

RULES AND REGULATIONS

Title 25—ENVIRONMENTAL PROTECTION

ENVIRONMENTAL QUALITY BOARD

[25 PA. CODE CH. 78A]

Unconventional Well Permit Application Fee Amendments

The Environmental Quality Board (Board) amends §§ 78a.1 and 78a.19 (relating to definitions; and permit application fee schedule) to read as set forth in Annex A. This final-form rulemaking satisfies the obligation of the Department of Environmental Protection (Department), as specified in §§ 78.19(e) and 78a.19(b), to provide the Board with an evaluation of the well permit application fees in Chapters 78 and 78a (relating to oil and gas wells; and unconventional wells) and recommend regulatory amendments to address any disparity between the income generated by well permit application fees and the cost of administering 58 Pa.C.S. Chapter 32 (relating to development) (2012 Oil and Gas Act) by the Department's Office of Oil and Gas Management (Oil and Gas Program or Program). This final-form rulemaking increases the well permit application fees from \$5,000 for nonvertical unconventional wells and \$4,200 for vertical unconventional wells to \$12,500 for all unconventional well permit applications to sustain the Program at current staff levels and operating costs. This final-form rulemaking does not amend the current fees for conventional well permit applications. This final-form rulemaking also removes definitions for "nonvertical unconventional well" and "vertical unconventional well" related to well permit applications as well permit application fees will now be the same for all unconventional well permit applications.

This final-form rulemaking was adopted by the Board at its meeting on January 21, 2020.

A. Effective Date

This final-form rulemaking will be effective upon final-form publication in the *Pennsylvania Bulletin*.

B. Contact Persons

For further information, contact Kurt Klappkowski, Director, Bureau of Oil and Gas Planning and Program Management, Rachel Carson State Office Building, 15th Floor, 400 Market Street, P.O. Box 8765, Harrisburg, PA 17105-8765, (717) 772-2199; or Elizabeth Davis, Assistant Director, Bureau of Regulatory Counsel, P.O. Box 8464, Rachel Carson State Office Building, Harrisburg, PA 17105-8464, (717) 787-7060. Persons with a disability may use the Pennsylvania AT&T Relay Service, (800) 654-5984 (TDD users) or (800) 654-5988 (voice users). This final-form rulemaking is available on the Department's web site at www.dep.pa.gov (select "Public Participation," then "Environmental Quality Board").

C. Statutory Authority

This final-form rulemaking is being made under the authority of 58 Pa.C.S. § 3274 (relating to regulations), which directs the Board to adopt regulations necessary to implement the 2012 Oil and Gas Act; 58 Pa.C.S. § 3211(d) (relating to well permits), which authorizes the Board to establish well permit application fees that bear a reasonable relationship to the cost of administering the 2012 Oil and Gas Act; and section 1920-A of The Adminis-

trative Code of 1929 (71 P.S. § 510-20), which authorizes the Board to promulgate regulations of the Department.

D. Background and Summary

The purpose of this final-form rulemaking is to increase unconventional well permit application fees to sustain the Program at current staff levels and operating costs. This fee increase is needed because the current revenue generated by the well permit application fees are not adequate to cover the Program's current costs despite recent staff reductions and the implementation of several cost-saving measures.

The fee increase in this final-form rulemaking is intended to cover the costs to sustain the existing Program. The other sources of revenue currently available to the Program, including conventional well permit application fees and the \$6 million distributed to the Department from the Impact Fee established by 58 Pa.C.S. Chapter 23 (relating to unconventional gas well fee) currently allocated to the Program, are needed to provide a funding buffer. This buffer is necessary in the event that the actual permit applications the Department receives in the years following this final-form rulemaking do not meet the permit application projections that form the basis of this final-form rulemaking, as well as restore the Program to a full staff complement of 226 people, hire necessary additional staff and fund program enhancements.

Statutory framework for well permit application fees

The Department is tasked with implementing the 2012 Oil and Gas Act. Under section 3202 of the 2012 Oil and Gas Act (relating to declaration of purpose of chapter), the purposes of the 2012 Oil and Gas Act are to:

(1) Permit optimal development of oil and gas resources of this Commonwealth consistent with protection of the health, safety, environment and property of Pennsylvania citizens.

(2) Protect the safety of personnel and facilities employed in coal mining or exploration, development, storage and production of natural gas or oil.

(3) Protect the safety and property rights of persons residing in areas where mining, exploration, development, storage or production occurs.

(4) Protect the natural resources, environmental rights and values secured by the Constitution of Pennsylvania (58 Pa.C.S. § 3202).

The 2012 Oil and Gas Act contains requirements regarding the exploration, development and recovery of oil and gas resources in this Commonwealth, including permitting, bonding, well location restrictions, protecting water supplies, containment, well control emergencies, restoration, plugging, reporting and enforcement. See 58 Pa.C.S. §§ 3201—3274. Regulations found at 25 Pa. Code Chapters 78 and 78a implement the 2012 Oil and Gas Act. The Department administers the 2012 Oil and Gas Act and its implementing regulations through the functions of the Program, including data management, staffing, well permitting, surface activity permitting, inspections, compliance, and policy and program development.

Section 3211(d) of the 2012 Oil and Gas Act provides: "Each application for a well permit shall be accompanied by a permit fee, established by the Environmental Qual-

ity Board, which bears a reasonable relationship to the cost of administering [the 2012 Oil and Gas Act].” 58 Pa.C.S. § 3211(d). A well permit application fee is a one-time payment submitted with each well permit application that is deposited into the Well Plugging Fund as a dedicated revenue source for the Program. This fee is set by the Board in regulation and must be reasonably related to the cost of the Program to administer the 2012 Oil and Gas Act. The fees do not provide ongoing revenue to the Program. For that reason, the fees received in a given year must fund all of the Program’s functions beyond permitting.

Based on this funding mechanism, the Board has established reasonable fees to fund Program costs. Prior fee increases have established a fee structure based on several factors, including annual well permit applications projections, the different types of wells, total well bore length, the costs to develop the different well types and ability to pay.

In accordance with 25 Pa. Code §§ 78.19(e) and 78a.19(b), the Department evaluates these fees and recommends regulatory amendments to the Board every 3 years to address any disparity between the Program income generated by the fees and the Department’s cost of administering the Program with the objective of ensuring fees meet all Program costs and the Program is self-sustaining.

Prior well permit applications fee increases

The Oil and Gas Act, originally enacted in 1984, established a \$100 well permit application fee. See 58 P.S. § 601.201(d), repealed by the act of February 14, 2012, (P.L. 87, No. 13), § 3(2). This fee remained in place for 25 years. In 2009 and 2014, the Board increased well permit application fees to fund the Program’s increasing expenses and to establish a fee structure that sets different amounts for the different types of wells, including unconventional, conventional and home use wells. As stated previously, the Board has established reasonable fees to fund Program costs for these different types of wells based on several factors, including annual well permit application projections, total well bore length, the costs to develop the different well types and ability to pay.

Declining well permit revenues

When the Board last amended the unconventional well permit fees in 2014, it eliminated a sliding scale and established a flat fee of \$5,000 for nonvertical unconventional wells and \$4,200 for vertical unconventional wells. The Board projected that those increased fees would be adequate to support the Program with a full complement of 226 staff provided the Program receives 2,600 unconventional well permits annually.

However, while that projection was accurate during the pendency of that rulemaking, the number of unconventional well permit applications received since that time has been lower than anticipated. In Fiscal Year (FY) 2014-2015, the Program received 2,533 unconventional well permit applications. In FY 2015-2016, the Program received 1,646 unconventional well permit applications. And in, FY 2016-2017, the Program received 1,993 unconventional well permit applications. As a result, the well permit application fees have not generated the revenue needed to fund Program costs.

Cost-saving measures

Because of declining unconventional well permit application fee revenues, the Program reduced staff over time from 226 employees to 190 employees today. The Program

also reduced operating costs, including the purchase of fixed assets and supplies. Over 3 years, the Program reduced operating and fixed asset costs by 38%.

Increasing workload

Despite declining well permit application revenues, the Program’s workload has increased. Each year more wells are drilled than plugged resulting in a growing inventory of wells to be inspected to ensure compliance with the 2012 Oil and Gas Act and its implementing regulations. There is also a growing number of support facilities, including gathering pipelines, well development impoundments, water withdrawals and other support facilities, with separate authorizations and inspection obligations. As the result of a continually growing oil and gas industry, the Program has increasing responsibilities to develop guidance, update forms, provide training, improve data management, and to study and evaluate new and evolving issues all to ensure that the Program operates effectively and efficiently while providing clarity to the regulated community. Equally important are the Program’s responsibilities related to gas storage as well as orphaned and abandoned wells. Finally, the Program must ensure that it responds to complaints, emergencies and requests for public records related to the implementation of the 2012 Oil and Gas Act. All of these activities are essential program functions beyond well permit application reviews that are necessary to administer the 2012 Oil and Gas Act and are paid for by the one-time well permit application fees.

As a result, the Program now struggles to meet its gas storage field inspection goals, consistently achieve appropriate permit review time frames, adequately fund training opportunities for staff and provide trainings for the industry. Important Program development initiatives, such as policies, best practices and technical guidance documents, have been put on hold indefinitely due to the lack of sufficient staff to develop and update these important pieces of the Program necessary to administer the 2012 Oil and Gas Act. In short, the Program is challenged to provide an adequate level of high-quality service to the public and to the industry.

Fee report

To thoroughly address prior inaccurate well permit application projections and to comply with §§ 78.19(e) and 78a.19(b), which require the Department to provide an evaluation of well permit applications fees and recommend regulatory changes every 3 years, the Department prepared and presented to the Board a 3-Year Regulatory Fee and Program Cost Analysis Report (Fee Report) at the Board’s April 17, 2018, meeting. A copy of the Fee Report is available from the persons listed in Section B.

The Fee Report provided that the Program’s projected budget to sustain the Program with 190 staff and operating costs in FY 2018-2019 would be approximately \$25 million. Given this projected budget and the current well permit application fees, the Program would need to receive 5,000 nonvertical unconventional well permit applications per year to sustain the Program. However, based on the average of annual well permit applications the Department received in FYs 2015-2016, 2016-2017 and 2017-2018 discussed previously, the Department anticipated receiving 2,000 unconventional well permit applications per year. For that reason, the Department recommended that the Board revise the unconventional well permit application fee to \$12,500. This analysis provided the basis for the proposed rulemaking.

Current projections

Based on the Fee Report’s analysis of unconventional well permit application trends for FYs 2014-2015, 2015-2016, and 2016-2017, the Program continues to anticipate that it will receive approximately 2,000 unconventional well permit applications per year. Additionally, the Program continues to project the costs to fund the Program at its reduced complement of 190 employees and operating costs at approximately \$25 million as explained in the following table. For this reason, as recommended in the Fee Report and in the proposed rulemaking, this final-form rulemaking establishes an increased unconventional well permit application fee of \$12,500.

<i>Expense</i>	<i>Cost (in dollars)</i>
Staff (190 positions at \$106,000 per staff person)	20,140,000
Operating Expenses (FY 2018-2019)	4,519,000
TOTAL Cost	24,659,000

The Department’s well permit application projections are reasonable given the challenges in predicting the number of well permit applications. It is significant that in FY 2017-2018, the Department received 1,674 unconventional well permit applications. And in FY 2018-2019, the Department received 1,684 unconventional well permit applications. For the first half of FY 2019-2020, the Department is on track to receive fewer than 1,600 unconventional well permit applications. The variability of unconventional well permit applications can be attributed to various market and industry changes. The price of natural gas has remained low, which industry analysts suggest is the result of supply-demand imbalances between the Appalachian region and the rest of the United States market. It might also be because the first few years of Marcellus Shale gas development constituted an initial boom and was not representative of drilling patterns in a more mature shale production market. Also, improvements in technology are allowing operators to extract more gas from each well, thus requiring fewer wells to satisfy the same demand. All of these trends are outside of the Department’s control, may be subject to a vacillating commodity market, and are not readily predictable.

Because of this reasonable uncertainty, it is critical that the other sources of revenue currently available to the Program, including conventional well permit application fees and the \$6 million distributed to the Department from the Impact Fee established by 58 Pa.C.S. Chapter 23 currently allocated to the Program, provide a funding buffer in the event that the actual permit applications the Department receives in the years following this final-form rulemaking do not meet the permit application projections. If that happens, the Program will need these other revenue sources to sustain the Program. If not, these funds will be allocated for the additional Program needs described as follows.

Other revenue sources

Once received, unconventional and conventional well permit application fees are placed in the Well Plugging Fund as a dedicated revenue source for the Program. In addition to the one-time fee that the Department receives with each well permit application, the Program has the following other sources of revenue: (1) conventional well permit application fees; (2) an appropriation from the Act 13 Impact Fee; and (3) incidental civil penalties collected

for violations of the 2012 Oil and Gas Act (section 3271(a) of the 2012 Oil and Gas Act (58 Pa.C.S. § 3271(a) (relating to well plugging funds)). No General Fund revenue is used to support the Program.

Conventional well permit application fees

Section 78.19(a) provides a sliding scale for conventional well permit applications based on total well bore length from \$250 for a well bore up to 2,000 feet to \$1,950 for a well bore between 11,501 feet to 12,000 feet. Conventional wells exceeding 12,000 feet pay \$1,950 plus \$100 for every 500 feet the well bore extends over 12,000 feet. See § 78.19(b). Home use wells with a well bore length of 1,500 feet or less pay a \$200 well permit application fee. See § 78.19(e).

The Department receives approximately 240 conventional well permits per year. The average conventional well permit application fee is approximately \$365.

Similar to unconventional wells, the number of conventional well permit applications has declined in recent years. This decrease in applications has resulted in less revenue from conventional well permit application fees. In FY 2015-2016, the conventional well permit application fee revenue was \$97,750. In FY 2016-2017, the conventional well permit application fee revenue was \$84,300. And in FY 2017-2018, the conventional well permit application fee revenue was \$76,973. In the proposed rulemaking, the Board stated the conventional well permit application fees were not included in the fee analysis for this rulemaking. To clarify, these fees are included in the Program’s overall budget, and the revenue collected from the fees represents less than 0.5% of the Program’s annual operating costs.

Act 13 Impact Fees

Act 13 of 2012, (58 Pa.C.S. §§ 2301–3504) (Act 13), established an annual impact fee for the unconventional well industry and provided for the collection and distribution of this fee (Act 13 Impact Fee). Under section 2314 of Act 13 (58 Pa.C.S. § 2314 (relating to distribution of fee)), the Act 13 Impact Fee is collected and deposited in the Unconventional Gas Well Fund administered by the Pennsylvania Public Utility Commission. In accordance with section 2314(c.1)(3), \$6 million of the annual fees collected are distributed to the Department “for the administration of [Act 13] and the enforcement of acts relating to clean air and clean water.”

During the proposed rulemaking process, the Board stated that the \$6 million distributed to the Department from the Act 13 Impact Fees were not included in the fee analysis. To clarify, these fees are included in the Program’s overall budget. Currently, the \$6 million appropriated to the Department from the Act 13 Impact Fee is allocated to the Program. Significantly, these fees are not dedicated solely to the Program and may be used to support the Department’s air and water programs. Allocation of these funds ultimately depends on the Department’s immediate needs. The Department has determined that it is currently appropriate for the Program to receive all \$6 million dollars from the Department’s Act 13 Impact Fee appropriation due to declining well permit application revenue.

Civil penalties

The Program also receives revenue from fines and civil penalties assessed for violations of the 2012 Oil and Gas Act. The Department has not included fines and civil penalties in its well permit application fee analysis, because relying on penalties to fund fundamental ele-

ments of a regulatory program is not appropriate and is contrary to sound public policy.

Chapter 102 and Chapter 105 fees

The Department receives fees from permit applications under 25 Pa. Code Chapters 102 and 105 (relating to erosion and sediment control; and dam safety and waterway management), including the Erosion and Sediment Control General Permit. These fees are not currently distributed to the Program. Instead, they are deposited into the Clean Water Fund. These fees are committed to funding critical operations that support County Conservation Districts as well as Department staff who, among other responsibilities, provide support and training to staff within the Program that review Chapter 102 and Chapter 105 permit applications and inspect permitted projects. In the Department's analysis of these fees, it was determined that if the Chapter 102 and Chapter 105 permit application fees were re-allocated to the Program, the Program would receive less of the \$6 million from the Act 13 Impact Fee because the Chapter 102 and Chapter 105 programs would then need a portion of those funds to make up for this reallocation.

Legacy wells

Significantly, the well permit application fee does not include the Program's costs to plug orphaned and abandoned wells. Section 3271(b) of the 2012 Oil and Gas Act requires a \$50 surcharge paid in addition to the well permit application fee. This surcharge is deposited into a restricted revenue account known as the Abandoned Well Plugging Fund to indemnify the Commonwealth for the cost of plugging abandoned wells. Section 3271(c) of the 2012 Oil and Gas Act requires a \$100 surcharge for oil wells and a \$200 surcharge for gas wells paid in addition to the well permit application fee. These surcharges are deposited into a restricted revenue account known as the Orphan Well Plugging Fund for the Department to plug orphan wells. These surcharges have not changed since the act of December 19, 1984 (P.L. 1140, No. 223) (58 P.S. §§ 601.101—601.605) (repealed by the act of February 14, 2012 (P.L. 87, No. 13)). Significantly, these permit surcharges are insufficient to cover the cost of properly plugging all legacy wells in Pennsylvania.

Program enhancements and restoring program staff complement

In the event that the actual number of permit applications that the Program receives meet the permit application projections in this final-form rulemaking, the \$6 million Act 13 Impact Fee revenue and conventional well permit application fees are available for needed program enhancements, restoring staff complement and adding necessary staff to administer the 2012 Oil and Gas Act and its implementing regulations.

The Program estimates that approximately \$6.5 million is needed for the following program enhancements and staffing needs. The Department developed these estimates for this final-form rulemaking. These estimates clarify and update prior estimates in the Fee Report and proposed rulemaking. Notably, the staffing numbers have been updated to reflect that the Program recently reorganized the Office of Oil and Gas Management to create three new management positions to oversee Statewide subsurface and surface permitting. Additionally, the current estimated cost of an employee based on standard benefits and average salary is \$106,000 and prior estimates were based on a prior estimated cost of \$100,000 per employee.

Enhanced electronic data management

The Program will allocate a portion of any available revenue to information technology projects for the Program. These include enhancing the current mobile digital inspections tools, digitizing forms and developing new databases that will better enable analysis of the effectiveness of the regulatory programs. This investment in technology will yield efficiencies for the Program and the regulated community in terms of more predictable and timely permit issuance, more effective site inspections, increased availability of staff for compliance assistance, and more streamlined reporting to and communication with the Department. It will also make the Program's work more transparent to the public as electronic documents can be easily made available online.

Enhancements to the mobile digital inspection platform and mobile devices will create additional improvements and efficiencies through the establishment of a risk-based inspection protocol. Through the protocol, wells will be ranked and color coded based on a hierarchy of need for an inspection. This will give inspectors and supervisors a simple way of prioritizing their work and ensuring that all wells are inspected an appropriate number of times during all phases of a well's life.

The Program also intends to digitize all other oil and gas related forms. These include the well record and completion report, alternative waste management authorization request, well plugging forms and others. Electronic receipt and storage of the permitting documents and forms will also result in significant savings in terms of records storage and of staff time and costs associated with requests from the public to access records. The public will enjoy greater access to timely data and information as the Department receives it.

Finally, the Department intends to develop additional databases to house information it collects to enable better analysis of Program effectiveness. Two of these databases include water sample results and spills. The Program receives thousands of ground and surface water sample results; these records are not managed in a manner that allows analysis over time and location. A properly designed data management system would give the Department the ability to analyze trends in water quality across this Commonwealth. Similarly, the spills database could produce reports on spill volumes, types, locations and causes, which could provide the basis of Program enhancements and industry improvements.

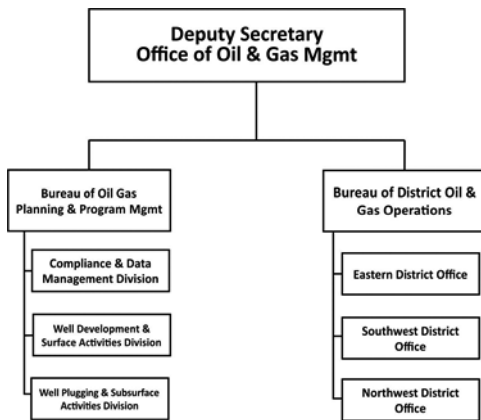
The enhanced electronic data management needs previously described are not new concepts. They are simply needs that are not yet met because the Department lacks the resources to pay for the information technology services required to meet these needs and create these tools. The Program currently pays the Bureau of Information Technology (BIT) \$700,000 each year. However, BIT services to the Program actually cost \$2 million annually. Allocating an additional \$1.3 million to fully fund these program enhancements will enable the Program to support the Program's information technology needs.

