eliminate the requirement that the customer supply the EDC account number. Similar to the disposition of the SSN issue, this recommendation has been effectively addressed through the action taken on the PEA petition.

Regarding § 57.171(a)(2), many of the commentators noted that the term "confirmation package" should be changed to "confirmation letter." We agree and have incorporated the change into the regulations at § 57.173(a)(2). Additionally, IRRC recommended that we specify when the 10-day waiting period begins. We agree and have added a requirement that the letter be mailed by the end of the next business day following the EGS's notification to the EDC of the customer's EGS selection. The day the confirmation letter is sent is identified as the start of the 10-day period. This should also address Enron's concern that the EDCs will use this procedure to delay the selection process. Finally, we have specified certain customer-specific information the letter must contain.

Enron questions the need for the letter and recommends that if it is sent, it should come from the selected EGS. In our view, the letter is a necessary protection to ensure that no unauthorized switches occur. In addition, since it is the EDC who will make the switch, it is appropriate that the letter come from that entity. This does not prohibit the selected EGS from sending the customer appropriate information as well.

Enron and the OCA also find the 10-day waiting period to be excessive. Enron states that customers upset by a slam typically complain the day they become aware of the unauthorized switch. Enron provides no basis for this contention. We disagree, noting that the 10 days includes mailing and delivery time as well as providing sufficient opportunity for the customer to call the EDC, the EGS, or perhaps both.

Both Enron and the OCA noted their disagreement with our position regarding customer contacts with the EDC. In their view, the customer must initiate service with the EGS and it is the EGS who would supply either the verbal or written authorization to the EDC.

Enron also recommends that we change our position relative to what constitutes written verification of the customer's consent to a change of electricity supplier. It is Enron's view that written notice from the EGS should be considered a valid written authorization. Again, as a result of the action taken on the PEA petition the EGS is permitted to provide the written notice to the EDC via a data transfer.

PECO commented that in instances where the customer cannot provide the required information on the initial phone call, that providing written authorization should not be the only avenue available to the customer to initiate the change of EGS. Since the regulations now require the customer to initiate service with the selected EGS this is no longer an issue.

§ 57.173. Customer Contacts with EGSs.

IRRC pointed out that our proposed regulations dealt with customer contacts with EDCs and EGSs under one provision. It was recommended that in the interests of clarity, these contacts be addressed under separate provisions. These regulations reflect our agreement to adopt this recommendation.

IRRC noted that our proposed regulations failed to address the use of the various forms of electronic mail as valid written authorization. We have addressed this concern through our disposition of the PEA petition. The EGSs are now permitted to electronically notify the EDCs of customer supplier selections by data transfer. In this regard, PECO states that we have failed to address situations where the customer sends the written authorization directly to the EDC. These regulations make clear the requirement that customers must initiate service with the selected EGS.

Enron recommended that § 57.173 of our proposed regulations be modified to permit immediate teleconferencing with the customer, the EGS and the EDC, to process the customer's selection regardless of who initiates the contact. We have addressed this issue through our disposition of the PEA petition where we have eliminated any need for teleconferencing. The OCA opposes such a modification based on the abuses that have been documented in the telephone industry. The OCA position has been mooted by our disposition of the PEA petition which granted the request to exclude the teleconferencing requirement.

Finally, the commentators had different views as to when EDC representatives should be available to handle calls transferred from an EGS. PEA and its member companies support the view that the regulations should require availability during normal working hours. Enron recommends that the EDCs be available 24 hours a day. IRRC suggested that, in the interest of customer convenience while recognizing the potential demand on the EDC, the EDC employes be available until 6 or 7 p.m. Again, we have effectively addressed this issue through the disposition of the PEA petition by eliminating the need for teleconferencing.

§ 57.174. EDC Requirement.

Enron strongly recommended that the regulations include a provision requiring the EDC to complete an EGS switch within 36 hours of the customer's selection of the EGS. We agree that it is necessary to provide a standard to avoid delays in the switching process. However, we believe the 36-hour standard to be unreasonable and, in fact, due to the 10-day waiting period required by these regulations, it is impossible. Instead, to be consistent with our electronic data transfer and exchange standards, we have required that the change occur at the beginning of the first feasible billing period following the 10-day waiting period.

§ 57.175. Persons Authorized to Act on Behalf of a Customer.

Many of the commentators noted that our proposed regulation allowing customers to identify persons authorized to act on their behalf did not limit the activity in which these persons could become involved to authorizing a change of EGS. In fact, only Enron disagreed that such a distinction was necessary. Since these regulations are intended to govern customer changes of EGSs, we agree that the limitation is necessary. We have modified the requirement accordingly.

PEA and its members also oppose allowing a customer to authorize more than one person to act on the customer's behalf. The basis of this opposition is that it will add needless administrative burden on the EDC and increase the possibility of customer confusion. We disagree and have allowed customers to authorize more than one person to act on the customer's behalf. In our opinion, only a small number of customers will use this provision, and an even smaller number submit multiple authorizations. However, we have pledged to revisit these regulations within the next 5 years. If at that time an EDC can demonstrate that the provision has proven burdensome, we will reconsider our decision.

Finally, PP&L recommends that we require EDCs to inform customers of their right to authorize others to act on their behalf in the confirmation letter. We have not adopted this recommendation. We believe that customers who need to avail themselves of this option will become aware of it should a problem arise when someone else attempts to make the switch without authorization or through consumer educational materials that will be produced as the customer choice process continues. Since the primary purpose of the confirmation letter is to act as a protection against the unauthorized switch of an EGS, we want to avoid including extraneous material that may draw attention away from the most important information.

§ 57.176. Valid Written Authorization.

Both PEA and PP&L pointed out that the phrase "but are not limited to" was present in the Commission's April 24, 1997, proposed rulemaking order but does not appear in the *Pennsylvania Bulletin* version. Both parties favored its inclusion. We agree and have made the necessary change.

Again, Enron argues that the requirement include more general agency agreements authorizing the supplier to exercise broader control over the customer's electric service arrangements. We disagree and believe the current provision is necessary to ensure that these regulations accomplish the goal of assuring that customer consent is obtained prior to a change of EGS.

§ 57.177. Dispute Procedures.

IRRC commented that this provision, which was originally titled "Customer Responsibility to Pay Bills," should be modified to read "Customer Dispute Procedures." We agree that a modification is needed and have changed the title to "Dispute Procedures" since the requirements pertain largely to the EDCs and the EGSs.

Of the commentators, only Enron and the OCA did not object to our proposed requirements. In fact, Enron felt that this requirement alone offered a strong and effective deterrent to slamming and "that in and of itself, this provision will eliminate systematic slamming." While we agree that the provision stands as a significant deterrent, we believe that other safeguards are necessary to reach the goal set by the act.

PEA and its members take the position that the requirement would result in many more instances of a "customer dispute" than are realistic and lead to a wasteful expenditure of resources. PEA argues that should the customer service representative of either an EDC or an EGS be successful in resolving a customer's concern in the context of the initial inquiry, the matter should not be considered a dispute. This position is consistent with the current Chapter 56. However, we believe, at least through the initial phase of customer choice, that the requirements we have set forth are

needed if the standard set forth in the act is to be attained. First, it is unlikely that service representatives will be able to satisfy customers on the initial call because an investigation involving a retrieval of records and contacts with a third party (the EDC or EGS) will be necessary.

Second, permitting an EDC to attempt to satisfy customer inquiries to avoid disputes creates the possibility of the EDC systematically showing favoritism to its affiliated supplier. This could occur because complaints against affiliates could be handled differently than those filed against nonaffiliates. That is, representatives could be instructed to "give away the store" during the initial contact to satisfy customers calling to complain about the affiliate. Thus, there would be few, if any, documented disputes filed against the affiliated supplier. On the other hand, these same service representatives could be instructed to treat complaints against nonaffiliated suppliers as disputes. We believe setting the standard that all slamming complaints be considered disputes to be both reasonable and necessary.

The PGA argues that the EDCs' duties are largely ministerial tasks necessary to affect a change of the EGS. The association argues that "before one burdens utilities with new requirements inspired by Chapter 56, one should remember that slamming arises out of dealings between suppliers and customers." This argument fails to convince us for two reasons. First, it is conceivable that the company responsible for a slam is an EDC. Second, the statute directs us to produce regulations to ensure that an EDC does not change an EGS without the customer's consent. We view the EDC involvement as more than simply ministerial tasks. Finally, while we are directing the EDCs and the EGSs to use the Chapter 56 dispute procedures to investigate and respond to slamming allegations, these regulations are inspired by the act, not by Chapter 56. We have chosen to use the Chapter 56 procedures because the EDCs have years of experience with these regulations that should prove to be beneficial in limiting the training needs of service representatives.