Additional Program staffing

As discussed previously, as a result of declining unconventional well permit application fee revenue following the 2014 fee rulemaking, the Program reduced staff from 226 employees to 190 employees. Allocating the other revenue sources to additional program staffing will enable the Program to restore previously reduced staff positions and add staff needed to administer the 2012 Oil and Gas Act and its implementing regulations.

In 2016, the Program conducted an analysis of permitting, inspections and compliance processes and developed a tool to aid in Program planning. To develop the current workload analysis, annual permitting, inspection and compliance-related data from 2017 was entered into the workload tool. This workload tool provides a high-level assessment of current staffing needs within the Program based on current data. However, the workload tool is limited and does not capture all of the various job duties performed by the Program. For example, it does not analyze staffing levels within the Bureau of Oil and Gas Planning and Program Management (BPPM) because of the significant variability of the work performed by those staff. The output of the model is confined to the Bureau of District Oil and Gas Operations (DOGO) staff only.

The Program consists of two Bureaus:



The Bureau of District Oil and Gas Operations

DOGO consists of three district offices primarily headquartered in three regional office locations (Pittsburgh, Meadville and Williamsport) in the oil and gas producing regions of this Commonwealth. DOGO staff are responsible for permitting, inspection, compliance and enforcement functions.

DOGO includes the following:

Permitting

When the previously-referenced staff reductions and cost-saving measures occurred, it included nine permitting positions. As a result, the Program faced challenges related to meeting permit review timeframes. To address this shortcoming, the Program reorganized the Office of Oil and Gas Management to create three new management positions to oversee statewide subsurface and surface permitting. The Program also reclassified certain vacant positions to well permit geologist positions. The well permit review timeframes then improved. For example, in the Southwestern District Office, the well permit review timeframes decreased from over 100 days to an average of approximately 35 days. For Erosion and Sediment Control General Permits, the review times decreased from more than 230 to approximately 125 days.

To further improve review timeframes, the Program needs to restore the nine previously eliminated permitting positions and fund the three new management positions resulting from the reorganization. These 12 positions would cost approximately \$1.27 million.

Inspections

Inspections staff perform the majority of the Program’s field inspection and investigatory work. Inspector positions include water quality specialists, oil and gas inspectors, environmental protection specialists and field geologists. These inspectors are also responsible for responding to citizen complaints regarding oil and gas activities throughout this Commonwealth. More inspectors of all types are needed across this Commonwealth. Two areas of critical need involve the inspection of gas storage wells and oil and gas inspectors focused drilling and construction of new wells and plugging legacy wells.

The workload tool estimates 16 additional inspectors are needed including three just for gas storage wells inspections at a cost of \$1.7 million to fund these positions.

Compliance

Compliance specialists perform a variety of important job duties, including handling and management of enforcement and compliance cases, development and execution of compliance documents, and document gathering of responsive information for the many requests from the public for records. Compliance specialists perform the majority of the duties responding to requests for records as many of the requests are for records regarding the Program’s enforcement efforts to ensure compliance with the 2012 Oil and Gas Act. Compliance specialists are vital to the Program’s administration of the 2012 Oil and Gas Act as they directly interface with the citizens of this Commonwealth residing in areas of active oil and gas development.

The workload tool estimates that 11 additional compliance positions are needed to perform these various duties at a cost of \$1.17 million annually to fund these positions.

The Bureau of Oil and Gas Planning and Program Management (BPPM)

BPPM is in the Department’s Central Office (Harrisburg) and is responsible for administrative, policy and regulatory development functions.

BPPM includes the following:

Division of Well Development and Surface Activities

The Division of Well Development and Surface Activities is responsible for developing policies and guidance regarding surface activities associated with well site and gathering line design, construction and operation. This includes waste management and engineered components, such as erosion and sediment control structures, postconstruction stormwater management features, spill and release reporting and remediation, and stream and wetland crossings and encroachments.

Division of Well Plugging and Subsurface Activities

The Division of Well Plugging and Subsurface Activities includes the Subsurface Activities Section and the Well Plugging Section. The Subsurface Activities Section is responsible for the management of subsurface oil and gas activities and offers expertise in drilling, casing, cementing, completion, workover, and production activities and operations. The Well Plugging Section maintains and implements the Department’s Orphaned and Abandoned Well Plugging Program.

The Division of Compliance and Data Management

The Division of Compliance and Data Management works closely with BIT to oversee the development, operation and maintenance of data management systems

that track reports, notifications, records, applications and other information or documents that are submitted to the Department by the regulated community. This division is also responsible for assisting in the development of Statewide data management tools, such as electronic well permitting and mobile site inspection, as well as Statewide enforcement efforts related to electronic data submissions.

As a result of staff reductions, BPPM has postponed several policy development projects including updated guidance documents, public information, internal training, external training, modernized well plugging regulations, standards for storing mine influenced water in well development impoundments and an established area of alternative methods for hydraulically fracturing Utica wells in western Pennsylvania. The Program estimates that 11 BPPM positions at a cost of \$1.17 million would enable the Program to begin work on these and other important projects.

In sum, based on prior staff reductions and the workload tool, the Program estimates that it needs 49 additional positions at a cost of approximately \$5.2 million to administer the 2012 Oil and Gas Act and its implementing regulations. Because of new permit review tools and mobile inspection tools, the Program will continue to evaluate staffing and hire staff when necessary and when funds are available.

No increase to conventional well permit application fees

As stated in the Fee Report, the Department decided to not increase conventional well permit application fees for conventional wells as a solution to correcting this funding imbalance. Significantly, section 3211(d) of the 2012 Oil and Gas Act requires that well permit application fees bear a “reasonable relationship” to the cost of administering the 2012 Oil and Gas Act. The determination to increase only unconventional well permit application fees and not conventional well permit applications is (1) within the Board’s granted authority under section 3274 of the 2012 Oil and Gas Act to promulgate regulations to establish a permit application fee under section 3211(d) of the 2012 Oil and Gas Act for each application for a well permit which bears a reasonable relationship to the cost of administering the 2012 Oil and Gas Act, (2) advances the purposes of the 2012 Oil and Gas Act in Section 3202 of the 2012 Oil and Gas Act, and (3) is not contrary to the express language in the 2012 Oil and Gas Act.

Conventional well drilling has declined significantly over the last few years. In FY 2015-2016, the Program received 287 conventional well permit applications generating \$97,750. In FY 2016-2017, the Program received 205 conventional well permit applications generating \$84,300. In FY 2017-2018, the Program received 225 conventional well permit applications generating \$76,973. If the Program projects that it will receive 240 conventional well permit applications annually at the average conventional well permit application fee of \$365, the Program can anticipate receiving \$87,600 per year from conventional well permit application fees under the existing fee structure. These fees are included in the Program’s overall budget, and the revenue collected from the fees represents less than 0.5% of the Program’s annual operating costs.

The cost to drill a conventional oil well is approximately \$115,000, and the cost to drill a conventional gas well is approximately \$250,000. The 3-year average conventional well permit application fee paid was \$365.

Thus, the average conventional well permit accounts for between .15% and .3% of the cost to drill a conventional well. The cost to drill an unconventional well is approximately \$8 million. The \$12,500 unconventional well permit application fee established by this rulemaking accounts for .16% of the cost to drill an unconventional well. Accordingly, the fees are comparable in terms of the percentage of the costs to drill wells.

In developing the analysis for this final-form rulemaking, the Department considered that the conventional industry may account for approximately 40% of the costs to administer the Program. In doing so, the Department considered proportional costs related to fee amounts. Based on the projected budget of \$25 million to sustain current staff and operating costs, the conventional industry’s proportional costs would be \$10 million. If the Program projects that it will receive 240 conventional well permit applications annually, the conventional well permit application fee would need to be set at a flat rate of nearly \$42,000 per application to account for the conventional industry’s proportional costs. Increasing the conventional well permit applications fees from the average of \$365 to \$42,000 per well permit application is not reasonable or appropriate given the costs to drill conventional wells and because most, if not all, conventional well operators are small businesses.

It is reasonable for the conventional industry to pay less for well permit applications than the unconventional industry and for the Board to maintain the conventional well permit application fee at its current sliding scale structure. For these reasons, conventional well permit application fees are part of the Program’s budget allocated for restoring staff, funding program enhancements or, if necessary, providing a funding buffer.

Public outreach

The Department consulted with the Oil and Gas Technical Advisory Board (TAB) in the development of the proposed rulemaking to raise the unconventional well permit application fee to \$12,500 and discussed this final-form rulemaking at the TAB meeting on September 19, 2019.

E. Summary of Regulatory Requirements

Current fee structure

The current well permit application fee structure in § 78a.19 assesses a flat well permit application fee of \$5,000 for every nonvertical unconventional well permit and \$4,200 for every vertical unconventional well permit.

Final-form fee structure

This final-form rulemaking amends §§ 78a.1 and 78a.19 to increase the well permit application fee on all unconventional wells to \$12,500. This final-form rulemaking also removes definitions for “nonvertical unconventional well” and “vertical unconventional well” related to well permit applications so that permit application fees will now be the same for all unconventional well permit applications. Assuming the Program will receive approximately 2,000 unconventional well permit applications annually following this final-form rulemaking, \$12,500 per unconventional well permit application is needed to sustain the Program at current staff levels and operating costs.

As discussed in Section D of this preamble, this final-form rulemaking does not amend the current conventional well permit application fees in § 78.19.

F. Changes from Proposed to Final-Form Rulemaking

This final rulemaking Annex A does not contain any changes from the proposed rulemaking Annex A.

G. Summary of Major Comments and Responses

The proposed rulemaking was adopted by the Board at its meeting on May 16, 2018, and published at 48 Pa.B. 4100 (July 14, 2018), with a 30-day comment period. No public hearings were held. The public comment period closed on August 13, 2018.

The Board received 51 comments from 14 commenters. One commenter was neutral on the rulemaking. Two commenters offered comments in support of the rulemaking while ten commenters opposed the rulemaking. The Independent Regulatory Review Commission (IRRC) also submitted comments on September 12, 2018.

Consider alternate sources of funding

The Board received comments from commenters that did not believe that well permit fees should be such a disproportionate source of program funding and that the Board should work with stakeholders to find an alternative, more stable source of funding. These commenters recommended forming a workgroup to identify cost saving measures, using General Fund money, reallocating Chapter 102 and Chapter 105 permit fees that are paid by the oil and gas industry from the Clean Water and Dam Safety Programs to the Oil and Gas Program, and use of the \$6 million Impact Fee.

The Board will work with stakeholders to identify more stable sources of funding. Reallocating general funds or permit fees received by other programs to the Program is not an option, as those programs are also underfunded. The Department noted that the Program currently receives the entire \$6 million Impact Fee even though that fee could be allocated to the Clean Air and Clean Water Programs in addition to or instead of the Oil and Gas Program.

Clarify benefits of well permit fee increase

Commenters requested that the Board identify cost saving measures that could be undertaken through an audit or workload analysis.

The Department implemented cost saving measures by reducing 36 positions and reducing operational costs by 38%. However, these cost savings have resulted in operational shortcomings which this final-form rulemaking, along with the conventional well permit fees and the \$6 million Impact Fee, is intended to address. The Program also developed a sophisticated workload analysis tool and used that tool to provide a detailed explanation for why additional staffing and financial resources are needed.

Justify that the fee is reasonably related to the cost of administering the Program

The Board received comments that a 150% increase in the cost of an unconventional well permit fee is disproportional to the Program's costs to administer a program that oversees both the conventional and unconventional industry.

In response, the Board relies on section 3211(d) of the 2012 Oil and Gas Act. As prescribed by section 3211(d), a well permit application fee is a one-time payment submitted with each well permit application that is deposited into the Well Plugging Fund as a dedicated revenue source for the Program. This fee is set by the Board in regulation and must be reasonably related to the cost of the Program to administer the 2012 Oil and Gas Act. The

fees do not provide ongoing revenue to the Program. For that reason, the fees received in a given year must fund all of the Program's functions beyond permitting.

Since 1984, the Board has increased the well permit application fees, in 2009 and 2014, to fund the Program's increasing expenses and established different amounts for the different classes of wells, including unconventional, conventional and home use wells. The Board established different amounts for these different classes of wells based on the cost of the Program related to well permit application projections, total well bore length for conventional wells, the costs to develop each class of well and the ability of the applicant to pay. The Board ensures that the well permit application fees bear a reasonable relationship to Program costs by using these factors to establish the different fee amounts.

The Board disagrees that fees must be based on proportional costs by industry sector. Section 3211(d) does not require that the fees be determined by the proportional costs of the Department based on the different segments of the industry. Section 3211(d) only requires that these fees bear a "reasonable relationship" to costs. Nonetheless, in developing this final-form rulemaking, the Board considered proportional costs related to fee amounts. The Board also considered that conventional well drilling has declined over recent years with only 225 conventional well permit applications submitted in FY 2017-18. In contrast, the Department received 1,706 unconventional well permit applications in 2018. This demonstrates that the unconventional industry is applying for the vast majority of the permits issued by the Department. The Board also considered the revenue generated by conventional well permit application fees. In FY 2017-18, the conventional well permit application fee revenue was \$76,973. The revenue collected from the fees represents less than 0.5% of the Program's annual operating costs. Further, the average conventional well permit fee accounts for between .14% and .3% of the cost to drill a conventional well. With the fee increase included in this rulemaking, the unconventional well permit application fee would cost .16% of the cost to drill an unconventional well.

Based on the previous information, the one-time nature of the well permit and Program costs, the Board decided not to increase the conventional well permit application fees. The determination to increase only unconventional well permit application fees and not conventional well permit applications is (1) within the Board's granted authority under section 3274 of the 2012 Oil and Gas Act to promulgate regulations to establish a permit application fee under section 3211(d) of the 2012 Oil and Gas Act for each application for a well permit which bears a reasonable relationship to the cost of administering the 2012 Oil and Gas Act, (2) advances the purposes of the 2012 Oil and Gas Act in section 3202 of the 2012 Oil and Gas Act, and (3) is not contrary to the express language in the 2012 Oil and Gas Act.

As such, the Board asserts that the existing conventional well permit application fees and the increase fee for unconventional well permit established in this final-form rulemaking bear a reasonable relationship to the cost of administering the Oil and Gas Program for both industries.

New fee will negatively impact small businesses and Pennsylvania's competitiveness

Some commenters expressed concern that the increased unconventional well permit application fee would nega-

tively impact Pennsylvania small businesses and the Commonwealth's ability to compete for business compared to other gas producing states.

In developing this final-form rulemaking, the Board thoroughly considered the impact of raising fees on companies engaged in unconventional natural gas extraction that qualify as small businesses and what impact that could have on Pennsylvania's competitiveness for future business. While a majority of the 80 unconventional natural gas extraction operators that will be impacted by this final-form rulemaking qualify as small businesses, the increased unconventional well permit application fee will now account for .16% of the cost to drill an unconventional well that costs approximately \$8 million to drill. Furthermore, the Marcellus and Utica Shales are the premier shale gas plays in the United States with Pennsylvania being the premier state in which to drill these wells. While the well permit fee in Pennsylvania will be higher than in other states, other state regulatory agencies receive significant funding from a severance tax to fund their oil and gas program operations and charge fees for a variety of activities other than well permit applications.

Due to the relatively small percentage that the well permit application fee will cost unconventional operators in the scheme of developing a well and the fee structure that Pennsylvania has compared to other states, the new unconventional well permit application fee will not negatively impact unconventional operators that qualify as small businesses or harm Pennsylvania's ability to be competitive with other gas producing states.

New fees will not assure faster permit review times

Commenters contended that the new fee will not result in faster permit reviews, which are the greatest challenge faced by the Department, and that additional permit reviewers should be prioritized over other staffing needs.

The Board acknowledged that the Oil and Gas Program was struggling to meet permit review timeframes in 2017. This was a direct result of the reduction in staff by 36 positions in response to a lack of revenue from well permit fees. To address this shortcoming, the Program reorganized the Office of Oil and Gas Management to create three new management positions to oversee statewide subsurface and surface permitting. The Program also reclassified certain vacant positions to well permit geologist positions. The well permit review timeframes then improved. For example, in the Southwestern District Office, the well permit review timeframes decreased from over 100 days to an average of approximately 35 days. For Erosion and Sediment Control General Permits, the review times decreased from more than 230 to approximately 125 days.

As discussed previously, the Program estimates that additional 12 permitting staff is needed to further improve review timeframes. The fee increase in this final-form rulemaking is to sustain the Program at current staff levels and operating costs. The other sources of revenue, including conventional well permit application fees and the \$6 million distributed to the Department from the Act 13 Impact Fee, provide a funding buffer in the event that the actual permit applications the Department receives in the years following this final-form rulemaking do not meet the permit application projections. If that happens, the Program will need these other revenue sources to sustain the Program. If not, these funds will be allocated for needed program enhancements, restoring staff complement and adding necessary staff to

administer the 2012 Oil and Gas Act and its implementing regulations. Because of new permit review tools and mobile inspection tools, the Program will continue to evaluate staffing and hire staff when necessary and when funds are available.

H. Benefits, Costs and Compliance

Benefits

The increased unconventional well permit application fee revenue will be used to sustain the Program at current staff levels and operating costs in order to administer the 2012 Oil and Gas Act and ensure the responsible development of oil and natural gas in this Commonwealth.

As long as the Department receives the projected number of unconventional well permit applications that form the basis of this final-form rulemaking in order to sustain the Program at its current staffing and operating costs, the other sources of revenue currently available to the Program, including conventional well permit application fees and the \$6 million distributed to the Department from the Impact Fee established by 58 Pa.C.S. Chapter 23 currently allocated to the Program, can be used to restore the Program to a full staff complement of 226 people, hire necessary additional staff and fund program enhancements.

Compliance costs

The fee paid for unconventional well permit applications is currently a \$5,000 fee for each nonvertical unconventional well and \$4,200 for each vertical unconventional well permit. The proposed fee increase is \$12,500 for all unconventional well permit applications. This is an increase of \$7,500 for each nonvertical unconventional well application and \$8,300 for each vertical unconventional well application. The Department assumes that if approximately 2,000 well permit applications are received annually this final-form rulemaking would result in an additional annual incremental permit application cost of \$15 million to the regulated community. This final-form rulemaking does not require new legal, accounting or consulting procedures.

Compliance assistance plan

The Department plans to educate and assist the public and regulated community in understanding the final-form amendment requirements and how to comply with them. This outreach initiative will be accomplished through the Department's ongoing compliance assistance program. Permit application forms and instructions would be amended to reflect the new fee structure.

Paperwork requirements

This final-form rulemaking does not create any additional paperwork requirements. Minor changes to the unconventional well permit application form, Permit Application to Drill and Operate an Unconventional Well (Document # 8000-PM-OOGM0001BU), will be necessary to implement this final-form rulemaking and a draft version of that form was submitted to IRRC.

I. Pollution Prevention

The Pollution Prevention Act of 1990 (42 U.S.C.A. §§ 13101—13109) established a National policy that promotes pollution prevention as the preferred means for achieving state environmental protection goals. The Department encourages pollution prevention, which is the reduction or elimination of pollution at its source, through the substitution of environmentally friendly materials, more efficient use of raw materials and the incorporation

of energy efficiency strategies. Pollution prevention practices can provide greater environmental protection with greater efficiency because they can result in significant cost savings to facilities that permanently achieve or move beyond compliance. The anticipated increased revenues would allow the Department to continue providing adequate oversight of the oil and gas industry in this Commonwealth, ensuring continued protection of the environment and the public health and welfare of the citizens of this Commonwealth.

J. Sunset Review

The Board is not establishing a sunset date for these regulations, since they are needed for the Department to carry out its statutory authority. The Department will continue to closely monitor these regulations for their effectiveness and recommend updates to the Board as necessary. In addition, in accordance with §§ 78.19(e) and 78a.19(b), the Department will evaluate these fees and recommend regulatory amendments to the Board to address any disparity between the Program income generated by the fees and the Department's cost of administering the Program with the objective of ensuring fees meet all Program costs and the Program is self-sustaining. This report and any proposed regulatory amendments will be presented to the Board no later than 3 years after the promulgation of this final-form rulemaking.

K. Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on July 2, 2018, the Department submitted a copy of proposed rulemaking published at 48 Pa.B. 4100 (July 14, 2018) to IRRC and to the Chairpersons of the House and Senate Committees on Environmental Resources and Energy for review and comment.

Under section 5(c) of the Regulatory Review Act, the Department is required to submit to IRRC and the House and Senate Committees copies of comments received during the public comment period, as well as other documents when requested. In preparing this final-form rulemaking, the Department has considered all comments from IRRC, the House and Senate Committees, and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P.S. § 745.5a(j.2)), on June 17, 2020, the final-form rulemaking was deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on June 18, 2020 and approved the final-form rulemaking.

L. Findings

The Board finds that:

(1) Public notice of proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P.L. 769, No. 240) (45 P.S. §§ 1201 and 1202), known as the Commonwealth Documents Law and regulations promulgated thereunder, 1 Pa. Code §§ 7.1 and 7.2 (relating to notice of proposed rulemaking required; and adoption of regulations).

(2) A public comment period was provided as required by law, and all comments were considered.

(3) This final-form rulemaking does not enlarge the purpose of the proposed rulemaking published at 48 Pa.B. 4100.

(4) These regulations are necessary and appropriate for administration and enforcement of the authorizing acts identified in Section C of this preamble.

M. Order

The Board, acting under the authorizing statutes, orders that:

(a) The regulations of the Department, 25 Pa. Code Chapter 78a, is amended by amending §§ 78a.1 and 78a.19 to read as set forth in Annex A, with ellipses referring to the existing text of the regulation.

(b) The Chairperson of the Board shall submit this regulation to the Office of General Counsel and the Office of Attorney General for review and approval as to legality and form, as required by law.

(c) The Chairperson of the Board shall submit this regulation to IRRC and the Committees as required by the Regulatory Review Act.

(d) The Chairperson of the Board shall certify this regulation and deposit them with the Legislative Reference Bureau as required by law.

(e) This regulation shall take effect immediately upon publication in the *Pennsylvania Bulletin*.

PATRICK McDONNELL,
Chairperson

(*Editor's Note:* See 50 Pa.B. 3355 (July 4, 2020) for IRRC's approval order.)

Fiscal Note: Fiscal Note 7-542 remains valid for the final adoption of the subject regulations.

Annex A

**TITLE 25. ENVIRONMENTAL PROTECTION
PART I. DEPARTMENT OF ENVIRONMENTAL PROTECTION**

Subpart C. PROTECTION OF NATURAL RESOURCES

ARTICLE I. LAND RESOURCES

CHAPTER 78a. UNCONVENTIONAL WELLS

Subchapter A. GENERAL PROVISIONS

§ 78a.1. Definitions.

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

* * * * *

Nonporous material—Nontoxic earthen mud, drill cuttings, fire clay, gel, cement or equivalent materials approved by the Department that will equally retard the movement of fluids.

Observation well—A well used to monitor the operational integrity and conditions in a gas storage reservoir, the reservoir protective area, or strata above or below the gas storage horizon.

* * * * *

Unconventional well or *well*—A bore hole drilled or being drilled for the purpose of or to be used for the production of natural gas from an unconventional formation.

WMP—*Water management plan*—A plan associated with drilling or completing a well in an unconventional formation that demonstrates that the withdrawal and use of water sources within this Commonwealth protects those sources, as required under law, and protects public health, safety and welfare.

* * * * *

**Subchapter B. PERMITS, TRANSFERS AND
OBJECTIONS**

PERMITS AND TRANSFERS

§ 78a.19. Permit application fee schedule.

(a) An applicant for an unconventional well shall pay a permit application fee of \$12,500.

(b) At least every 3 years, the Department will provide the EQB with an evaluation of the fees in this chapter and recommend regulatory changes to the EQB to address any disparity between the program income generated by the fees and the Department's cost of administering the program with the objective of ensuring fees meet all program costs and programs are self-sustaining.

[Pa.B. Doc. No. 20-1027. Filed for public inspection July 31, 2020, 9:00 a.m.]

**Title 49—PROFESSIONAL AND
VOCATIONAL STANDARDS**

STATE BOARD OF DENTISTRY

[49 PA. CODE CH. 33]

Child Abuse Reporting Requirements

The State Board of Dentistry (Board) hereby amends §§ 33.1, 33.250—33.255 and 33.401 and adds §§ 33.256 and 33.257 (relating to child abuse recognition and reporting—mandatory training requirement; and child abuse recognition and reporting course approval process) to read as set forth in Annex A.

Effective Date

The amendments will be effective upon publication of this final-form rulemaking in the *Pennsylvania Bulletin*.

Statutory Authority

Section 3(o) of the Dental Law (63 P.S. § 122(o)) sets forth the Board's general rulemaking authority. Section 6383(b)(2) of the Child Protective Services Law (CPSL) (23 Pa.C.S. § 6383(b)(2) (relating to education and training)) requires the Board to promulgate regulations to implement the mandatory reporting requirements for Board-regulated practitioners.

Purpose and Explanation

Since 2014 the General Assembly has made numerous amendments to the CPSL, including the requirement imposed by the act of April 15, 2014 (P.L. 411, No. 31) (Act 31 of 2014) on all health-related Boards to require training in child abuse recognition and reporting for licensees who are considered "mandated reporters" under the CPSL. Section 2 of Act 31 of 2014 provided that these training requirements would apply to all persons applying for a license, or applying for renewal of a license, on or after January 1, 2015. The Board implemented the training requirements as mandated by Act 31 of 2014 at the beginning of 2015 and subsequently proposed this rulemaking to update the Board's existing regulations on the subject of child abuse reporting to be consistent with the CPSL, as amended.

The proposed rulemaking was published at 48 Pa.B. 1179 (February 24, 2018) for 30 days of public comment, but no public comments were received. The Independent Regulatory Review Commission (IRRC) submitted comments on April 25, 2018. The House Professional

Licensure Committee (HPLC) and the Senate Consumer Protection and Professional Licensure Committee (SCP/PLC) did not submit comments. The following represents a summary of IRRC's comments and the Board's response, along with a description of the amendments made to this final-form rulemaking, some of which were necessitated by additional amendments made to the CPSL since publication of the proposed rulemaking.

*Summary of IRRC's Comments and the Board's Response
Section 33.1 (relating to definitions)*

IRRC first commented relating to definitions that the Board is adopting or amending from the CPSL that are not defined exactly as stated in the CPSL. First, IRRC noted that the Board indicated its intent to remove the definition of the term "perpetrator" because it is no longer used in the regulations. However, IRRC correctly pointed out that the term continues to appear in the definition of "serious physical neglect" as taken directly from the CPSL. IRRC suggests that the Board should either keep the defined term "perpetrator" or revise the definition of "serious physical neglect" not to include the use of that term.

The Board had intentionally deleted the definition of the term "perpetrator" from the regulation because the Board believed it could cause confusion when a Board regulated practitioner was unsure of who may have abused a child leading to an underreporting of suspected child abuse. The Board has added the statutory definition of "perpetrator" to the final-form rulemaking in response to IRRC's comment. However, this addition is being made to assure that the regulation is consistent with the CPSL, and is not intended to imply that a Board regulated practitioner has a duty to conduct an investigation to determine who abused or caused abuse to the child and then determine if they meet the statutory definition of "perpetrator" prior to making a report of suspected child abuse. If a Board regulated practitioner believes a child has been the subject of abuse, the Board regulated practitioner should make a report as set forth in the regulations so that the appropriate authorities may investigate.

IRRC also noted that the Board's intent is to amend the definition of "child abuse" to comport with amendments made to the CPSL. However, IRRC noted that the proposed definition varies from the CPSL. Specifically, section 6303(b.1)(8)(ii) of the CPSL states, "unreasonably restraining or confining a child, based on consideration of the method, location or duration of the restraint or confinement," whereas the equivalent definition in the Board's regulations only states "unreasonably restraining or confining a child."

Initially, the qualifying phrase "based on consideration of the method, location or duration of the restraint or confinement" was intentionally omitted from the proposed rulemaking because the Board did not want Board regulated practitioners to be making subjective determinations about whether the method, location or duration of the restraint or confinement was or was not "unreasonable" resulting in an underreporting of suspected child abuse. However, upon consideration of IRRC's comment, it appears to the Board that the phrase may be helpful to Board regulated practitioners by clarifying what aspects of restraint or confinement make it unreasonable. For that reason, and to assure that the definition is consistent with the CPSL, the qualifying phrase has been added to this final-form rulemaking.

IRRC also noted that the phrase "provided that the violation is being investigated by law enforcement" was

not carried over from section 6303(b.1)(8)(iv) of the CPSL to the Board's definition of "child abuse." This provision of the CPSL defines "child abuse" to include the act of "causing a child to be present at a location while a violation of 18 Pa.C.S. § 7508.2 (related to operation of methamphetamine laboratory) is occurring, provided that the violation is being investigated by law enforcement." In response to IRRC's comment, the Board has inserted the missing clause. Originally, the Board did not want to include the proviso at the end because it might imply that the Board regulated practitioner would have a duty to determine if the methamphetamine laboratory was being investigated by law enforcement, which was not the Board's intent. Again, the insertion of the proviso in the final-form rulemaking is being made to assure that the definition in the Board's regulation is consistent with the CPSL. It is not intended to imply that a Board regulated practitioner has such a duty. If a Board regulated practitioner believes that a child has been present at a methamphetamine laboratory, it should be reported as set forth in the regulation.

Additionally, IRRC noted that section 6303(b.1)(8)(vii)(D) of the CPSL was not included at all in the proposed rulemaking. This provision is related to leaving a child unsupervised with an individual, other than the child's parent, who has been determined to be a sexually violent predator under 42 Pa.C.S. § 9799.58 (relating to assessments) or has to register for life under 42 Pa.C.S. § 9799.55(b) (relating to registration). In response, the Board notes that section 6303(b.1)(8)(vii)(D) was added by the act of February 21, 2018 (P.L. 27, No. 10) (Act 10 of 2018), while the Board delivered the proposed rulemaking to IRRC and the standing committees of the House and Senate on February 9, 2018. Therefore, the Board could not have included it in the proposed rulemaking because it did exist as a requirement of the CPSL at the time of delivery. However, it has been added to the final-form rulemaking.

IRRC also noted that since it is the Board's intent to amend the regulations to be consistent with the CPSL to benefit licensees and so as to avoid confusion as to their responsibilities in this area, the Board should ensure that the final-form rulemaking is consistent with the CPSL. The final-form rulemaking has been reviewed and revised so that it comports with the CPSL, including more recent amendments that occurred after the proposed rulemaking was published. In addition, the Board will endeavor to keep up with future changes to the CPSL and to amend the regulations as needed.

Section 33.401 (relating to credit-hour requirements)

IRRC raised a concern that the proposed rulemaking does not provide direct notice that if the continuing education requirement for child abuse recognition and reporting is not met, a license or certificate cannot be renewed. IRRC suggests that direct and clear notice in the wording of the regulation will benefit both the Board and the regulated community in obtaining compliance. In response, the Board has added a clear notice to § 33.401(h) indicating that the Board will not renew a license or certificate unless the Bureau has received an electronic report from an approved provider documenting the attendance/participation of the licensee or certificate holder. Instead, the licensee or certificate holder will receive a "discrepancy notice" through the Pennsylvania Licensing System informing them that the Bureau/Board has not received an electronic report evidencing completion of the mandatory child abuse training and that their license or certificate cannot be renewed until such a report is received.

Description of Amendments to the Final-form Rulemaking

The definition of "child abuse" has been amended in response to IRRC's comments to be consistent with the definition in the CPSL as discussed previously. Additionally, the definition of "perpetrator" has been included in this final-form rulemaking.

In the proposed rulemaking, the Board had planned to add a new section, § 33.252a (relating to mandatory reporting of children under 1 year of age) as a result of amendments to section 6386 of the CPSL, which had required mandatory reporting when a health care provider is involved in the care of a child under 1 year of age who is born and identified as being affected by illegal substance abuse by the child's mother, withdrawal symptoms resulting from prenatal drug exposure, or a Fetal Alcohol Spectrum Disorder. However, section 6386 of the CPSL was amended in June of 2018, to change this requirement to a "notification" and to clarify that this "notification" does not constitute a child abuse report. Therefore, the Board determined that this section was no longer needed in this final-form rulemaking and it has been deleted. This, of course, does not relieve health care providers from the duty to make such notifications under the CPSL, but simply reflects the fact that the Board is not required to enforce this requirement by regulation. In addition, all cross references to proposed § 33.252a have been removed from this final-form rulemaking.

Section 33.255 (relating to noncompliance) has been amended in this final-form rulemaking to reflect recent amendments made to the CPSL by the act of November 26, 2019 (P.L. 648, No. 88), which were effective as of January 25, 2020, with regard to the criminal penalties related to the willful failure to report suspected child abuse.

Finally, the Board has amended § 33.401(h) to provide clear notice that the Board will not renew a license or certificate unless the Bureau has received an electronic report from an approved child abuse course provider documenting the attendance/participation by the licensee or certificateholder of the required 2 hours of continuing education in child abuse recognition and reporting requirements.

Fiscal Impact and Paperwork Requirements

The Board does not anticipate any significant fiscal impact or paperwork requirements relating to these amendments. Because licensees and certificateholders are already required to complete mandatory continuing education, and the 2 hours in child abuse recognition and reporting are incorporated in the existing requirement, there would be no increased burden. Only applicants for licensure or certification incur an additional requirement, and as there are many low-cost and free options available to complete the training, the Board anticipates this impact to also be minimal. Because all approved Act 31 training providers are required to report attendance/participation electronically, there are no additional paperwork requirements imposed on licensees. In addition, the implementation of an electronic reporting system for mandatory reporters of child abuse under the CPSL by the Department of Human Services has decreased the paperwork requirements related to the mandatory reporting requirements.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on February 9, 2018, the Board submitted a copy of the notice of proposed rulemaking,

published at 48 Pa.B. 1179, to IRRC and to the Chairpersons of the HPLC and SCP/PLC for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC, the HPLC and the SCP/PLC were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing this final-form rulemaking, the Board has considered all comments from IRRC. No public comments were received. The Board also received no comments from the HPLC or the SCP/PLC.

Under section 5.1(j.2) of the Regulatory Review Act (71 P.S. § 745.5a(j.2)), on February 13, 2020, the Board delivered this final-form rulemaking to IRRC, the HPLC and the SCP/PLC. Under section 5.1(j.2) of the Regulatory Review Act (71 P.S. § 745.5a(j.2)), on June 17, 2020, the final-form rulemaking was deemed approved by the HPLC and the SCP/PLC. Under section 5.1(e) of the Regulatory Review Act, IRRC met on June 18, 2020, and approved the final-form rulemaking.

Additional Information

Individuals who need information about this final-form rulemaking may contact Lisa Burns, Board Administrator, State Board of Dentistry, at P.O. Box 2649, Harrisburg, PA 17105-2649, RA-DENTISTRY@pa.gov.

Findings

The Board finds that:

- (1) Public notice of proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P.L. 769, No. 240) (45 P.S. §§ 1201 and 1202), known as the Commonwealth Documents Law and the regulations promulgated thereunder, 1 Pa. Code §§ 7.1 and 7.2 (relating to relating to notice of proposed rulemaking required; and adoption of regulations).
- (2) A public comment period was provided as required by law, but no comments were received.
- (3) The amendments to this final-form rulemaking do not enlarge the original purpose of the proposed rulemaking published at 48 Pa.B. 1179.
- (4) This final-form rulemaking is necessary and appropriate for the administration of the amendments to the Child Protective Services Law (23 Pa.C.S. §§ 6301—6387).

Order

The Board, therefore, orders that:

(a) The regulations of the Board at 49 Pa. Code Chapter 33, are amended by amending §§ 33.1, 33.250—33.255 and 33.401 and adding §§ 33.256 and 33.257 to read as set forth in Annex A, with ellipses referring to the existing text of the regulations.

(*Editor's Note:* Proposed § 33.252a in the proposed rulemaking published at 48 Pa.B. 1179, is not being adopted.)

(b) The Board shall submit this Order and Annex A to the Office of Attorney General and the Office of General Counsel for approval as required by law.

(c) The Board shall submit this order and Annex A to IRRC, the HPLC and the SCP/PLC as required by law.

(d) The Board shall certify this Order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(e) This final-form rulemaking shall take effect upon publication in the *Pennsylvania Bulletin*.

IVAN R. LUGO, DMD,
Chairperson

(*Editor's Note:* See 50 Pa.B. 3355 (July 4, 2020) for IRRC's approval order.)

Fiscal Note: Fiscal Note 16A-4626 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 49. PROFESSIONAL AND VOCATIONAL STANDARDS

PART I. DEPARTMENT OF STATE

Subpart A. PROFESSIONAL AND OCCUPATIONAL AFFAIRS

CHAPTER 33. STATE BOARD OF DENTISTRY

Subchapter A. GENERAL PROVISIONS

§ 33.1 Definitions.

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

* * * * *

Board regulated practitioner—A dentist, restricted faculty license holder, dental hygienist, public health dental hygiene practitioner or expanded function dental assistant.

Bodily injury—Impairment of physical condition or substantial pain.

Bureau—The Bureau of Professional and Occupational Affairs of the Commonwealth.

Child—An individual under 18 years of age.

Child abuse—Intentionally, knowingly or recklessly doing any of the following:

(i) Causing bodily injury to a child through any recent act or failure to act.

(ii) Fabricating, feigning or intentionally exaggerating or inducing a medical symptom or disease which results in a potentially harmful medical evaluation or treatment to the child through any recent act.

(iii) Causing or substantially contributing to serious mental injury to a child through any act or failure to act or a series of such acts or failures to act.

(iv) Causing sexual abuse or exploitation of a child through any act or failure to act.

(v) Creating a reasonable likelihood of bodily injury to a child through any recent act or failure to act.

(vi) Creating a likelihood of sexual abuse or exploitation of a child through any recent act or failure to act.

(vii) Causing serious physical neglect of a child.

(viii) Engaging in any of the following recent acts:

(A) Kicking, biting, throwing, burning, stabbing or cutting a child in a manner that endangers the child.

(B) Unreasonably restraining or confining a child, based on consideration of the method, location or duration of the restraint or confinement.

(C) Forcefully shaking a child under 1 year of age.

(D) Forcefully slapping or otherwise striking a child under 1 year of age.

(E) Interfering with the breathing of a child.

(F) Causing a child to be present at a location while a violation of 18 Pa.C.S. § 7508.2 (relating to operation of methamphetamine laboratory) is occurring, provided that the violation is being investigated by law enforcement.

(G) Leaving a child unsupervised with an individual, other than the child's parent, who the actor knows or reasonably should have known:

(I) Is required to register as a Tier II or Tier III sexual offender under 42 Pa.C.S. Chapter 97, Subchapter H (relating to registration of sexual offenders), where the victim of the sexual offense was under 18 years of age when the crime was committed.

(II) Has been determined to be a sexually violent predator under 42 Pa.C.S. § 9799.24 (relating to assessments) or any of its predecessors.

(III) Has been determined to be a sexually violent delinquent child as defined in 42 Pa.C.S. § 9799.12 (relating to definitions).

(IV) Has been determined to be a sexually violent predator under 42 Pa.C.S. § 9799.58 (relating to assessments) or has to register for life under 42 Pa.C.S. § 9799.55(b) (relating to registration).

(H) Causing the death of the child through any act or failure to act.

(I) Engaging a child in a severe form of trafficking in persons or sex trafficking, as those terms are defined under section 103 of the Trafficking Victims Protection Act of 2000 (22 U.S.C.A. § 7102).

ChildLine—An organizational unit of the Department of Human Services, which operates a 24-hour a day Statewide toll free telephone system for receiving reports of suspected child abuse, referring reports for investigation and maintaining the reports in the appropriate file.

* * * * *

General supervision—In a dental facility, supervision by a dentist who examines the patient, develops a treatment plan, authorizes the performance of dental hygiene services to be performed within 1 year of the examination, and takes full professional responsibility for the performance of the dental hygienist. In facilities identified in § 33.205(c)(2) and (3) (relating to practice as a dental hygienist), general supervision is defined in § 33.205(d)(2).

Individual study—A course of continuing education offered by an approved program sponsor, which permits the participant to learn without interacting with an instructor or interactive learning methodologies and which requires a passing grade on a written examination or workbook.

Local anesthesia—The elimination of sensations, especially pain, in one part of the body by regional injection of an anesthetic agent.