All the commentators except Enron and the OCA also object to the proposed provision granting the customer an EGS refund if a valid slamming complaint is filed within the first three billing periods, since the customer should reasonably have known of the change of EGS. The commentators base their objections on the notification protections already present in the regulations. In addition, a number of commentators state that the proposal may result in consumers playing the system to obtain refunds of the EGS portion of the bill. Based on these objections, we have reduced the 3 months to a 2-month time frame. We believe 2 months is reasonable based on our experience with pilot programs where delays in billing have occurred that could affect a customer's ability to recognize that a change of EGS has taken place. Even taking into consideration the notification requirements in these regulations, we believe it is reasonable to allow the customer to receive at least one bill in order to recognize that an unauthorized switch of the EGS has occurred. In terms of customer abuse, we note that refunds are only appropriate when the dispute investigation has established that an unauthorized switch has indeed occurred. Therefore, we fail to see how customers can play the system to obtain refunds.

We have adopted a PP&L recommendation that permits the Commission's Bureau of Consumer Services to adjudicate administrative charges as well as electricity supplier bills. Based on an IRRC recommendation, we have also made it clear that refunds only pertain to generation charges.

IRRC recommended that we delete this provision based on four concerns. First, IRRC questions the Commission's statutory authority to implement and enforce the provision. IRRC views the refund provision as a penalty and notes that section 1928 of the Rules of Statutory Construction, 1 Pa.C.S. § 1928, requires the strict construction of the penal provisions. IRRC goes on to comment that nothing in the act permits the Commission to penalize a supplier by taking 3 months of revenue. Furthermore, it is IRRC's position that the Commission cannot impose such a penalty based on its general rulemaking authority.

We do not view the refund provision as a penalty. The provision is intended to provide relief to the adversely affected customer and make the customer whole. That is, the customer is being refunded the money paid or credited the amount owed for a service that was never requested. In addition, the Commission imposed a penalty for the unauthorized switch, it would be in the form of a fine under 66 Pa.C.S. § 3301.

Currently, under Chapter 56, the Commission routinely orders that refunds be given to customers in situations deemed appropriate. In the case of an unauthorized switch of an EGS, we believe the customer is due a refund for the unordered service so long as the customer's claim is filed promptly.

The second IRRC concern relates to the question as to whether the provision affords adequate due process to the supplier. We believe it does. Should a customer file the dispute with the EGS, it will be the EGS who conducts the initial investigation and makes the initial determination as to whether an unauthorized switch took place. Clearly, in this instance the EGS will have the opportunity to makes its case. Should the complaint be filed with the EDC, we believe the EDC, in the course of investigating the complaint, will need to communicate with the EGS before rendering an initial determination. In these instances, should the EGS dispute the findings of the EDC, an appeal to the Commission's Bureau of Consumer Services is available. Should the EGS be dissatisfied with the informal decision rendered by the BCS, the matter can be formally appealed to the Commission. In our view, the provision does not violate the EGS's due process rights.

IRRC's third concern reflects that of the EDCs who view three billing periods as an unreasonably long period of time for the customer to register an unauthorized switch of EGS dispute. As stated previously, we have adjusted the time frame to 2 months. We believe this is reasonable because it is probable that the customer will have received at least one bill from the new EGS in this time frame. Finally, we have already addressed IRRC's fourth concern by making it clear that the refund provision only applies to the generation charges.

The OCA recommendations included adding a provision to § 57.175 that would explicitly state the Commission's intent to use its authority over EGSs who exhibit a pattern of violating these regulations. We agree and have modified our regulations accordingly. This modification also results in the acceptance of an IRRC recommendation to reference the Commission's authority to assess penalties.

§ 57.178. Provider of Last Resort.

PECO's comments included the recommendation that the regulations include a provision that addresses the

situation where a customer does not necessarily return voluntarily to the EDC in its role as the supplier of last resort. We agree and have added a provision stating that these regulations do not apply in these instances.

§ 57.179. Record Maintenance.

Several commentators including IRRC, PEA and UGI recommended that we revise this provision by lowering the record retention requirement from 4 to 2 years. Virtually every commentor cites Chapter 56 requirements as the basis of the recommendation. We agree that the 4-year period should be reduced and our regulations now call for a 3-year record retention period. The 3-year period is based on 66 Pa.C.S. § 3314 which sets 3 years as the time frame within which the Commission can assess penalties for violations of our regulations. If it becomes necessary to take the action against an EGS or an EDC, we believe it only prudent to be able to access all potential violations that may be part of the action.

Reporting Requirements.

After consideration of all the comments, we have deleted any reporting requirement. Since the record maintenance requirement allows us to access complete records should the need arise, we will not require that annual reports be filed with us. We have already pledged to revisit these regulations within the next 5 years. At that time, a determination can be made as to whether reporting requirements are necessary.