Mandated reporter—A person who is required under 23 Pa.C.S. § 6311 (relating to persons required to report suspected child abuse) to make a report of suspected child abuse. For purposes of this chapter, the term includes all Board regulated practitioners.

Parent—A biological parent, adoptive parent or legal guardian.

Perpetrator—A person who has committed child abuse as defined in this section.

- (i) This term includes only the following:
 - (A) A parent of the child.
 - (B) A spouse or former spouse of the child's parent.

(C) A paramour or former paramour of the child's parent.

(D) A person 14 years of age or older and responsible for the child's welfare or having direct contact with children as an employee of child-care services, a school or through a program, activity or service.

(E) An individual 14 years of age or older who resides in the same home as the child.

(F) An individual 18 years of age or older who does not reside in the same home of the child but is related within the third degree of consanguinity or affinity by birth or adoption of the child.

(G) An individual 18 years of age or older who engages a child in severe forms of trafficking in persons or sex trafficking, as those terms are defined under section 103 of the Trafficking Victims Protection Act of 2000 (22 U.S.C.A. § 7102).

(ii) Only the following may be considered a perpetrator for failing to act, as provided in this section:

- (A) A parent of the child.
- (B) A spouse or former spouse of the child's parent.
- (C) A paramour or former paramour of the child's parent.
- (D) A person 18 years of age or older and responsible for the child's welfare.
- (E) A person 18 years of age or older who resides in the same home as the child.

Person responsible for the child's welfare—A person who provides permanent or temporary care, supervision, mental health diagnosis or treatment, training or control of a child in lieu of parental care, supervision and control.

Program, activity or service—Any of the following in which children participate and which is sponsored by a school or a public or private organization:

- (i) A youth camp or program.
- (ii) A recreational camp or program.
- (iii) A sports or athletic program.
- (iv) A community or social outreach program.
- (v) An enrichment or educational program.
- (vi) A troop, club or similar organization.

Program sponsor—The party approved by the Board who is responsible for the development and presentation of the continuing dental education program.

Public health dental hygiene practitioner—A licensed dental hygienist who is certified by the Board as having met the requirements of section 11.9 of the act (63 P.S. § 130j), and who is authorized to perform dental hygiene services in accordance with § 33.205b (relating to practice as a public health dental hygiene practitioner) without the authorization, assignment or examination of a dentist.

Recent act or failure to act—An act or failure to act committed within 2 years of the date of the report to the Department of Human Services or county agency.

Serious mental injury—A psychological condition, as diagnosed by a physician or licensed psychologist, including the refusal of appropriate treatment, that does one or more of the following:

(i) Renders a child chronically and severely anxious, agitated, depressed, socially withdrawn, psychotic or in reasonable fear that the child's life or safety is threatened.

(ii) Seriously interferes with a child's ability to accomplish age-appropriate developmental and social tasks.

Serious physical neglect—Any of the following when committed by a perpetrator that endangers a child's life or health, threatens a child's well-being, causes bodily injury or impairs a child's health, development or functioning:

(i) A repeated, prolonged or egregious failure to supervise a child in a manner that is appropriate considering the child's developmental age and abilities.

(ii) The failure to provide a child with adequate essentials of life, including food, shelter or medical care.

Sexual abuse or exploitation—Any of the following:

(i) The employment, use, persuasion, inducement, enticement or coercion of a child to engage in or assist another individual to engage in sexually explicit conduct, which includes the following:

(A) Looking at the sexual or other intimate parts of a child or another individual for the purpose of arousing or gratifying sexual desire in any individual.

(B) Participating in sexually explicit conversation either in person, by telephone, by computer or by a computer-aided device for the purpose of sexual stimulation or gratification of any individual.

(C) Actual or simulated sexual activity or nudity for the purpose of sexual stimulation or gratification of any individual.

(D) Actual or simulated sexual activity for the purpose of producing visual depiction, including photographing, videotaping, computer depicting or filming.

(ii) Any of the following offenses committed against a child:

(A) Rape as defined in 18 Pa.C.S. § 3121 (relating to rape).

(B) Statutory sexual assault as defined in 18 Pa.C.S. § 3122.1 (relating to statutory sexual assault).

(C) Involuntary deviate sexual intercourse as defined in 18 Pa.C.S. § 3123 (relating to involuntary deviate sexual intercourse).

(D) Sexual assault as defined in 18 Pa.C.S. § 3124.1 (relating to sexual assault).

(E) Institutional sexual assault as defined in 18 Pa.C.S. 3124.2 (relating to institutional sexual assault).

(F) Aggravated indecent assault as defined in 18 Pa.C.S. § 3125 (relating to aggravated indecent assault).

(G) Indecent assault as defined in 18 Pa.C.S. § 3126 (relating to indecent assault).

(H) Indecent exposure as defined in 18 Pa.C.S. § 3127 (relating to indecent exposure).

(I) Incest as defined in 18 Pa.C.S. § 4302 (relating to incest).

(J) Prostitution as defined in 18 Pa.C.S. § 5902 (relating to prostitution and related offenses).

(K) Sexual abuse as defined in 18 Pa.C.S. § 6312 (relating to sexual abuse of children).

(L) Unlawful contact with a minor as defined in 18 Pa.C.S. § 6318 (relating to unlawful contact with minor).

(M) Sexual exploitation as defined in 18 Pa.C.S. § 6320 (relating to sexual exploitation of children).

(iii) For the purposes of subparagraph (i), the term does not include consensual activities between a child who is 14 years of age or older and another person who is 14 years of age or older and whose age is within 4 years of the child's age.

Sexual misconduct—Any conduct with a current patient, including words, gestures or expressions, actions or any combination thereof, which is sexual in nature, or which may be construed by a reasonable person as sexual in nature.

Subgingival agents—Therapeutic agents, including antimicrobials, antibiotics, antiseptics or anesthetics, placed below the free margin of the gingiva by a local delivery system or device, including injectable systems for ointments, gels or pastes, and degradable or nondegradable devices, such as fibers, films, strips, slaps, spheres, discs or chips.

Subchapter C. MINIMUM STANDARDS OF CONDUCT AND PRACTICE

§ 33.250. Suspected child abuse—mandated reporting requirements.

(a) *General rule.* Under 23 Pa.C.S. § 6311 (relating to persons required to report suspected child abuse), all Board regulated practitioners are considered mandated reporters. A mandated reporter shall make a report of suspected child abuse in accordance with this section if the mandated reporter has reasonable cause to suspect that a child is a victim of child abuse under any of the following circumstances:

(1) The mandated reporter comes into contact with the child in the course of employment, occupation and practice of the profession or through a regularly scheduled program, activity or service.

(2) The mandated reporter is directly responsible for the care, supervision, guidance or training of the child, or is affiliated with an agency, institution, organization, school, regularly established church or religious organization or other entity that is directly responsible for the care, supervision, guidance or training of the child.

(3) A person makes a specific disclosure to the mandated reporter that an identifiable child is the victim of child abuse.

(4) An individual 14 years of age or older makes a specific disclosure to the mandated reporter that the individual has committed child abuse.

(b) *Staff members of public or private agencies, institutions and facilities.* Whenever a Board regulated practitioner is required to make a report under subsection (a) in the capacity as a member of the staff of a medical, dental or other public or private institution, school, facility or agency, that Board regulated practitioner shall report immediately in accordance with subsection (c) and shall immediately thereafter notify the person in charge of the institution, school, facility or agency or the designated agent of the person in charge.

(c) *Reporting procedure.* A mandated reporter shall immediately make a report of suspected child abuse to the Department of Human Services by either:

(1) Making an oral report of suspected child abuse by telephone to ChildLine at (800) 932-0313, followed by a written report within 48 hours to the Department of Human Services or the county agency assigned to the case in a manner and format prescribed by the Department of Human Services. The written report submitted under this subparagraph may be submitted electronically.

(2) Making an electronic report of suspected child abuse in accordance with 23 Pa.C.S. § 6305 (related to electronic reporting) through the Department of Human Service's Child Welfare Information Solution self-service portal at www.compass.state.pa.us/cwis. A confirmation by the Department of Human Services of the receipt of a report of suspected child abuse submitted electronically relieves the mandated reporter of the duty to make an additional oral or written report.

(d) *Written or electronic reports.* A written or electronic report of suspected child abuse, shall include the following information, if known:

(1) The names and addresses of the child, the child's parents and any other person responsible for the child's welfare.

(2) Where the suspected child abuse occurred.

(3) The age and sex of the subject or subjects of the report.

(4) The nature and extent of the suspected child abuse, including any evidence of prior abuse to the child or sibling of the child.

(5) The name and relationship of the person or persons responsible for causing the suspected abuse and any evidence of prior abuse by those persons.

(6) Family composition.

(7) The source of the report.

(8) The name, telephone number and e-mail address of the person making the report.

(9) The actions taken by the person making the report, including actions taken under 23 Pa.C.S. §§ 6314—6317.

(10) Other information required by Federal law or regulation.

(11) Other information that the Department of Human Services may require by regulation.

§ 33.251. Photographs, medical tests and X-rays of child subject to report.

A Board regulated practitioner may take or cause to be taken photographs of the child who is subject to a report and, if clinically indicated, cause to be performed a radiological examination and other medical tests on the child. Medical summaries or reports of the photographs, X-rays and relevant medical tests taken shall be sent to the county children and youth social service agency at the time the written report is sent, or within 48 hours after an electronic report is made under § 33.250(c)(2) (relating to suspected child abuse—mandated reporting requirements), or as soon thereafter as possible. The county children and youth social service agency shall have access to actual photographs or duplicates and X-rays and may obtain them or duplicates of them upon request.

§ 33.252. Suspected death as a result of child abuse—mandated reporting requirement.

A Board regulated practitioner who has reasonable cause to suspect that a child died as a result of child abuse shall report that suspicion to the coroner or medical examiner of the county where death occurred or,

in the case where the child is transported to another county for medical treatment, to the coroner or medical examiner of the county where the injuries were sustained.

§ 33.253. Immunity from liability.

Under 23 Pa.C.S. § 6318 (relating to immunity from liability) a Board regulated practitioner who participates in good faith in the making of a report of suspected child abuse, making a referral for general protective services, cooperating or consulting with an investigation including providing information to a child fatality or near fatality review team, testifying in a proceeding arising out of an instance of suspected child abuse or general protective services or engaging in any action authorized under 23 Pa.C.S. §§ 6314—6317, shall have immunity from civil and criminal liability that might otherwise result by reason of the Board regulated practitioner's actions. For the purpose of any civil or criminal proceeding, the good faith of the Board regulated practitioner shall be presumed. The Board will uphold the same good faith presumption in any disciplinary proceeding that might result by reason of a Board regulated practitioner's actions under §§ 33.250—33.252 (relating to suspected child abuse—mandatory reporting requirements; photographs, medical tests and x-rays of child subject to report; and suspected death as a result of child abuse—mandated reporting requirement).

§ 33.254. Confidentiality—waived.

To protect children from abuse, the reporting requirements of §§ 33.250—33.252 (relating to suspected child abuse—mandated reporting requirements; photographs, medical tests and X-rays of child subject to report; and suspected death as a result of child abuse—mandated reporting requirement) take precedence over the provisions of any client confidentiality, ethical principle or professional standard that might otherwise apply. In accordance with 23 Pa.C.S. § 6311.1 (relating to privileged communications), privileged communications between a mandated reporter and a patient does not apply to a situation involving child abuse and does not relieve the mandated reporter of the duty to make a report of suspected child abuse.

§ 33.255. Noncompliance.

(a) *Disciplinary action.* A Board regulated practitioner who willfully fails to comply with the reporting requirements in §§ 33.250—33.252 (relating to suspected child abuse—mandated reporting requirements; photographs, medical tests and X-rays of child subject to report; and suspected death as a result of child abuse—mandated reporting requirement) will be subject to disciplinary action under section 4.1 of the act (63 P.S. § 123.1).

(b) *Criminal penalties.* Under 23 Pa.C.S. § 6319 (relating to penalties), a Board regulated practitioner who is required to report a case of suspected child abuse or to make a referral to the appropriate authorities and who willfully fails to do so commits a criminal offense, as follows:

(1) An offense not otherwise specified in paragraphs (2), (3) or (4) is a misdemeanor of the second degree.

(2) An offense is a felony of the third degree if all of the following apply:

(i) The mandated reporter willfully fails to report.

(ii) The child abuse constitutes a felony of the first degree or higher.

(iii) The mandated reporter has direct knowledge of the nature of the abuse.

(3) If the willful failure to report continues while the mandated reporter knows or has reasonable cause to suspect a child is being subjected to child abuse by the same individual, or while the mandated reporter knows or has reasonable cause to suspect that the same individual continues to have direct contact with children through the individual's employment, program, activity or service, the mandated reporter commits a felony of the third degree, except that if the child abuse constitutes a felony of the first degree or higher, the mandated reporter commits a felony of the second degree.

(4) A mandated reporter who, at the time of sentencing for an offense under 23 Pa.C.S. § 6319, has been convicted of a prior offense under § 6319, commits a felony of the third degree, except that if the child abuse constitutes a felony of the first degree or higher, the penalty for the second or subsequent offense is a felony of the second degree.

§ 33.256. Child abuse recognition and reporting—mandatory training requirement.

(a) Except as provided in subsection (c), individuals applying to the Board for an initial license or certificate shall submit proof of completion of 3 hours of training in child abuse recognition and reporting requirements which has been approved by the Department of Human Services.

(b) Except as provided in subsection (c), licensees and certificate holders seeking renewal of a license or certificate issued by the Board shall complete, as a condition of biennial renewal of the license or certificate, 2 hours of approved continuing education in child abuse recognition and reporting requirements, as a portion of the total continuing education required for biennial renewal. For credit to be granted, the continuing education course or program must be approved by the Bureau, in consultation with the Department of Human Services, as set forth in § 33.257 (relating to child abuse recognition and reporting course approval process).

(c) An applicant, licensee or certificate holder may apply in writing for an exemption from the training/continuing education requirements set forth in subsections (a) and (b) provided the applicant, licensee or certificate holder meets one of the following:

(1) The applicant, licensee or certificate holder submits documentation demonstrating that:

(i) The applicant, licensee or certificate holder has already completed child abuse recognition training as required by section 1205.6 of the Public School Code of 1949 (24 P.S. § 12-1205.6).

(ii) The training was approved by the Department of Education in consultation with the Department of Human Services.

(iii) The amount of training received equals or exceeds the amount of training or continuing education required under subsection (a) or (b), as applicable.

(2) The applicant, licensee or certificate holder submits documentation demonstrating all of the following:

(i) The applicant, licensee or certificate holder has already completed child abuse recognition training required under 23 Pa.C.S. § 6383(c) (relating to education and training).

(ii) The training was approved by the Department of Human Services.

(iii) The amount of training received equals or exceeds the amount of training or continuing education required under subsection (a) or (b), as applicable.

(3) The applicant, licensee or certificate holder submits documentation demonstrating that the applicant, licensee or certificate holder should not be subject to the training or continuing education requirement. Each request for an exemption under this paragraph will be considered on a case-by-case basis.

§ 33.257. Child abuse recognition and reporting course approval process.

(a) An individual, entity or organization may apply for approval to provide mandated reporter training as required under 23 Pa.C.S. § 6383(b) (relating to education and training) by submitting the course materials set forth in subsection (b) simultaneously to the Department of Human Services (DHS), Office of Children, Youth and Families, and to the Bureau at the following addresses:

(1) Department of Human Services, Office of Children, Youth and Families, Health and Welfare Building, 625 Forster Street, Harrisburg, PA 17120 or electronically at RA-PWOCYFCPSL@pa.gov.

(2) Bureau of Professional and Occupational Affairs, 2601 North Third Street, P.O. Box 2649, Harrisburg, PA 17105-2649 or electronically at RA-steps1_course_app@pa.gov.

(b) Submissions must include all of the following:

(1) Contact information (mailing address, e-mail address and telephone number) for the agency/course administrator.

(2) General description of the training and course delivery method.

(3) Title of the course.

(4) Timed agenda and estimated hours of training.

(5) Learning objectives.

(6) Intended audience.

(7) All course related materials, including as applicable:

(i) Handouts.

(ii) Narrated script or talking points.

(iii) Interactive activities or exercises.

(iv) Videos and audio/visual content.

(v) Knowledge checks, quizzes or other means of assessing participant's understanding of the material.

(vi) For online courses, a transcript or recording of audio training.

(8) Citation of sources, including written permission to use copyrighted material, if applicable.

(9) Anticipated credentials or experience of the presenter, or biography of presenter, if known.

(10) Printed materials used to market the training.

(11) Evaluation used to assess participants' satisfaction with the training.

(12) Sample certificate of attendance/participation, which shall include:

(i) Name of participant.

(ii) Title of training.

(iii) Date of training.

- (iv) Length of training (2 or 3 hours).
 - (v) Name and signature of the authorized representative of the provider. The signature may be an electronic signature.
 - (vi) Statement affirming the participant attended the entire course.
- (13) Verification of ability to report participation/attendance electronically to the Bureau in a format prescribed by the Bureau.

(c) The Bureau will notify the applicant in writing upon approval of the course and will post a list of approved courses on the Bureau's web site and the Board's web site.

Subchapter F. CONTINUING DENTAL EDUCATION
§ 33.401. Credit-hour requirements.

* * * * *

(b) Except as provided in subsection (h), the required hours shall be taken in subject areas listed in § 33.402 (relating to continuing education subject areas) from a program sponsor listed in § 33.403 (relating to program sponsors).

* * * * *

(g) Exceptions are as follows:

(1) An applicant is exempt from the continuing education requirement in subsection (a) for only the biennial period during which the applicant passed the licensure or certification examination.

(2) An applicant who cannot meet the continuing education requirement due to illness, emergency or hardship may apply to the Board in writing for a waiver. The request must explain why compliance is impossible. Waiver requests will be evaluated on a case-by-case basis.

(h) All licensees and certificate holders shall complete 2 of the required hours of continuing education in approved courses on child abuse recognition and reporting as set forth in § 33.256 (relating to child abuse recognition and reporting—mandatory training requirement). The Board will not renew a license or certificate unless the bureau has received an electronic report from an approved course provider documenting the attendance/participation by the licensee or certificateholder.

[Pa.B. Doc. No. 20-1028. Filed for public inspection July 31, 2020, 9:00 a.m.]

Title 52—PUBLIC UTILITIES

PENNSYLVANIA PUBLIC UTILITY COMMISSION

[52 PA. CODE CH. 54]

[L-2017-2628991]

Rulemaking Regarding Electricity Generation Customer Choice

Executive Summary

The Commission adopted this Final Rulemaking Order on February 27, 2020, to amend the customer information regulations at 52 Pa. Code §§ 54.3, 54.5, 54.7 and 54.10 providing for standards and pricing practices for retail electric services; a disclosure statement for residential and small business customers; marketing/sales activities; and the provision of notices of contract expiration or

changes in terms for residential and small business customers. With this Final Rulemaking Order, the Commission enhances these rules to provide customers ample protections and the necessary information to make informed decisions when shopping in Pennsylvania's competitive retail electricity market. As such, the Commission is amending its regulations to align its electric supplier regulations with the existing natural gas supplier regulations. In addition, the Commission is prohibiting the imposition of early termination fees once a supplier provides to customers the contract options notice required by 52 Pa. Code § 54.10(2). Furthermore, the Commission is requiring suppliers to disclose how they will handle customer account information and whether a contract is assignable.

Public Meeting held
 February 27, 2020

Commissioners Present: Gladys Brown Dutrieuille, Chairperson; David W. Sweet, Vice Chairperson; Andrew G. Place; John F. Coleman, Jr.; Ralph V. Yanora

Rulemaking Regarding Electricity Generation Customer Choice, 52 Pa. Code Chapter 54; L-2017-2628991

Final Rulemaking Order

By the Commission:

In this Final Rulemaking Order, the Pennsylvania Public Utility Commission (Commission) amends the customer information disclosure regulations at 52 Pa. Code §§ 54.3, 54.5, 54.7 and 54.10 providing for standards and pricing practices for retail electricity service; a disclosure statement for residential and small business customers; marketing/sales activities; and the provision of notices of contract expiration or changes in terms for residential and small business customers. With this Final Rulemaking Order, the Commission enhances these rules to provide customers ample protections and the necessary information to make informed decisions when shopping in Pennsylvania's competitive retail electricity market.

Background

The Pennsylvania Public Utility Code (Code) requires electric generation suppliers (EGSs) to provide adequate and accurate information to customers. Specifically, Section 2807(d)(2) requires the Commission to:

... establish regulations to require each electric distribution company, electricity supplier, marketer, aggregator and broker to provide adequate and accurate customer information to enable customers to make informed choices regarding the purchase of all electricity services offered by that provider. Information shall be provided to consumers in an understandable format that enables consumers to compare prices and services on a uniform basis.

66 Pa.C.S. § 2807(d)(2).

Pursuant to this statutory directive, the Commission first issued Interim Requirements in 1997.¹ This was followed by promulgated regulations in 1998.² See 52 Pa. Code §§ 54.1—54.9 (relating to customer information). The regulations at 52 Pa. Code §§ 54.4—54.6 (relating to bill format for residential and small business customers; disclosure statement for residential and small business customers; and request for information about

¹ See Chapter 28 Electric Generation Customer Choice and Competition Act—Customer Information—Interim Requirements, Docket No. M-00960890F0008 (Order entered July 11, 1997).

² See Final Rulemaking Order Establishing Customer Information Disclosure Requirements for Electricity Providers 52 Pa. Code, Chapter 54, Docket No. L-00970126 (Order entered May 1, 1998).

generation supply) were later amended in 2007, after receiving and incorporating comments from numerous stakeholders.³ In 2010, the Commission adopted Interim Guidelines which provided general guidance on the timing and content of advanced notifications that give customers important information about their options prior to the expiration of or a change in terms of their current contract for generation supply.⁴

In 2014, the Commission adopted amendments to 52 Pa. Code § 54.5 and added 52 Pa. Code § 54.10.⁵ The Commission amended these regulations to ensure, among other things, that future EGS disclosure statements include an EGS Contract Summary of key contractual terms and conditions; additional information regarding variable-priced products, including disclosure of the price to be charged for the first billing cycle of generation service; customer access to historical information; and more specific explanation of limits on variability.

With a December 7, 2017 Notice of Proposed Rule-making Order (December 2017 NOPR),⁶ the Commission proposed updates to 52 Pa. Code § 54.5 regarding disclosure statements for residential and small business customers to reflect the evolving competitive electric marketplace. This section of the customer information regulations requires that EGSs provide disclosure statements to residential and small business customers when those customers request an EGS to initiate service, when an EGS proposes to change the terms of service, or when service commences from a default service provider. See 52 Pa. Code § 54.5(b)(1–3). These disclosure statements must include, among other things: the generation charges; conditions of and any applicable limitations on variable prices; explanations of cancellation fees; and information regarding a customer's options upon the expiration of an agreement. See Annex A, § 54.5.

History of the Commission's Review of Its Customer Information Regulations

In September of 2010, the Commission reviewed its customer information regulations and provided Interim Guidelines, as noted previously. In its Interim Guidelines, the Commission provided general guidance on the timing and content of advanced notifications that give customers important information about their options prior to the expiration of or a change in terms of their current contract for generation supply.

Guidelines for Use of Fixed Price Labels

The Commission addressed some supplier pricing, labeling and disclosure issues in the November 2013 Final Order regarding Guidelines for Use of Fixed Price Labels for Products with a Pass-Through Clause.⁷ This Order, commonly referred to as the “Fixed Means Fixed” Order, finalized guidelines on the pricing labels used when selling electric generation service to residential customers. The Commission updated its “electric competition dictionary,” which is available on www.PAPowerSwitch.com. The updates provide guidance to electric generation

suppliers on the appropriate use of the “fixed-price” label when presenting offers to potential customers.

The revised definitions included:

- *Fixed Price*: An all-inclusive per kWh price that will remain the same for at least three billing cycles or the term of the contract, whichever is longer.
- *Variable Price*: An all-inclusive per kWh price that can change, by the hour, day, month, etc. according to the terms and conditions in the supplier's disclosure statement.
- *Introductory Price*: For new customers, an all-inclusive per kWh price that will remain the same for a limited period of time between one and three billing cycles followed by a different fixed or variable per kWh price that will be in effect for the remaining billing cycles of the contract term, consistent with terms and conditions in the supplier's “disclosure statement.”

Additionally, the Commission addressed what is meant and intended by the phrase “all-inclusive.” The Commission reminded suppliers and consumers that to facilitate the comparison of prices on a uniform basis (i.e. apples-to-apples) the Commission developed the concept of the PTC, which is defined at 52 Pa. Code § 54.182:

PTC—Price-to-compare—A line item that appears on a retail customer's monthly bill for default service. The PTC is equal to the sum of all unbundled generation and transmission related charges to a default service customer for that month of service.

While this definition specifies its use for default service, the intent is to provide a bundled price that a consumer can use to compare EGS prices. To make an “apples-to-apples” comparison possible, it follows that EGS prices should be similarly bundled. The Commission reiterated that the price that an EGS presents to a residential or small business customer is expected to be “all-inclusive,” including all of the pricing components found in the PTC for default service customers (generation, transmission where applicable, gross receipts tax, etc.).⁸ “Sales tax” is a notable exception in that it is not bundled within the PTC, but for residential consumers this is usually of no relevance since most residential accounts are exempt from this tax.⁹

We also emphasized the importance of disclosure and the disclosure regulations at 52 Pa. Code § 54.5 and that disclosures need to be clear, well-organized and in plain language so that consumers have the information they need to make informed decisions. Further, we reminded everyone of the regulation at 52 Pa. Code § 54.7 that requires EGSs to calculate and present to the customer the actual per kWh rate at 500, 1,000 and 2,000 usage levels. This regulation is of relevance if the supplier is using a pricing structure that varies depending upon usage (such as a declining or inclining block rate) and/or the supplier is using flat monthly charges in addition to the PTC that are sometimes referred to as monthly “service charges” or “customer charges.” This information must be presented to the customer to allow the “apples-to-apples” comparison discussed above.¹⁰

2014 Polar Vortex

During the winter of 2014, some retail electric customers with variable-rate contracts experienced sharp price

³ See Final Rulemaking Order Re Electric Distribution Companies' Obligation to Serve Retail Customers at the Conclusion of the Transition Period Pursuant To 66 Pa.C.S. § 2807(e)(2), Docket No. L-00040169 (Order entered May 10, 2007).

⁴ See Final Order Re Interim Guidelines Regarding Advance Notification by an Electric Generation Supplier of Impending Changes Affecting Customer Service; Amendment re: Supplier Contract Renewal/Change Notices, Docket Nos. M-2010-2195286 and M-0001437 (Order entered September 23, 2010).

⁵ See Final-Omitted Rulemaking Order Re Rulemaking to Amend the Provisions of 52 Pa. Code, Section 54.5 Regulations Regarding Disclosure Statement for Residential and Small Business Customers and to Add Section 54.10 Regulations Regarding the Provision of Notices of Contract Expiration or Changes in Terms for Residential and Small Business Customers, Docket No. L-2014-2409385 (Order entered April 3, 2014).

⁶ See Rulemaking Regarding Electricity Generation Customer Choice, 52 Pa. Code Chapter 54, Docket No. L-2017-2628991 (Order entered December 7, 2017).

⁷ See Final Order Re Guidelines for Use of Fixed Price Labels for Products with a Pass-Through Clause, Docket No. M-2013-2362961 (Order entered November 14, 2013).

⁸ See Final Order Re Guidelines for Use of Fixed Price Labels for Products with a Pass-Through Clause, Docket No. M-2013-2362961 at 28 (Order entered November 14, 2013).

⁹ *Id.*

¹⁰ *Id.* at 29.

increases resulting from price fluctuations in the wholesale and retail electricity markets. In light of this and after a review of the 2010 Interim Guidelines, the Commission concluded that codifying, strengthening, and augmenting the 2010 guidelines as expeditiously as possible was in the public interest.

In an Order adopted at its February 20, 2014 Public Meeting, the Commission reaffirmed the General Assembly's directive that EGSs provide:

“...adequate and accurate customer information to enable customers to make informed choices regarding the purchase of all electricity services offered by the provider. Information shall be provided to consumers in an understandable format that enables consumers to compare prices and services on a uniform basis.”¹¹

In the Variable Rate Order, the Commission expressed concern for customers receiving their electric supply service from an EGS under a contract with a monthly adjusted variable rate. As indicated supra, some of these customers experienced sharp increases in their bills during the early months of 2014, due to the demands of the winter heating season and unprecedented price spikes in the wholesale electricity market. While acknowledging that it is important for consumers to carefully review the terms of their supplier contracts, including conditions of variability, the Commission believed that EGSs had to take further steps to ensure that customers can easily find and understand information related to price, price variability, and history, as well as cancellation fees, renewal notices, and other terms and conditions.

To obtain feedback from stakeholders on the proposed changes to the regulations on customer information, the Commission issued a Secretarial Letter on March 19, 2014, alerting affected parties of the Commission's intention to promulgate a Final-Omitted Rulemaking that would amend existing regulations at 52 Pa. Code, Chapter 54, to revise disclosure statement requirements for residential and small business customers.¹² This Secretarial Letter noted that while some amendments would codify, with modifications, existing contract renewal and change in terms notice requirements contained in the Interim Guidelines, other changes raise new issues that had not previously been considered. Thus, the Commission requested comments on its proposed regulations to give those entities most affected an opportunity to provide recommendations prior to the issuance of a Final-Omitted Rulemaking Order.

The Commission determined that revising the customer information regulations, 52 Pa. Code § 54.5, and adding 52 Pa. Code § 54.10 by use of a Final-Omitted rulemaking process was necessary to serve and protect the public interest. Based upon the circumstances of the situation at the time, specifically, the unusually high electric supply bills incurred by customers receiving supply service through variable-priced contracts and fluctuations in wholesale energy markets, the Commission found good cause for omitting the traditional notice and comment procedures for the revisions as they were impractical, unnecessary, and contrary to the public interest.

¹¹ Order Re Review of Rules, Policies and Consumer Education Measures Regarding Variable Rate Retail Electric Products, Docket No. M-2014-2406134 (Order entered March 4, 2014) (Variable Rate Order) at 4-5 (citing 66 Pa.C.S. § 2807(d)).

¹² Secretarial Letter Re Rulemaking to Amend the Provisions of 52 Pa. Code, Section 54.5 Regulations Regarding Disclosure Statement for Residential and Small Business Customers and to Add Section 54.10 Regulations Regarding the Provision of Notices of Contract Renewal or Changes in Terms, Docket No. L-2014-2409385 (served March 19, 2014) (Secretarial Letter).

In response to the March 19, 2014 Secretarial Letter, twelve parties¹³ filed comments. In addition, Pennsylvania Senators Robert M. Tomlinson and Lisa M. Boscola sent a letter notifying the Commission that they had received numerous complaints from constituents enrolled in variable-priced contracts. In their letter, Senators Tomlinson and Boscola stated that the Commission should immediately begin revising its regulations regarding variable-priced contracts and the treatment of customers who have an expiring fixed-term contract.

After careful review and consideration of the comments, the Commission on April 3, 2014, adopted a Final-Omitted Rulemaking Order Regarding the Provisions of Notices of Contract Expiration or Changes in Terms for Residential & Small Business Customers (Final-Omitted Rulemaking).¹⁴ This Final-Omitted Rulemaking made numerous significant changes to the Chapter 54 customer information regulations, most of which were intended to provide consumers with more detailed information concerning variable priced products.

To codify the Interim Guidelines and to ensure EGS compliance with these requirements, the Commission added Section 54.10 (Notice of Contract Renewal or Change in Terms), to the customer information regulations. At the same time, the Commission augmented the notice rules by requiring that the EGS provide the new price the customer will be charged the first billing cycle following the expiration or change in terms and that the EGS provide 30 days' notice in advance of any subsequent price change.

2016 NGS Disclosure Regulation Revisions

In April 2016, as part of the Commission's continuing efforts to enhance customer protections in the competitive energy markets, the Commission revised the Chapter 62 natural gas customer information regulations.¹⁵ This rulemaking amended customer information disclosure regulations at 52 Pa. Code §§ 62.72 and 62.75 for residential and small business natural gas supply customers. Section 62.72 provides regulatory definitions while Section 62.75 discusses the disclosure statement and notice requirements of the natural gas supplier (NGS) to the customer.

The Commission noted that a principal reason for revising the NGS rules was to bring them into alignment with the analogous EGS rules that had been significantly revised in 2014 as discussed above. We believe that both customers and suppliers benefit from substantially consistent cross-industry rules. Inconsistencies between the two sets of rules can lead to customer confusion and inefficiencies for suppliers, especially for those customers who obtain both gas and electric service from the same supplier. Another important rationale for revising the natural gas rules in 2016 was the Commission's belief that concerns regarding variable rates and disclosure statements in the electric supply industry are relevant to the customer disclosure information in the natural gas industry. The Commission believes that concerns about

¹³ Pennsylvania Representatives Robert W. Godshall and Peter J. Daley; the Office of Consumer Advocate, the Office of Small Business Advocate, Citizen Power, UGI Energy Services, LLC, Washington Gas Energy Services, Inc., Constellation NewEnergy, Inc. and Constellation Energy Power Choice, Inc., IGS Energy, the Retail Energy Supply Association, NRG Retail Northeast Companies, Alphabuyer, the National Energy Marketers Association, and FirstEnergy Solutions Corp.

¹⁴ See Final-Omitted Rulemaking Order Regarding the Provisions of Notices of Contract Expiration or Changes in Terms for Residential & Small Business Customers, Docket No. L-2014-2409385 (Order entered April 3, 2014).

¹⁵ See Final Rulemaking Order—Rulemaking to Amend and Add Regulations to Title 52 of the *Pennsylvania Code*, Sections 62.72, 62.75, and 62.81 Regarding Customer Information Disclosure Requirements for Natural Gas Suppliers Providing Natural Gas Supply to Residential and Small Business Customers, Docket No. L-2015-2465942 (Order entered April 21, 2016).

wholesale market price spikes in the natural gas markets, similar to the electric price spikes of early 2014, cannot be dismissed.

Because of the extensive changes to the NGS disclosure rules in 2016, there are now some inconsistencies between those rules and the analogous electric disclosure rules. These differences include:

- *Introductory Pricing:* The NGS rules state that “If the price is introductory, the variable pricing statement must include a statement that the price is an introductory price, the duration of the introductory period and the price for the first billing cycle after the introductory period.” 52 Pa. Code § 62.75(c)(2)(ii). Introductory pricing is not mentioned in the EGS rules.
- If prices change (such as with a variable priced product), the NGS rules require the NGS to disclose when and how a customer is informed of the price change. “A description of when and how the customer will receive notification of price changes.” 52 Pa. Code § 62.75(c)(2)(iv).
- The NGS rules address contract assignment. “If the contract is assignable, the NGS shall inform the customer at the time the parties enter into the contract. Prior to a contract assignment, the NGS shall provide notice to the affected customer, the affected NGDC and the Commission. The customer notice must include the name of the new NGS, the contact information for the new NGS and language informing the customer that contract terms and conditions remain unchanged.” 52 Pa. Code § 62.75(j).
- Most references to the natural gas distribution company (NGDC) were removed from the NGS disclosure statement. The EGS disclosure rules still require including some references to the electric distribution company (EDC).

As noted above, the Commission recognizes the value in having the EGS and NGS disclosure rules be as consistent as possible (noting that some inherent operational differences between the two industries may make complete consistency impractical). We also acknowledge that our 2014 Final-Omitted proceeding provided a limited opportunity for parties to comment on electric customer information matters. Given the emergency conditions of 2014, the Commission had no alternative but to resort to an abbreviated process. Now we have time to more fully consider these matters again based on experience with the existing regulations. Accordingly, during an April 21, 2017 CHARGE¹⁶ conference call, the Commission’s Office of Competitive Market Oversight (OCMO) invited stakeholders to submit informal comments on possible revisions to the EGS disclosure rules at 52 Pa. Code § 54.5, with the intent of using the informal comments to develop a Notice of Proposed Rulemaking (NPRM) to revise the EGS disclosure rules.

Upon careful review of the informal comments received and input from various previous proceedings, and the authority granted the Commission under Sections 501 and 1501 of the Code, 66 Pa.C.S. §§ 501 and 1501, at a December 7, 2017 Public Meeting the Commission proposed amendments to regulations at 52 Pa. Code §§ 54.3, 54.5, 54.7, and 54.10.¹⁷ The December 2017 NPRM

¹⁶ CHARGE (Committee Handling Activities for Retail Growth in Electricity) participants include EDCs, EGSs, industry trade organizations, consumers, the Office of Consumer Advocate, and the Office of Small Business Advocate.

¹⁷ See Rulemaking Regarding Electricity Generation Customer Choice, 52 Pa. Code Chapter 54, Docket No. L-2017-2628991 (Order entered December 7, 2017).

provided for a 60-day comment period that commenced with publication in the *Pennsylvania Bulletin* on March 24, 2018.¹⁸

Thirteen parties filed comments, including AARP; Marion Biddle, the Consumer Advisory Council (CAC); Duquesne Light Company (Duquesne); FirstEnergy Solutions (FES); the Federal Trade Commission (FTC); Inspire Energy Holdings LLC (Inspire); Joint Comments of the Coalition for Affordable Utility Service and Energy Efficiency in Pennsylvania and the Tenant Union Representative Network and Action Alliance of Senior Citizens of Greater Philadelphia (collectively “Low Income Advocates”); the National Energy Marketers Association (NEMA); the Office of Consumer Advocate (OCA); the Retail Energy Supply Association (RESA); Shipley Choice d/b/a Shipley Energy (Shipley); and WGL Energy Services (WGL). All of the comments are available on the Commission’s website at this link to the electronic casefile:

http://www.puc.pa.gov/about_puc/consolidated_case_view.aspx?Docket=L-2017-2628991.

On June 21, 2018, the Independent Regulatory Review Commission (IRRC) filed their comments. These comments are available on the PUC’s website using the above referenced weblink and are also available on IRRC’s website at <http://www.irrc.state.pa.us/> referencing Regulation # 57-319 or IRRC # 3201.

Summary of Comments and Discussion

Independent Regulatory Review Commission Comments

IRRC commends the Commission for proposing amendments to address early termination fees (ETFs) and for encouraging affected parties to offer their perspectives relating to any possible unintended consequences. In addition to eliminating ETFs after the initial notice, IRRC has two suggestions. First, IRRC notes that under existing § 57.173(1), the customer can specify a future date for the switch to a new supplier, but that in practice, customers and their new suppliers do not appear to be specifying a future date for the switch. IRRC posits that instead, the switch request is immediately processed, creating problems for both the customer and current supplier. IRRC asks whether prospective suppliers should be required to better inform customers of the option to specify a future date to align a switch with the end of the customer’s current contract. Second, IRRC notes that commentators suggested that notices closer to the expiration date may more reasonably limit the economic impact on suppliers while still protecting the consumer. IRRC asks the Commission to consider whether, consistent with its statutory authority, the regulation can better balance the interests of both the suppliers and consumers by amending the customer notice process. IRRC at 1.

Also concerning § 54.3(1)(ii), IRRC notes that the terminology used in customer communications is to use the terms in accordance with the glossary posted at www.PaPowerswitch.com or other successor media platform as determined by the Commission. IRRC states that the regulation should specify how the reader can determine whether the Commission has opted to use another successor media platform. IRRC also asks whether the term “product” used in § 54.5(c) and (14)(i) should be defined. IRRC further asks whether the requirements in §§ 54.5(c)(3)(ii)(A) and (c)(11) relating to price variability are duplicative and whether they should be combined into one requirement. IRRC at 2.

IRRC points out that the expected date of delivery of the final regulation is January 2020. Given the current

¹⁸ 48 Pa.B. 1696.

and ongoing problems the PUC describes in its rationale for the revised rules, IRRC encourages the PUC to work toward filing the final regulation sooner, if possible. Finally, IRRC notes that economic and fiscal impacts of the regulation must be considered in their determination of whether a regulation is in the public interest. 71 P.S. § 745.5(a)(4) and (10), and § 745.5b(b)(1). IRRC indicates the responses submitted with the proposed regulation to the Regulatory Analysis Form (RAF) Questions (19), (23) and (23a) are not sufficient to determine whether the regulation is in the public interest relating to the criterion of economic impact. IRRC points out that these RAF questions ask for specific cost estimates and clarifies that even if costs or savings are estimated to be zero, the responses should reflect that rather than state the required cost data is “Not Applicable.” In addition, because commentators have stated there are impacts on pricing relating to elimination of ETFs toward the end of the contract period, IRRC asks the PUC to review its responses to these RAF questions and provide the best estimates of costs in the RAF submitted with the final regulation. This will allow IRRC to determine whether the final regulation is in the public interest, as required by the Regulatory Review Act. IRRC at 2.