In finalizing these regulations we believe we have met the intent of the act. We have made it as easy as possible for customers who wish to change electric suppliers to do so. In addition, we have established the necessary protections to assure that customers do not have their electricity supplier changed without their consent.

Accordingly, under 66 Pa.C.S. §§ 501 504—506, 1301 and 1501, and the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201—1208), and the regulations promulgated thereunder at 1 Pa. Code §§ 7.1—7.4, the Commission proposes adoption of the revised final rulemaking order to establish regulations to ensure that customer consent is obtained prior to a change of electric suppliers, as noted and set forth in Annex A; *Therefore,*

It Is Ordered that:

1. The relief requested in the PEA Petition for Rescission and Amendment of the Rulemaking Order Establishing Standards For Changing a Customer's Electric Supplier is hereby granted in part and denied in part, consistent with the body of this order.

2. The Commission's February 27, 1998, Final Rulemaking Order is hereby revised to the extent we have granted relief requested in the PEA's Petition for Rescission and Amendment.

3. The regulations of the Commission, 52 Pa. Code Chapter 57, are amended by adding §§ 57.171—57.179 to read as set forth in Annex A.

4. The Secretary shall submit this order and Annex A to the Office of Attorney General for approval as to legality.

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

6. The Secretary shall submit this order and Annex A for formal review by the designated standing committees of both houses of the General Assembly, and for formal review and approval by IRRC.

7. The Secretary shall deposit the original certified order and Annex A with the Legislative Reference Bureau for publication in the *Pennsylvania Bulletin.*

8. A copy of this order and Annex A shall be served upon all persons who submitted comments in this rulemaking proceeding.

9. The regulations adopted with this order are effective upon publication in the *Pennsylvania Bulletin.*

JAMES J. MCNULTY,
Secretary

(*Editor's Note:* The addition of §§ 57.178 and 57.179 was not included in the proposed rulemaking at 27 Pa.B. 5270.)

(*Editor's Note:* For the text of the order of the Independent Regulatory Review Commission relating to this document, see 28 Pa.B. 5636 (November 7, 1998).)

Fiscal Note: Fiscal Note 57-184 remains valid for the final adoption of the subject regulations.

Statement of Chairperson Quain, Vice Chairperson Bloom, Commissioner Hanger, Commissioner Rolka and Commissioner Brownell

Today, we set in place the "rules of the road" by which customers' requests to switch electric generation suppliers will be processed. We have observed other industries in which unauthorized customer switching, known as "slamming," has occurred. We wish to state now, up front and for the record: this Commission will have zero tolerance for slamming by any means and in any form.

During the pilots, we learned from experience. Our procedures have been developed based on those experiences. The participants in the marketplace have also had the opportunity to participate in that process and develop systems in light of those experiences. Accordingly, there is no excuse, no reason why slamming should occur. Regardless, it will not be tolerated.

In the event slamming occurs, Commission action will be swift and hard. The Public Utility Code provides for penalties which include monetary penalties of up to $1,000 per day, per violation, suspension of licenses and revocation of licenses. That authority permits this Commission to impose penalties of $1,000 per day, per customer from the day the unauthorized switch occurred until the matter is corrected. We may also order suspension of licenses so as to prohibit marketing or acceptance of new customers for a period of time. And, as the ultimate penalty, this Commission has the authority to revoke a license and prohibit any sale of retail generation services in this Commonwealth.

Customer slamming is among the most serious violations of our rules and regulations. There is no grace period. There is no "transition period" as far as slamming is concerned. You can count on this Commission imposing commersurate penalties quickly and without hesitation.

Statement of Commissioner David W. Rolka

I wholeheartedly support the sentiment offered in the statement authored by Commissioner Brownell. Additionally, in deference to the modifications offered by the Chairman which simplifies the administrative responsibilities of the generation suppliers and distribution utilities, payment obligations for allegedly slammed service

should be presumed to be resolved in favor of the customer during any pending deliberations on the subject.[1]

Annex A

TITLE 52. PUBLIC UTILITIES

PART I. PUBLIC UTILITY COMMISSION

Subpart C. FIXED SERVICE UTILITIES

CHAPTER 57. ELECTRIC SERVICE

Subchapter M. STANDARDS FOR CHANGING A CUSTOMER'S ELECTRICITY GENERATION SUPPLIER

§ 57.171. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

Act—The Electricity Generation Customer Choice and Competition Act, 66 Pa.C.S. §§ 2801—2812.