As explained more completely in this Order, the Commission revised the proposed rules to address the concerns raised by the Independent Regulatory Review Commission (IRRC). The Commission revised the proposed rule to a more reasonable and still consumer-friendly alternative by revising the date the ETF exclusion period begins. We had proposed starting the exclusion period from the date of the initial notice—approximately 60 days from the end of the contract. Instead, the exclusion period will start on the date that the second (options) notice is sent to the customer. This second (options) notice is issued no later than 30 days prior to the expiration of the contract. This will in effect create an ETF-exclusion period of approximately 30 days; compared to a 60-day period originally proposed. One of our primary motives for this change is the fact that a customer has no control over the precise date of a supplier switch. While some of the commentators, including the FTC and IRRC, have interesting suggestions addressing this matter via the supplier switching rules and procedures, we find that those matters lie outside of the current rulemaking and that the approach adopted in this final rulemaking is more reasonable and balanced.

We agree with OCA and Duquesne that the customer must rely on the supplier to submit the drop/add request to the EDC. Significantly, the supplier submitting the request would be a new supplier that has no knowledge of the terms and conditions of the customer’s current supply contract and would have no business reason to act to protect the customer from any potential ETF. Once the supplier submits the request the EDC must complete the switch within three business days. See 52 Pa. Code § 57.174 (relating to the time frame requirement). Again, the actions of these two entities, the new supplier and the EDC, are beyond the customer’s control and their interests do not necessarily align with that of the customers.

While the regulations do permit an EGS to submit a drop/add request on a date specified by the customer,¹⁹ the customer still has no actual control over whether the request is submitted on the date requested. This process assumes that residential and small commercial customers know the utility business practices and regulations enough to precisely know when to have the new supplier

submit the request, especially when their time and energy is consumed with daily life activities or with running a small business.

While an EGS may be subject to financial risk if a customer switches to another EGS or default service before the end of a contract, we find that the customer is also subject to financial risk based on the actions of the supplier if a switch does not occur on the date requested. If the supplier submits the request early, the customer is subject to the ETF which, as pointed out by the OCA and Low Income Advocates, can be significant. If the supplier submits the request late, the customer may be subject to a higher price than the price offered by the new supplier or default service. We also find it significant that the customer has no real recourse against a supplier that does not submit the request on the date specified by the customer. We find that suppliers are sophisticated enough to be able to hedge against any potential losses that may occur due to a customer leaving a contract less than 30 days before it ends and should be the ones that bear that risk, not the residential or small business customer.

Regarding IRRC’s suggestion that the regulation should specify how the reader can determine whether the Commission has opted to use another successor media platform, we decline to codify in the regulation how the Commission will make such a determination or what other types of media platforms will be available in the future as such information or methods are unknown at this time. With that said, we note that as with the current www.PaPowerswitch.com, the Commission will use all appropriate methods and media available at the time of the change to inform customers.

We agree with IRRC that the term “product” used in these regulations may be ambiguous. Initially, we note that the purpose of this subchapter “is to require that electricity providers enable customers to make informed choices regarding the purchase of electricity services. . . .” 52 Pa. Code § 54.1(a). Furthermore, as we have consistently stated, the information provided must be in a form to permit customers to make an apples-to-apples comparison of all offers for retail electric service. We recognize that some suppliers may also offer other services or value-added products with the basic generation service. While these other products and services may induce consumers to choose that supplier, in the end, the consumer must know what they are purchasing and what the cost of all the products and services are. We also agree with the OCA that tangible products and services that can be provided in a manner that is distinct and separate from generation service, their costs or charges are to be disclosed separately. Accordingly, we have replaced the term “product” with the term “offer” or removed it to eliminate any potential confusion. Rather than attempting to develop a definition for product that encompasses all current and potential future product offerings, the Commission finds that simply referring to whatever the EGS is offering avoids any need for interpretation and avoids confusion.

Regarding IRRC’s question asking if the provisions of § 54.5(c)(3)(ii)(A) are duplicative of the requirements at subsection (c)(11). We do not view these two requirements as duplicative. Subsection (c)(3) addresses the content—what must be disclosed. Subsection (c)(11) concerns formatting—that this information must be in a larger font size.

Regarding IRRC’s request that we provide cost data, based on the best available data, the Commission believes that costs associated with the amendments to these rules

¹⁹ See 52 Pa. Code § 57.173 (relating to customer contacts the EGS to request a change in electric supply service).

are minimal and transitory. This is based on the comments provided indicating that EGSs can adjust their risk management practices to avoid or minimize any potential risk when developing new offers. In addition, at the suggestion of RESA, the Commission agreed to delay the effective date of the rules by 60 days to give suppliers time to revise their contracts and disclosure statements, further reducing the cost impacts of the rules. In addition, the new rules will reduce costs for customers, including small business customers, by eliminating ETFs in the last 30 days of a contract and providing enough information so that they can make an apples-to-apples comparison of supplier offers to determine which offer is beneficial to them. All of this demonstrates that the Commission has endeavored to obtain and present the cost information available.

General Comments

The FTC commends the PUC for its interest in providing parallel marketing rules for both electricity and natural gas retailers and agrees that parallel rules are likely to lessen the confusion that dissimilar rules can create for consumers. From a competition perspective, parallel marketing rules are highly appropriate for end uses in which electricity and natural gas compete head-to-head. Parallel marketing rules for retail electric and natural gas sectors are particularly timely in view of ongoing competition between electricity and natural gas for some end uses and increased national interest in efficient electrification. FTC at 7, 8.

The FTC argues that it is important for marketers to be allowed to explain their offers with enough detail. Limitations on disclosures run the risk of cutting off information that customers need to make fully informed decisions. For this reason, the FTC encourages the PUC to continue framing its disclosure requirements as minimum disclosure requirements, rather than as rules that limit disclosures to specific categories that may not be sufficient to describe some offers. The FTC encourages the PUC to continue with this generally positive approach to additional disclosures about contract offers for residential and small commercial customers. FTC at 10, 11.

While Shipley agrees that consistency between regulations for the electricity and natural gas markets is important, it should only be the goal in situations that are substantially similar. Shipley thinks that it is ironic, then, that the Commission proposes a substantial change in this proceeding that will divest EGSs of the benefits of existing and future contracts, by eliminating their ability to charge early termination fees (“ETF”) during what could be critical usage and cost periods of a contract. Shipley at 2.

FES appreciates the efforts the Commission has taken to clarify the rules related to (i) customer information regulations pertaining to standards and pricing practices for retail electricity services; (ii) disclosure statements for residential and small business customers; (iii) marketing and sales activities; and (iv) notices of contract expiration or changes in terms. FES is not opposed to the proposed changes and believes that standardization of such regulations with those for the natural gas industry will reduce potential customer confusion. FES further believes that clarification of terms and conditions will enhance the customer’s shopping experience, thus benefitting the overall competitive market in Pennsylvania. FES at 1, 2.

§ 54.3. Standards and pricing practices for retail electricity service

We proposed revisions to 52 Pa. Code § 54.3(1)(ii) to update the regulation by referring to the correct location

where the glossary of terms can be found (similar to our proposed revision relating to a similar requirement at 52 Pa. Code § 54.5(e)). We also proposed a new requirement at 52 Pa. Code § 54.3(2) that would in effect ban the imposition of early termination fees (ETFs) once a supplier has provided the initial contract expiration notice required by 52 Pa. Code § 54.10. We proposed this requirement in response to consumers who object to having an ETF assessed upon them simply because they acted on the expiration notices sent by the supplier. From the consumer’s perspective, they are acting on the expiration notice they received from the supplier by exercising one of the following options available to them—selecting a new supplier or returning to default service. In addition, we note that the early ending of a contract can be inadvertent—the customer miss-times the switch to a new supplier or default service resulting in the ETF being imposed. This is especially true given that the customer has no actual control over the timing of the switch, as it is ultimately up to the supplier and the utility as to just when a switch occurs. The imposition of an ETF under these circumstances can understandably frustrate and discourage customers from participating in the competitive market.

The proposed requirement would be in effect only during the final 45–60 days of the customer’s contract with the EGS (once the initial notice has gone out) and that this only impacts the residential and small business segment of the market. We acknowledged that this kind of requirement may not be appropriate for large commercial/industrial customers, where early exits can result in significant financial loss for the EGS and where the customer is more sophisticated and more able to manage such transitions due to the costs involved.

Duquesne supports the proposed changes to § 54.3(1)(ii) that provides a single, easily accessible and correct location for the glossary of terms related to electric choice in Pennsylvania. Duquesne notes that as technology continues to evolve and as more customers transition to accessing information mostly via electronic means, the transition to maintaining information on the www.PAPowerswitch.com website is a logical next step. Duquesne also supports the Commission’s proposal deleting § 54.3(1)(iii), which currently requires EDCs to distribute the “Common Electric Competition Terms” as part of its consumer education program. Duquesne agrees that this change is an important step toward a further understanding among consumers of the different roles of EGSs and EDCs in the retail marketplace and reduces the likelihood of consumer confusion regarding the involvement of EDCs in the retail market. Duquesne at 4, 5.

Additionally, Duquesne supports the Commission’s proposed language in § 54.3(2) that precludes any early termination fees being assessed against a residential or small business customer when the customer terminates a fixed duration contract after the notice of the contract expiration has been issued by the EGS. Duquesne states that as the retail market has evolved and as EDCs and EGSs have continued to refine the process by which customers are switched between suppliers or default service with automated transactions there is less customer control over the precise date a switch occurs. Duquesne agrees that penalizing a customer for when a transaction occurs over which the customer has no control discourages participation in the retail market and reduces customer satisfaction with both the EGS and the EDC. Duquesne at 4, 5.

OCA also notes that the customer has no control over the timing of the switch that is ultimately up to the supplier and the utility. OCA asserts that while many suppliers waive the ETF under certain circumstances, there is no certainty as to whether an ETF will be waived as the decision to waive the ETF is left to the sole discretion of the supplier. OCA also asserts that when a customer acts as a result of a contract expiration notice and faces the imposition of an ETF as a result, the customer typically perceives these charges as unfair, resulting in a lower level of customer interest in the retail energy market generally. Accordingly, the OCA supports the Commission's proposed revision as it provides a critical protection to customers who are acting in good faith based on the required notices. OCA at 3—5.

OCA also recommends that the Commission consider other protections regarding ETFs. OCA submits that it is not just the imposition of an ETF nearing the end of the contract that is of concern. OCA asserts that some ETFs are prohibitively high and discourage a customer from entering into a contract or leaving a contract that is harming the customer. OCA suggests that the Commission should consider whether it wants to limit the ETF charged to customers. OCA notes that both Illinois and Connecticut impose a maximum ETF limit of \$50 on residential customers on fixed rate contracts. OCA submits that an ETF exceeding \$50 discourages ratepayers from participating in the competitive market. OCA at 3—5.

The Low Income Advocates and the CAC support the Commission's proposal and believe that such a ban will reinforce the notion that customers are permitted to make a choice prior to expiration of their existing EGS contracts and should not be penalized for doing so. The Low Income Advocates assert that suppliers may penalize a consumer for making an active choice in response to information provided in the options notice. The Low Income Advocates agree wholeheartedly with the Commission's assessment that this practice leads to widespread customer frustration and often negative financial implications for the customer, who in many cases cannot afford to pay inflated charges. Low Income Advocates at 6—8; CAC at 2, 3.

The Low Income Advocates also agree that the practice damages the reputation of the market, causing many consumers to return to and remain with their default service provider to avoid further financial consequences. The Low Income Advocates assert that waivers and refunds do not mitigate the impact of the practice on consumers or the competitive market as fee waivers and refunds are not automatic. The Low Income Advocates state that current early termination fees range as high as \$200, but could go even higher, which for a low-income family can mean significant hardship. Low Income Advocates at 6—8.

AARP strongly urges the PUC to halt the process under which unsuspecting customers are hit with large penalties simply because they follow the instructions in their current supplier's contract expiration notice and let the supplier know that they do not wish to renew their contracts. AARP states that the proposed changes should be adopted. AARP at 2.

In the FTC's view, the proposed limitation on ETFs reduces customers' switching costs, but may also introduce additional risks for EGSs. The FTC proposes that the Commission consider making the switch effective at the end of the contract period unless the customer explicitly indicates that the switch should take place

earlier, resulting in the customer's payment of the ETF. The FTC notes that one potential unintended consequence of reducing switching costs is that marketers might increase the minimum duration of customer contracts. The FTC suggests that the Commission engage marketers in a discussion of whether these and other potential costs associated with the proposal are likely to occur, and then weigh the benefits against the costs in reaching a determination on this proposal. FTC at 2, 8.

RESA recommends that the Commission revise the proposal to limit the ban on the imposition of ETFs starting 14 days prior to the contract expiration date. RESA thinks this would be a reasonable balance between the information EGSs are required to provide to customers two months in advance and the EGSs' financial exposure. RESA notes that EGSs generally secure load for customer contracts through wholesale supply contracts consistent with the duration of the customer contract. RESA asserts that the EGS will likely be bound by a wholesale supply contract even if the customer cancels the contract early, depriving the EGS of the revenue to cover the wholesale contract. RESA notes that contracts with small business customers may have specific requirements that are negotiated as part of the contract and significant usage associated with the contract increasing the EGS' financial risks. For these reasons, RESA asserts that ETFs may play an important role in the ability of the EGS to offer a particular price to a customer. RESA asserts that since EGSs are already required to provide the date when the fixed duration contract is set to expire, consumers will know the appropriate timing in which they must act to cancel the contract to avoid imposition of an ETF. RESA at 12—15.

RESA proposes the following revisions for each of the impacted Sections:

Section 54.3(2) For residential and small commercial customers, contracts for retail electric service entered into after the effective date of this regulation may only impose a fee not include any fees to be paid by the retail electric customer for terminating a fixed duration contract up to 14 days prior to the date the contract expires between the date the initial notice required in § 54.10 (relating to notice of contract expiration or change in terms for residential and small business customers) is issued and the expiration of the fixed duration contract.

Section 54.5(c)(11) An explanation of limits on price variability, penalties, fees or exceptions, printed in type size larger than the type size appearing in the terms of service. Penalties and fees shall be disclosed in actual dollars or a specific method for determining the actual dollars shall be disclosed. This explanation shall include a statement advising the customer that the customer may will not be subject to any penalty or fee if the customer terminates the contract up to 14 days prior to the date the contract expires, at any time between the date the initial notice required in § 54.10 (relating to notice of contract expiration or change in terms for residential and small business customers) is issued and the expiration of the fixed duration contract.

Section 54.10(1)(vi) A statement indicating whether the existing fixed [term] duration contract has a cancellation fee, and an explanation [of the fee amount and how to avoid the fee, if possible, including notice of the date when the customer can choose a different product from the customer's existing EGS, choose an alternative EGS or return to default

service] that the customer may be is not subject to the cancellation fee if the customer terminates the contract up to 14 days prior to the date the contract expires. at any time between the date of the initial notice and the expiration date of the fixed duration contract.

RESA at 12—15.

NEMA does not recommend adoption of this proposal because requiring EGSs to send consumers notices of contract expiration and then penalizing EGSs for the result is a perverse outcome. NEMA suggests it may be more appropriate to explore how the date is placed on the notice and whether it could be improved to facilitate consumer awareness and understanding of the consequences. NEMA asserts that instances of consumer “objection” to the ETF are not enough to impose this material rule change on the industry. NEMA states that EGSs have the discretion to waive or forego an ETF as part of their business plan and desire to satisfy consumers if they deem it appropriate. NEMA states that the ETF serves an important role in mitigating supplier risks of serving consumers for the entire term of the contract. NEMA notes that EGSs hedge to provide service up to the point when the customer may be served by an alternative product, alternative supplier or the utility. NEMA asserts that prohibiting the imposition of ETFs may encourage EGSs to “front load” the ETF to avoid the impact of the prohibition. NEMA at 2—4.

Inspire suggests that EGSs should specify in the initial notice, or in subsequent communications with customers that a customer has two options: (1) to cancel the contract early and possibly incur a cancellation fee; or (2) request that the contract not be renewed, but with the understanding that the customer will continue to receive service from the supplier through the pendency of the existing term. Inspire at 2.

Shiplely states that, contrary to the speculation in the order, the proposed change poses the likelihood that serious supplier harm will result. Shiplely notes that the period during which a customer could exit a contract without an ETF would be, under the proposed rule, 1/6 of the length of a one-year contract or 1/3 of a six-month contract, which in either case is substantial and can mean the difference between a supplier making or losing money. Shiplely also states that if a customer’s contract renews in August and the notice is sent in June, and the customer leaves in early July, the supplier will lose the revenue for the high consumption months of July and August, thus inflicting even more substantial loss, which the ETF is intended to mitigate. Shiplely states that EGSs are willing to offer fixed prices because they can at least somewhat insure against loss with an ETF. Shiplely asserts that eliminating that bargain will harm consumers—more than the few customers who end up paying ETFs because they switched after they received a notice that their contract was ending. Shiplely at 2, 3.

Shiplely believes that the solution is to change to a single notice at 30—45 days before the end of the contract: a notice that includes the renewal price. Shiplely asserts that under this single notice proposal, EGSs might lose part of the last month of a contract, but if they did it would likely be because another supplier made a better offer, not because the customer was scared into shopping prematurely. Shiplely at 2, 3.

IRRC commends the Commission for proposing amendments to address ETFs and for encouraging affected parties to offer their perspectives relating to any possible

unintended consequences. In addition to eliminating ETFs after the initial notice, IRRC has two suggestions. First, IRRC notes that under existing § 57.173(1), the customer can specify a future date for the switch to a new supplier, but that in practice, customers and their new suppliers do not appear to be specifying a future date for the switch. IRRC posits that instead, the switch request is immediately processed, creating problems for both the customer and current supplier. IRRC asks whether prospective suppliers should be required to better inform customers of the option to specify a future date to align a switch with the end of the customer’s current contract. Second, IRRC notes that commentators suggested that notices closer to the expiration date may more reasonably limit the economic impact on suppliers while still protecting the consumer. IRRC asks the Commission to consider whether, consistent with its statutory authority, the regulation can better balance the interests of both the suppliers and consumers by amending the customer notice process. IRRC at 1.

Also concerning § 54.3(1)(ii), IRRC notes that the terminology used in customer communications is to use the terms in accordance with the glossary posted at www.PaPowerswitch.com or other successor media platform as determined by the Commission. IRRC states that the regulation should specify how the reader can determine whether the Commission has opted to use another successor media platform. IRRC at 2.

Discussion

Not surprisingly, there was a broad range of comments to the Commission’s proposal to restrict the imposition of ETFs as a contract expiration approaches, from enthusiastic support to vigorous disagreement. Nonetheless, some parties took a position between these two extremes, suggesting that there is some possible “middle-ground” that would address the Commission’s concerns while avoiding some of the more adverse unintended consequences. After considering the comments, we are convinced that there is a reasonable compromise here that will protect consumers while avoiding most of the hazards identified by some suppliers.

We think Shiplely has a point when they argue that barring ETFs for the final two months of a contract is substantial—in effect 1/6 of a one-year contract or 1/3 of a six-month contract—and that this could impose significant financial harm on suppliers. RESA agrees that requiring suppliers to possibly absorb two months of losses is overly prescriptive. The FTC and IRRC also point to this possibility and asked us to weigh these arguments against possible alternatives.

RESA offers as an alternative a 14-day ETF exclusion period at the end of a contract. While we appreciate RESA offering this alternative, we fear that this is unworkable from a consumer’s perspective as it assumes that a customer knows or will remember the precise date of their contract expiration and be able to identify when the 14-day ETF exclusion period begins. We are also concerned that a 14-day window may be too short. We also find that such a rule would require additional administrative costs on EGSs in that they would have to implement additional controls to track and identify when the 14-day ETF exclusion period begins. Whereas, setting the ETF exclusion period to coincide with the issuance of the second options notice would require little to no additional administrative costs for EGSs as they already have such processes in place.

We find that a more reasonable and still consumer-friendly alternative is to date the ETF exclusion period

from the date that the second (options) notice is sent to the customer. This second (options) notice is issued no later than 30 days prior to the expiration of the contract. This will in effect create an ETF-exclusion period of approximately 30 days; compared to a 60-day period originally proposed. While we understand and appreciate that some suppliers may waive or refund ETFs in these situations, we agree with the Low Income Advocates that consumers should not have to pursue such waivers, which they may or may not receive. We point again, as we did in the NPRM, that the impact of this ban will also be limited by the fact that it is contained within the Chapter 54 customer information regulations that only apply to residential and small business accounts. Large commercial and industrial accounts will not be covered by this ban, where we acknowledge that such a ban could expose a supplier to a far more substantial financial risk.

Again, one of our primary motives for this change is the fact that a customer has no control over the precise date of a supplier switch. While some of the commentators, including the FTC and IRRC, have interesting suggestions addressing this matter via the supplier switching rules and procedures, we find that those matters lie outside of the current rulemaking and that the approach adopted in this final rulemaking is more reasonable and balanced.

We agree with OCA and Duquesne that the customer must rely on the supplier to submit the drop/add request to the EDC. Significantly, the supplier submitting the request would be a new supplier that has no knowledge of the terms and conditions of the customer's current supply contract and would have no business reason to act to protect the customer from any potential ETF. Once the supplier submits the request, the EDC must complete the switch within three business days. See 52 Pa. Code § 57.174 (relating to the time frame requirement). Again, the actions of these two entities, the new supplier and the EDC, are beyond the customer's control and their interests do not necessarily align with that of the customers.

While the regulations do permit an EGS to submit a drop/add request on a date specified by the customer,²⁰ the customer still has no actual control over whether the request is submitted on the date requested. This process assumes that residential and small commercial customers know the utility business practices and regulations enough to precisely know when to have the new supplier submit the request, especially when their time and energy is consumed with daily life activities or with running a small business. EGSs are at a distinct advantage because the wholesale and retail electric market is their business and they know how to deal with such markets and how to mitigate any potential risks caused by customers leaving after the final options notice is provided.

While an EGS may be subject to financial risk if a customer switches to another EGS or default service before the end of a contract, we find that the customer is also subject to financial risk based on the actions of the supplier if a switch does not occur on the date requested. If the supplier submits the request early, the customer is subject to the ETF which, as pointed out by the OCA and Low Income Advocates, can be significant. If the supplier submits the request late, the customer may be subject to a higher price than the price offered by the new supplier or default service. We also find it significant that the customer has no real recourse against a supplier that

does not submit the request on the date specified by the customer. The only recourse is for the customer to request that the EGS they left to waive any ETF, which provides no significant improvement over the existing circumstances. We find that suppliers are sophisticated enough to be able to hedge against any potential losses that may occur due to a customer leaving a contract less than 30 days before it ends and should be the ones that bear that risk, not the residential or small business customer.

We also reject OCA's suggestion to impose caps on the amount charged by EGSs for ETFs. While we do have concerns about the perception of the competitive market caused by large ETF amounts and the resulting impact on consumers' willingness to participate and shop, imposing caps would be a significant change to the market and one that has not been fully vetted by all the stakeholders. We find that prohibiting the charging of ETFs after the second options notice is provided to the customer is more reasonable and balanced in that it protects customers from financial risk for actions beyond their control and allows EGSs to continue to hedge against potential losses due to a customer leaving the EGS before a significant portion of the contract term has lapsed.

Regarding IRRC's suggestion that the regulation should specify how the reader can determine whether the Commission has opted to use another successor media platform, we decline to codify in the regulation how the Commission will make such a determination or what other types of media platforms will be available in the future as such information or methods are unknown at this time. With that said, we note that as with the current www.PaPowerswitch.com, the Commission will use all appropriate methods and media available at the time of the change to inform customers.

§ 54.5. Disclosure statement for residential and small business customers

52 Pa. Code § 54.5(c)(1)

We proposed revising this Section to bring the electric rule into alignment with the natural gas rule at 52 Pa. Code § 62.75(c)(1). This requirement is intended to ensure that the prices presented to consumers are bundled appropriately to make "apples-to-apples" comparisons possible. However, we recognized that as we move forward to an electric market with advanced metering technology, new products and pricing structures are possible and we invited parties to comment on the need for this regulation to accommodate these possibilities or, at the least, not to obstruct or be an obstacle to future innovations.

OCA fully agrees with the Commission's proposal that generation charges should be disclosed in a price per kWh format. This will result in an apples-to-apples price comparison with the PTC and between supplier offers. OCA believes that new pricing structures will have to fit within this regulation to fully inform the customer and if there are enrollment fees or monthly fees, these will need to be incorporated and treated in accordance with § 54.5(c)(4). If a flat bill only option is proposed, it also will need to be treated as a price that changes with usage and show price/kWh at 500, 1000, and 2000, even though the flat bill is the same for each usage level. OCA at 5, 6.

OCA further notes that the word "product" is an undefined term that may require clarification from the Commission. OCA notes that if the EGS "product" is a pricing structure such as a time-of-use (TOU) rate, flat bill, or fee that is part of receiving the electric generation service, then the "product" should be converted to a cents

²⁰ See 52 Pa. Code § 57.173 (relating to customer contacts the EGS to request a change in electric supply service).

per-kilowatt-hour basis and disclosed to the customer since the “product” is part of the generation service. OCA states that if, however, the “product” is a tangible product or a service such as a home security system, an HVAC maintenance contract, or a smart thermostat, then these charges should be unbundled from the generation service and disclosed separately. OCA asserts that these charges are similar to non-basic services and must be disclosed to the customer as to their cost impact on the monthly bill. OCA states, however, that since these “products” are not a requirement of the generation service, they may not need to be disclosed on a price per-kilowatt-hour. OCA at 5, 6.

The Low Income Advocates strongly support the proposal to amend § 54.5(c)(1) to require suppliers to disclose generation charges in actual prices per kilowatt-hour as it will provide a critically important tool for consumers to conduct an apples-to-apples comparison of various offers. The Low Income Advocates assert that disclosure of the kilowatt-hour price will make these complicated pricing structures more transparent, enhancing the competitive market. The Low Income Advocates also assert that when a consumer is harmed by a pricing structure that they do not understand, they are less likely to engage in the market in the future and are more likely to sway others to follow their example. The Low Income Advocates state that the requirement will likely allow suppliers to more clearly translate their innovation into savings that consumers understand. Low Income Advocates at 9–13.

The Low Income Advocates opine that while suppliers may create offers which bundle the rate for electricity in various ways to serve specific consumer interests, or which offer bonuses, rewards, or additional products or services, the commodity sold remains the same. The Low Income Advocates note that unit pricing, which has been around since at least the early 1970s, appears in a multitude of other commodity markets and has not stifled competition or innovation in those markets. They point to, for example, the grocery store label for orange juice that includes both the total price and the unit price per ounce, allowing consumers to easily compare products and make a value judgment about the quantity and brand of juice they wish to consume. The Low Income Advocates assert that the electric generation market is no different: suppliers are offering the same commodity, electricity, but ultimately the unit price of energy—per kilowatt-hour—is the critical benchmark allowing consumers to make a value judgment about an offer they wish to accept. Low Income Advocates at 9–13.

The CAC believes that the Commission’s proposed requirement will reduce the likelihood that customers will be misled by low kilowatt hour fees that are often coupled with high monthly or one-time fees that might not be displayed as prominently in the materials provided by some marketers. The CAC notes, for example, that an examination of offers in the PECO service territory on the PAPowerSwitch website reveals the “lowest” price per kilowatt hour offered to residential customers is a mere 3.88 cents per kWh, as compared to the much higher PECO PTC of 7.09 cents. The CAC states that the low per kWh rate, however, is coupled with a fixed fee of \$29.95 per month. The CAC asserts that it is essential that these types of fees be readily identified, incorporated into the unit price of energy, and the information provided to consumers so that they can make intelligent choices for their retail electric service. CAC at 3, 4.

The FTC commends the Commission for focusing on improving customers’ ability to obtain the information they need to make fully informed electricity service

choices. The FTC states that this approach is particularly admirable and economically significant because it preserves the ability of residential and small commercial customers to contract with marketers for dynamic pricing rate plans. The FTC asserts that the proposal thus preserves an important link between wholesale and retail electricity markets—a link severed by flat rate offers. The FTC states that preserving this link improves the efficiency and reliability of electricity service in Pennsylvania and beyond. FTC at 1.

The FTC believes that the challenge for marketers is to develop a reasonable and truthful way to include the value of non-price elements in making price comparisons. The FTC notes that a key example is when a marketer’s electricity contract offer bundles electricity supply with a physical device that can help reduce the customer’s power use and bills. The FTC further notes that in other instances, the contract may bundle electricity supply with unrelated services, such as gift cards or entertainment discounts, that the customer receives at some point after the supply contract is signed. The FTC encourages the Commission to allow marketers to explore how best to incorporate the value of bundled goods or services for purposes of developing accurate and clear apples-to-apples price comparisons. The FTC asserts that a policy that requires marketers to value these bundled goods or services at zero does not allow for an apples-to-apples comparison. FTC at 8, 9.

RESA is concerned that several of the Commission’s proposed revisions mandating how EGSs are to present their pricing structure to customers will have the effect of limiting the creative pricing structures that can be developed in the competitive market. RESA notes that the increasing availability of smart meters provides important interval level usage data necessary to enable EGSs to develop creative and new products and services that are already beginning to emerge. Since these new products and services will not neatly fit within predefined boxes, RESA urges the Commission to avoid being too restrictive in these regulations such that it stymies this innovation. RESA asserts that consumers receive the greatest benefit of these inherent drivers when EGSs are not overly restricted in how they are required to explain their pricing structures. RESA at 4.

RESA states that the proposed restrictions on pricing presentation would have the effect of dampening some of the current innovation that is already beginning here in Pennsylvania. RESA states that flat billed products, for example, charge the customer the same amount on a monthly basis without regard for the number of kilowatt-hours used; thus, presenting a price per kilowatt-hour for this type of product is not relevant for the customer. RESA further states that some time-of-use products are not priced on a per kilowatt-hour basis but rather have pricing based on usage on certain days (i.e. “free weekends”). RESA asserts that the expansion of on-site generation also impacts pricing presentation because pricing can be based on the credit that is applied for on-site generation. Accordingly, RESA suggests the following modification to § 54.5(c)(1) of the Commission’s proposal: “Generation charges shall be disclosed according to the actual prices per kilowatt-hour, as applicable.” RESA at 5, 6.

RESA recognizes that one purpose of the proposed language is to align the regulations with Commission precedent in the “Fixed Means Fixed” Order so that EGSs include an estimate of gross receipts tax (GRT) in the pricing offered to potential customers. RESA supports the inclusion of this language in the Commission’s regulations

for residential customers to better broadcast the Commission's expectations so that all EGSs are held accountable to the same standard. However, RESA offers that small business customers may need or want pricing to be shown in a different manner, for example, in a Request for Proposal process. Therefore, RESA suggests adding the following language to § 54.5(c)(1) to give EGSs the flexibility to satisfy the specific requirements of a potential customer: "Generation charges must include an estimate of all applicable taxes except for State sales tax and county tax, **unless the customer specifically requests a different price presentation.**" RESA at 6, 7.

WGL is also concerned that the proposed revision's mandate for per-kilowatt hour pricing does not allow for other types of products, such as flat-bill products or unlimited energy supply products that are growing in popularity among suppliers and customers. For this reason, WGL submits that the new proposed "per kilowatt-hour" reference at the end of the first sentence should be removed. WGL asserts that the current language in the first sentence of § 54.5(c)(1) sufficiently conveys the requirement for the contract to accurately disclose the actual price of generation charges, without unduly limiting the availability of price structures that are not based on a per kWh model. WGL submits that if the new "per kilowatt hour" language is retained, then the regulation needs to be expanded to address products that are not based on per kWh price. WGL proposes that § 54.5(c)(1) be further revised as follows:

Generation charges shall be disclosed according to actual prices per kilowatt hour, if the customer will be billed under per kilowatt hour price structure. If a customer will not be billed under a per kilowatt hour price structure, the contract's terms must clearly explain the pricing structure and what the customer's price for generation charges will be for a given period of time. Generation charges must include an estimate of all applicable taxes except for State sales tax and county sales tax.

WGL at 1, 2.

Inspire likewise opines that the proposed requirement, if interpreted strictly and without exception, will present a substantial obstacle to future and present innovations. Inspire notes that its subscription energy supply offering is a flat bill product in which customers are charged the same amount each month—regardless of usage—for the full term of the contract. Inspire states that this product is tailor-made for each customer, with Inspire looking at a variety of customer characteristics to generate a monthly energy supply price for a potential customer. Inspire's flat-bill plans are paired with a loyalty program, which offers generous bill credits to customers who reduce their consumption. Inspire asserts that few people understand the kWh and, specifically, what a kWh rate will mean for their ultimate bill. Inspire further asserts that what customers do understand, and what they care about, is how much they will ultimately pay each month. Inspire at 2—8.

Inspire insists that a requirement to present the price for an energy product as a cost per kWh at the point of sale would greatly limit innovation, and ultimately choice, and if applied strictly and without exception, it could essentially lock market participants into just two rate structures, fixed and variable. Inspire asserts that the best way to provide customer choice is to ensure that market rules are not so restrictive that innovation is stalled and that consumers are not presented with competitive options simply because suppliers cannot make

their products fit within the restrictive rules. Accordingly, Inspire urges the Commission to eliminate the cost per kWh requirement or, in the alternative, clarify its inapplicability to flat-bill and other innovative products. Inspire at 2—8.

IRRC asks if the term "product" should be defined. IRRC at 2.

Discussion

This is one of the more complex issues addressed in this rulemaking—one we urged stakeholders to comment upon, including a statement from then Vice Chairman Place specifically inviting comment on the impact of the proposed changes on sophisticated products made possible by advanced metering.²¹ This complexity was reflected in the thoughtful comments. Many of the parties acknowledged the tension between providing consumers with sufficient information to make informed decisions and comparisons, while at the same time not restricting innovative new products.

First, we agree with OCA and IRRC that the term "product" used in these regulations may be ambiguous. Initially, we note that the purpose of this subchapter "is to require that electricity providers enable customers to make informed choices regarding the purchase of electricity services. . . ." 52 Pa. Code § 54.1(a). Furthermore, as we have consistently stated, the information provided must be in a form to permit customers to make an apples-to-apples comparison of all offers for retail electric service. We recognize that some suppliers may also offer other services or value-added products with the basic generation service. While these other products and services may induce consumers to choose that supplier, in the end, the consumer must know what they are purchasing and what the cost of all the products and services are. With that said, we agree with the OCA that charges for generation service must be disclosed on a cents-per-kilowatt-hour basis, regardless of how they are structured, which includes time-of-use rates, flat bills or fees related to that service. We also agree with the OCA that for tangible products and services that can be provided in a manner that is distinct and separate from generation service, their costs or charges are to be disclosed separately. Accordingly, we have replaced the term "product" with the term "offer" or removed it altogether to eliminate any potential confusion.

Upon careful consideration of the comments, we believe that our original proposal to require prices to be expressed in a per-kWh rate is sound, while acknowledging some exceptions and the need to provide some additional guidance. The proposed requirement at § 54.5(c)(1) is fairly straight-forward if a traditional fixed per-kWh price is offered. We agree with many of the suppliers who argue that this requirement should only be applicable if the product is priced and presented to the customer on a per-kWh basis, and we will add language similar to what WGL suggests clarifying this point. If the product is priced on some other basis than per-kWh, the supplier is obligated to explain the pricing structure and what the customer charges are. Importantly, this does not mean that other types of products are necessarily exempt from calculating and displaying for the customer the per-kWh unit price for different usage levels, as will be explained later when we discuss our proposed § 54.5(c)(4) requirements. We find that RESA's suggestion to end this paragraph with a simple "as applicable" is too broad and

²¹ See Statement of Vice Chairman Andrew G. Place re Rulemaking Regarding Electricity Generation Customer Choice, 52 Pa. Code Chapter 54, Docket No. L-2017-2628991 (Public Meeting of December 7, 2017).

vague. We find that more detailed guidance on this point is needed and prefer a more descriptive revision similar to what WGL offered.

There was no opposition to our proposal that the prices presented to customers must include all applicable taxes (except for sales tax). The parties agree that this is necessary as to allow for “apples-to-apples” comparisons. However, RESA did ask for language permitting for different pricing presentation upon the customer’s request. While we understand that this may be of some use with small business customers, we find that it is not necessary to include this exception in the regulation. There is nothing to prevent a supplier from responding to such a customer request and providing a different pricing presentation, in addition to the required bundled price presentation. The regulation sets the minimum standard for what is required to be provided—a supplier is always free to provide the customer with additional information if desired by the customer.

52 Pa. Code § 54.5(c)(2)

We proposed revisions that would bring the electric rule into alignment with the natural gas rule at 52 Pa. Code § 62.75(c)(2)(ii). This requirement is also intended to provide for full price transparency when an EGS is offering an introductory price product. To make fully informed decisions in the energy marketplace, it is essential that a customer fully understands that the product is introductory, and that the customer know both the introductory price and the price they will be charged after the introductory period ends.

OCA notes that one of the hallmarks of the Customer Choice Act is that EGSs provide adequate and accurate customer information to enable customers to make informed choices. OCA submits that the proposed revision could be strengthened in several respects. Based on its experience, OCA states that many consumers make supplier decisions based on oral marketing and may not fully review the written disclosures that are not available to the customer in a telemarketing sales call. OCA asserts that even when the disclosure is provided customers often wait until a later time, after the agent has left, to read these materials. While customers have the legal option to review the multiple page contract terms and are given a three-day right of rescission without penalty, it is the OCA’s experience that customers rely on the oral presentation. As a result, the OCA recommends that suppliers be required to make an oral statement concerning introductory rates and the nature of the rate that will be charged after the introductory period, as well as include this information in the third-party verification (TPV) script. OCA at 6—8.

OCA further agrees that, due to the nature of variable rate contracts, the EGS should be required to, orally and in writing, state a specific price for the next billing period after the introductory period. Additionally, the OCA agrees with the Commission that the length of the introductory period should be disclosed. To strengthen this provision, the OCA proposes the following modification:

(2) If the price is introductory, the pricing statement, THE ORAL STATEMENT MADE BY THE SALES AGENT, AND THE THIRD PARTY VERIFICATION SCRIPT, must include a statement that the price is an introductory price, the duration of the introductory period and the price for the first billing cycle after the introductory period.

OCA at 6—8.

The Low Income Advocates support the proposed change. Notwithstanding their support, to further clarify the applicability of this disclosure, the Low Income Advocates recommend that the current definition of the term “introductory price” be modified. Low Income Advocates at 13, 14, 26.

AARP and the CAC support the requirement that marketers offering “introductory” rates include in their disclosure statements the duration of the introductory period and the price for the first billing cycle after the introductory period. The CAC asserts that in the absence of such information, customers really have no idea what they are purchasing. AARP at 3; CAC at 4, 5.

The FTC notes that the NPRM appropriately contains provisions requiring retailers to make clear whether introductory rates are lower than the rates that will apply after the introductory period. However, the FTC is concerned that the NPRM may focus too narrowly on problems with initial price discounting and does not account for innovations in retail electric marketing likely to involve bundling of price and non-price elements, where the non-price elements also provide value to customers. FTC at 8, 9.

WGL supports the requirement to provide customers with clear information regarding the duration of the introductory price. WGL, however, is concerned with the requirement to state a definitive price for the first billing period after the expiration of the introductory price for products that involve a variable pricing structure following the introductory price. WGL believes that if a supplier is required to state a specific price for a billing cycle following the introductory period at the time of contracting, the supplier will need to build in a risk adder to protect itself against the possibility that wholesale market prices will increase. Accordingly, instead of requiring a specific price be disclosed for the billing period following the introductory period, WGL submits that an EGS should only be required to explain whether the price following the introductory period will be fixed or variable, and how often the price is subject to change. WGL submits the following revisions:

If the price is introductory, the pricing statement must include a statement that the price is an introductory price, provide the duration of the introductory price, and state whether the price following the introductory period will be a fixed price or a variable price. If the price following the introductory period is fixed, the pricing statement must state what the fixed price will be. If the price following the introductory period is variable, the pricing statement must explain the conditions of variability and limits of variability in accordance with the remainder of this section 54.5.

WGL at 3, 4.

Discussion

There was little opposition voiced by the parties to our proposal, which we will retain as proposed. We decline to insert the language requested by OCA concerning the actions and scripting of sales agents. Not all sales transactions involve the use of agents (direct mail, electronic enrollment, PaPowerSwitch.com, etc.). Requirements for the actions by and scripting for sales agents are found in our Chapter 111 supplier marketing regulations and are beyond the scope of this rulemaking. We note that 52 Pa. Code § 111.12 (relating to consumer protection) requires agents to provide accurate and timely

information about products including the rates being offered. Specifically, 52 Pa. Code § 111.12(d)(4) requires a supplier to do the following:

Shall provide accurate and timely information about services and products being offered. Information includes rates being offered, contract terms, early termination fees and right of cancellation and rescission.