Customer—A purchaser of electric power in whose name a service account exists with either an EDC or an EGS. In addition, the term includes all persons authorized to act on a customer's behalf.

EDC—Electric distribution company—An electric distribution company as defined in section 2803 (relating to definitions).

EGS—Electric generation supplier—A supplier as defined in section 2803 of the act.

§ 57.172. Customer contacts with the EDC.

When a customer or a person authorized to act on the customer's behalf orally contacts the EDC to request a change of EGS, the EDC shall notify the customer that the selected EGS shall be contacted directly to initiate the change.

§ 57.173. Customer contacts with EGSs.

When a contact occurs between a customer or a person authorized to act on the customer's behalf and an EGS to request a change of the EGS, upon receiving direct oral confirmation or written authorization from the customer to change the EGS, the contacted EGS shall:

(1) Notify the EDC of the customer's EGS selection by the end of the next business day following the customer contact.

(2) Upon receipt of this notification, the EDC shall send the customer a confirmation letter noting the proposed change of EGS. This letter shall include notice of a 10-day waiting period in which the order may be canceled before the change of the EGS takes place. The notice shall include the date service with the new EGS will begin unless the customer contacts the EDC to cancel the change. The 10-day waiting period shall begin on the day the letter is mailed. The letter shall be mailed by the end of the next business day following the receipt of the notification of the customer's selection of an EGS.

§ 57.174. Time frame requirement.

When a customer or authorized party has provided the EGS with oral confirmation or written authorization to change EGSs, consistent with electric data transfer and exchange standards, the EDC shall make the change at the beginning of the first feasible billing period following the 10-day waiting period, as prescribed in § 57.173 (a)(2) (relating to customer contacts with EGSs).

§ 57.175. Persons authorized to act on behalf of a customer.

A customer may identify persons authorized to make changes to the customer's account. To accomplish this, the customer shall provide the EDC with a signed document identifying by name those persons who have the authority to initiate a change of the customer's EGS.

§ 57.176. Valid written authorization.

A document signed by the customer of record whose sole purpose is to obtain the customer's consent to change EGSs shall be accepted as valid and result in the initiation of the customer's request. Documents not considered as valid include, but are not limited to, canceled checks, signed entries into contests and documents used to claim prizes won in contests.

§ 57.177. Customer dispute procedures.

(a) When a customer contacts an EDC or an EGS and alleges that the EGS has been changed without consent, the company contacted shall:

(1) Consider the matter a customer registered dispute.

(2) Investigate and respond to the dispute consistent with §§ 56.151 and 56.152 (relating to utility company dispute procedures).

(b) When the customer's dispute has been filed within the first two billing periods since the customer should reasonably have known of a change of the EGS and the dispute investigation establishes that the change occurred without the customer's consent, the customer is not responsible for EGS bills rendered during that period. If the customer has made payments during this period, the company responsible for initiating the change of supplier shall issue a complete refund within 30 days of the close of the dispute. The refund or credit provision applies only to the generation charges.

(c) A customer who has had an EGS changed without having consented to that change shall be switched back to the original EGS for no additional fee. Any charges involved in the switch back to the prior EGS are the responsibility of the company that initiated the change without the customer's consent.

(d) If a customer files an informal complaint with the Commission alleging that the customer's EGS was changed without the customer's consent, the Bureau of Consumer Services will issue an informal decision that includes a determination of customer liability for any EGS bills or administrative charges that might otherwise apply, rendered since the change of the EGS.

(e) In addition to customer-specific remedies, the Commission may, after investigation and decision, assess fines under 66 Pa.C.S. Chapter 33 (relating to violations and penalties) and initiate proceedings to revoke the license of an EGS that demonstrates a pattern of violating this subchapter. The Commission may order a particular EGS that has a pattern of violating this subchapter to obtain written authorization from every new customer as a condition of providing service in this Commonwealth. Nothing in this subchapter is intended to limit the Commission's authority.

§ 57.178. Provider of last resort.

This subchapter does not apply when the customer's service is discontinued by the EGS and subsequently

[1] The Chairperson's motion directs that suppliers are to be contacted directly to initiate, terminate or change suppliers and that those changes be communicated electronically to the distribution utility.

provided by the provider of last resort because no other EGS is willing to provide service to the customer.

§ 57.179. Record maintenance.

Each EDC and each EGS shall preserve all records relating to unauthorized change of EGS disputes for 3 years from the date the customers filed the dispute. These records shall be made available to the Commission or its staff upon request.

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