In complying with this regulation, an agent would be expected to inform the customer if the product is introductory in nature when discussing the rates being offered. With that said, we find that the suggestions provided by OCA are beyond the scope of this rulemaking.

For this same reason, we reject WGL's suggestion that variable-priced contracts be exempt from this requirement. While we understand that a variable price will vary, we established during the 2014 revisions of these rules that even customers on variable-priced contracts must at least know what their initial price will be. While a variable price is established using the stated conditions of variability, as will be discussed later, the customer must at least know the first month's price under those stated conditions before entering into the agreement.

52 Pa. Code § 54.5(c)(3)

We proposed a revision to clarify that a variable pricing statement is only necessary if the product is a variable-priced product. There was no opposition to this proposal. Accordingly, we have adopted it.

52 Pa. Code § 54.5(c)(3)(i)

This proposed addition reflects a long-standing similar requirement in the analogous natural gas rule at 52 Pa. Code § 62.75(c)(2)(i). The intent of this proposed amendment is to provide greater transparency with variable-priced products, allowing the potential consumer to make a better-informed decision.

OCA agrees that this proposed revision reflects the NGS rules but submits that the proposed revision could be improved by requiring the EGS to give an example of how its prices will be calculated using its disclosed pricing methodology by providing a price disclosure for a recent month. OCA suggests that suppliers be required to provide full terms and conditions for all their products on their websites, and once new disclosures are in place, the new disclosures should be sent to all existing customers. OCA asserts that this would enhance transparency and provide the customer with an explanation of how prices are determined during the billing period. Accordingly, the OCA submits the proposed modification:

(2) The] (3) If the price is variable, the variable pricing statement must include:

(i) Conditions of variability (state on what basis prices will vary) including the EGS's specific prescribed variable pricing methodology AND AN EXAMPLE OF HOW THE EGS'S PRICES WILL BE CALCULATED USING ITS DISCLOSED PRICING METHODOLOGY AND RELYING ON THE MOST RECENT MONTH'S DATA.

(ii) Limits on price variability:

(A) If there is a limit on price variability, such as a specific price cap, a maximum percentage increase in price between billing cycles or minimum/maximum charges per kilowatt-hour for electricity during the term of the contract, the EGS shall clearly explain the applicable limits AND THAT THE PRICE CAN CHANGE EACH BILLING PERIOD.

(B) If there is not a limit on price variability, the EGS shall clearly and conspicuously state that there is not a limit on how much the price may change from one billing cycle to the next AND THAT THE PRICE CAN CHANGE EACH BILLING PERIOD.

OCA at 8, 9.

The Low Income Advocates and AARP support requiring additional information in the variable pricing statement, as it will promote pricing transparency and will better inform consumers about the terms and conditions of a variable price offer. The Low Income Advocates assert that variable prices can be subject to extreme volatility and, unless they are subject to a price ceiling, can be particularly dangerous for vulnerable low and fixed-income consumers unable to absorb an unexpected price hike. Accordingly, the Low Income Advocates state that it is critical that consumers be equipped with tools to both understand and respond to price spikes to avoid excessive charges for electricity. Low Income Advocates at 15, AARP at 3-4.

The CAC also supports the Commission proposal at § 54.5(c)(3) that requires marketers who offer variable price products to disclose their specific prescribed variable pricing methodology. The CAC asserts that the proposal would impose some discipline on marketers and some protection for consumers by requiring the marketer to specify the formula or factors that the marketer will follow in implementing variable rate changes. CAC at 4-5.

The FTC commends these provisions as they preserve the ability of customers to contract for variable pricing services and do so without adding potentially crippling disclosure or notification requirements. The FTC is particularly interested in preserving the subset of variable price offers that entail dynamic prices—the kind of pricing that links short-term variations in retail prices to short-term variations in wholesale market prices. FTC at 4.

RESA notes that pricing is complicated and each EGS factors different components into determining the final price that it offers customers. RESA asserts that describing these complex calculations in a meaningful way for customers would be extremely difficult. Moreover, RESA states that EGSs view their pricing methodologies as trade secrets. While RESA recognizes the Commission's desire to provide the customer with useful information about how a specific EGS variable product will be priced, RESA does not interpret the Commission's proposal as requiring EGSs to provide their confidential, complex pricing calculations to customers. Accordingly, RESA states that the language as proposed appears to provide EGSs the appropriate flexibility to determine how to balance their need to keep confidential their pricing methodology with the Commission's goal of providing customers information about the basis upon which their variable price is subject to change. However, RESA would not support the creation of either: (1) a new obligation to disclose specific pricing calculations; or (2) a new affirmative obligation on EGSs to notify customers of when and how they will receive notification of price changes. RESA at 10—12.

WGL understands the Commission's goal of providing greater transparency to allow customers to make better informed decisions. WGL states that it will be difficult for an EGS to articulate a specific prescribed variable pricing methodology for variable price electricity products. WGL asserts that EGSs can, and should, be able to provide a list of factors that will be considered in establishing a

variable retail price. WGL submits that the language in this rule should be modified to read as follows: “Conditions of variability (state on what basis prices will vary), including the factors that the EGS will rely upon to establish the variable price.” WGL at 4-5.

Inspire disagrees that the proposed change will advance transparency and more informed decision making and instead believes that this change will likely undercut those interests and create greater confusion. Inspire asserts that energy pricing is inherently complex with many factors impacting pricing, including PJM market conditions, such as, locational marginal prices, capacity and ancillary services charges, customer cost to serve, transmission and distribution costs; weather; fees associated with the use of financial instruments to reduce price volatility; and taxes. Inspire insists that what a consumer considering a variable rate product must understand is that the rate can change. Inspire avers that further disclosures with detailed technical discussions of price setting methodologies, or complex formulas, only serve to distract from this core piece of information. Inspire at 8-9.

IRRC asks if the requirements in § 54.5(c)(3)(ii)(A) and (c)(11) relating to price variability are duplicative. If so, IRRC requests that they should be combined into one requirement. IRRC at 2.

Discussion

As is apparent from the comments, providing potential customers with the information they need about a variable-priced product in an understandable manner is a challenging task. The components that make-up electricity prices are many and complex, and the types of variable products that consumers may be offered can be diverse. Our objective has been to provide potential customers with the information they need in a useful and understandable format while not being so restrictive that we inappropriately limit the ability of suppliers to offer such products. The FTC notes the importance of variable and dynamically-priced products and urges the Commission to avoid potentially crippling disclosure requirements that discourage such offerings. At the same time, the advocates urge us to require suppliers to be as descriptive as possible, with some requesting that specific rate calculation formulas be required. We believe there is a reasonable middle-ground here that can accomplish our objectives.

We reject requiring suppliers to provide a specific rate calculation formula for several reasons. We agree with RESA that these formulae could be considered proprietary and thus not appropriate for public disclosure. We also agree with RESA, WGL and Inspire that such formulae would likely be too complex and include components that consumers do not understand, which is contrary to the intent of the regulation. However, we agree with WGL that suppliers should be able to provide a list of factors that will be considered in establishing the price and have added this to the regulation.

OCA asks us to require the supplier to give an example of how the price will be calculated and to give an example of the outcome. We note that our regulations at subsection (iii) of this rule requires the supplier to provide the price to be charged, per kilowatt-hour, for the first billing cycle of generation service. This price should reflect the outcome of any variable pricing methodology. Further, subsection (14), which will be discussed in detail below, requires that the supplier make available a price-history of the variable product they are selling. We find that these two provisions are sufficient in demonstrating to

the potential customer what the price has looked like in the past and what their price will be at the start of the product period. Accordingly, we decline to adopt OCA's suggestion. We also decline to adopt OCA's suggestion that we impose the new regulatory requirements of this section upon contracts entered into prior to the effective date of these regulations. However, we agree with OCA that the subsections addressing the limits on price variability should include an important reminder to the customer that “the price can change each billing period” and that this must be disclosed in a larger font type to increase its prominence. Accordingly, we have added language to subsections (ii)(A) and (ii)(B) requiring this reminder.

Regarding IRRC's question asking if the provisions of this section are duplicative of the requirements at (c)(11), we do not view these two requirements as duplicative. Subsection (c)(3) addresses the content—what must be disclosed. Subsection (c)(11) concerns formatting—that this information must be in a larger font size.

52 Pa. Code § 54.5(c)(3)(iv)

We proposed a revision intended to bring the electric rule into alignment with the natural gas rule at 52 Pa. Code § 62.75(c)(2)(iv). We also noted that while this requirement is not in the current electric disclosure rule, it has been in the electric contract summary since 2014. This requirement is intended to let the potential customer know when and how they will be informed of their variable-price changes. For example, if the customer will not be informed of the price until the time of billing, the EGS must disclose this. Or if advanced notice of price changes will be provided, the EGS must disclose the timeframe of those notices and how they are delivered (U.S. mail, electronically, etc.).

The OCA and the Low Income Advocates suggest that § 54.5(c)(3)(iv) provide that a price change notice will be provided before the new price is charged to the consumer. The OCA and the Low Income Advocates assert that without information about what price is being charged, the consumer cannot make informed decisions about their energy use or about whether a new price plan or supplier is needed. The OCA submits the following changes to § 54.5(c)(3)(iv) for the Commission's consideration:

(iv) A STATEMENT description of when the customer will receive notification of price changes. SUCH NOTIFICATION SHALL BE AT LEAST 10 DAYS BEFORE SUCH PRICE CHANGE GOES INTO EFFECT.

The Low Income Advocates offer the following language (in bold):

A description of when and how the customer will receive notification of price changes. At a minimum, an EGS must provide customers with notice of changes to a variable rate price at least three days in advance of a price change if the price change is based on usage, temperature, and other factors that are not immediately apparent to the EGS at the start of the contract. If the changes to the variable rate price are scheduled or predetermined, an EGS must provide the customer with notice of the proposed changes at least 30 days prior to the effective date of the change.

OCA at 9-10; Low Income Advocates at 16, 26.

The FTC agrees that customers should be informed about how and when they will be notified about price

changes for variable price offers and they suggest adding a provision under which sellers can refer customers to publicly available indices of electricity prices if such indices are key factors in determining power bills. The FTC further encourages the Commission to accommodate retailer experimentation regarding variable rate plan disclosures. The FTC asserts that restrictions on disclosures that do not permit customers to make an apples-to-apples price comparison could harm customers by dissuading them from accepting variable price offers that increase their ability to reduce their bills. FTC at 7.

RESA does not interpret the Commission’s proposal to create a new affirmative obligation on EGSs to provide customers advance notice of price changes for variable contracts. Rather, RESA understands this proposal to affirmatively obligate the EGS offering a variable price and voluntarily agreeing to provide notification of price changes to disclose to the customer how such notification will be provided; for example, an EGS could state that the change will be reflected on the next monthly bill the customer receives. RESA does not oppose this revision based on these assumptions. RESA at 11.

Discussion

While we disagree with the FTC about referring customers to publicly available indices of electricity prices out of a concern that electricity pricing is too complex to make any such indices of any use to residential and small business customers, we do agree with the FTC that we need to allow for flexibility and accommodate experimentation as we move into the advanced-metering era. Accordingly, we find OCA’s and the Low Income Advocate’s suggestion that we always require advanced notice of price changes too restrictive. For some products linked to spot-market or real-time pricing, advanced notice of price changes may not be possible and such a requirement would in effect ban these products. We find that it is important that the customer be told up-front in both the disclosure and in the contract summary that the price may change each billing cycle, if indeed that is the case. Based on this finding, and in response to the understandable concerns of OCA and the Low Income Advocates, we added language to § 54.5(c)(3)(iv) making it a requirement that if the customer is not going to know their price until the time of billing, not only must that be disclosed, it must be disclosed in a larger font size as to increase its prominence.

52 Pa. Code § 54.5(c)(4)

This proposed addition was intended to make the longstanding requirements at 52 Pa. Code § 54.7 more visible and effective. Stakeholders have noted that these requirements are often overlooked because they are not found or referenced in the disclosure rules. This requirement is intended to enable consumers to compare supplier offers on an “apples-to-apples” basis, especially when non-volumetric charges, such as monthly fees or one-time fees, are involved. We invited parties to comment on the need for this regulation to accommodate an evolving electric marketplace where new products and pricing structures are likely. Specifically, we proposed the following:

If the unit price changes based on customer usage or if the product includes fees in addition to the unit price, the price per kWh shall factor in all costs associated with the rate charged to the customer and show the average price per kWh for usages of 500, 1,000 and 2,000 kWh of electricity in a table format.

The OCA agrees that this requirement provides an apples-to-apples comparison, especially when one-time or

monthly fees are involved. OCA asserts that providing the customer with all the costs associated with the rate in a table format based on usage levels provides more transparency to the customer and allows the customer to make informed choices. Regarding the flat bill option, if permitted, OCA asserts that the flat bill will have to be treated under § 54.5(c)(4) as a price that changes with usage. For products that are separately charged and not required to receive generation service, OCA asks that the price of these separately charged non-generation products be disclosed both on a total charge basis and as a monthly impact to the bill. If a product is bundled with generation service and is required to receive generation service, however, OCA states that the price of the product should be disclosed on a price per kWh basis. OCA at 10.

The Low Income Advocates strongly support this proposed change, as it will allow for an honest and transparent comparison of EGS offers. The Low Income Advocates assert that inconsistent fee structures have confounded many consumers attempting to participate in the marketplace. The Low Income Advocates believe that clear and transparent disclosure of the price per kWh based on various consumption levels is critical to allow consumers to accurately compare offers and make value judgments about product offerings. Low Income Advocates at 9—13, 17-18.

AARP notes that customers who wish to shop for electricity in Pennsylvania have long been advised by the PUC and other consumer educators to look to the “Price to Compare” as a starting point, but that the Price to Compare has not always given consumers the full cost of switching to another retail marketer. AARP believes that the proposed requirement will reduce the likelihood that customers will be misled by low kilowatt hour fees that often mask high monthly or one-time fees charged by some retail marketers. AARP at 3.

The FTC agrees with the proposal to require offers that include non-volumetric charges to continue to disclose the total billing amounts corresponding to different consumption levels. To help ensure that customers understand the implications of non-volumetric charges, the FTC suggests that an additional or alternative approach could be to classify offers that include non-volumetric charges as variable rate plans, in which the average net per-unit price varies based on the level of consumption. FTC at 10.

RESA supports moving this requirement (to the extent it is applicable) into § 54.5(c) because this is where the Commission sets forth all the required information and language EGSs are expected to include in their customer contracts. RESA argues that the addition of the term “actual” to describe usage will provide clarity that the requirement does not apply to customized products which may be quoted based on historical usage data. Reorganizing the sentence to reference fees in the context of the requirement to display “all costs,” provides additional clarity that the table is expected to factor in the usage costs plus included fees. RESA suggests the addition of the term “actual” in the text as follows:

Section 54.5(c)(4): If the unit price changes based on **actual** customer usage or if the product include fees in addition to the unit price, the price per kWh shall factor in all costs associated with the rate charged to the customer **including any fees** and show the average price per kWh for usages of 500, 1,000 and 2,000 kWh of electricity in a table format.

RESA asserts that limiting the requirement to display the usage table for products where the unit price (plus

any fees) changes based on actual customer usage is important to ensure that the regulation does not constrain the ability of EGSs to develop new products and services with appropriate pricing structures that are not based on usage. RESA asserts that as EGSs strive to innovate pricing structures and products, they also endeavor to determine the most consumer-friendly way to present their product and pricing information to consumers. RESA suggests that overly restrictive regulations that constrain the creativity of EGSs in presenting their pricing and products should be avoided. RESA 8-9.

NEMA agrees that the Commission should be mindful of avoiding rules that prevent innovative products from being offered and prevent the benefits of advanced metering from being realized by consumers. Given the very nascent state of market development with respect to time variant rates for mass market consumers, and the potential for rigid disclosure requirements to hamper product development and availability, NEMA asserts that it is appropriate to expressly exempt time variant products from the disclosure requirement. NEMA at 4-5.

Inspire fears that the proposed requirement, if interpreted strictly and without exception, will present a substantial obstacle to future and present innovations. Inspire asserts that few people understand the kWh, and specifically, what a kWh rate will mean for their ultimate bill. Inspire posits that what customers do understand, and what they care about, is how much they will ultimately pay each month. Inspire insists that a requirement to present the price for an energy product as a cost per kWh at the point of sale would greatly limit innovation, and ultimately choice—and if applied strictly and without exception, could essentially lock market participants into just two rate structures, fixed and variable. Accordingly, Inspire urges the commission to eliminate the cost per kWh requirement or, in the alternative, clarify its inapplicability to flat-bill and other innovative products. Inspire at 2—8.

IRRC suggests that the term “product” used in § 54.5(c)(4) and (14)(i) should be defined. IRRC at 2.

Discussion

As we discussed earlier relative to subsection (c)(1), how to present pricing is one of the more complex issues we must address and one that stakeholders offered diverse and engaging comments upon. The challenge once again is to provide potential customers with the information they need to make informed decisions and to comparison-shop, while not being so restrictive that we inadvertently ban new and innovative products made possible by advanced metering. Once again, after carefully considering the comments, we believe there is a way to balance these interests and make this regulation both effective but not overly prescriptive. We find that our original proposal is basically sound but acknowledge that some refinements and additional guidance is needed.

We agree with OCA and the Low Income Advocates that this requirement should apply if one-time or monthly fees are involved and agree with RESA that additional language should be added to the regulation to make this clear. We also agree with OCA that this requirement should apply to “flat bill” products (products where a customer is billed a flat monthly, pre-disclosed amount regardless of usage). For such products, the supplier should provide the “flat bill” amount under subsection (c)(1), and what that works out to be on a per-kWh basis for subsection (c)(4). We see no reason why this cannot be done and reject arguments that this would inhibit or

prohibit such products. To the contrary, this should allow suppliers to highlight the advantages of such products and, again, allows the potential customer to comparison shop. We will also insert language clarifying that if the product also has an introductory component (see subsection (c)(2)), a table must be included showing the introductory pricing information and a separate table displaying the pricing that applies after the introductory period expires.

However, we agree with NEMA and RESA that not all pricing structures will fit this regulation. Dynamic, time-of-use products, where the amount of the customer’s monthly bill will be determined in part by when they used the service, will be difficult if not impossible to accurately project in advance. These types of products could become increasingly common as advanced metering becomes ubiquitous and new technologies (e.g. electric vehicles) increase the need and demand for such products.

At this time, no one really knows all the types of dynamic, time-of-use products that will be offered or what they will look like. This means flexibility is needed when crafting this regulation. We revised our proposal to create an exception for dynamic/time-of-use products—suppliers will not be expected to provide per kWh prices for three different usage levels. However, we also inserted new language directing suppliers to present time-of-use pricing information in a table format that displays what the “times” are and what the applicable per kWh rate is for the specified times. If the rate for such is variable, the supplier shall display in the table the first month’s initial pricing levels (see subsection (c)(3)(iii)) and a notation that the prices displayed are initial prices only.

We acknowledge that it is possible there could be products in the future that do not fit neatly into any of the requirements. In such instances, we expect suppliers to make a good-faith effort to provide adequate information to potential customers so they can make informed decisions and comparison shop. We advise suppliers to contact Commission staff for guidance when encountering such situations. We also remind suppliers of the Standards of conduct and disclosure for licensees at 52 Pa. Code § 54.43(1):

To protect consumers of this Commonwealth, licensees shall adhere to the following principles in the provision of electric generation service:

(1) A licensee shall provide accurate information about their electric generation services using plain language and common terms in communications with consumers. When new terms are used, the terms shall be defined again using plain language. Information shall be provided in a format that enables customers to compare the various electric generation services offered and the prices charged for each type of service.

We further note the requirements in our Chapter 111 supplier marketing regulations, specifically, 52 Pa. Code §§ 111.12(4) and (5) that require suppliers:

(4) Shall provide accurate and timely information about services and products being offered. Information includes rates being offered, contract terms, early termination fees and right of cancellation and rescission.

(5) Shall ensure that product or service offerings made by a supplier contain information, verbally or written, in plain language designed to be understood by the customer. This includes providing written information to the customer in a language which the

supplier's representative has had substantive discussions with the customer or in which a contract is negotiated.

Regarding the request by IRRC to define the term "product" used in § 54.5(c)(4) and (14)(i), we will revise the language in § 54.5(c)(4) to reference the "offer" in place of the term "product" as that makes it clear that the rule relates to whatever it is the EGS is offering to the customer. Rather than attempting to develop a definition for product that encompasses all current and potential future product offerings, the Commission finds that simply referring to whatever the EGS is offering avoids any need for interpretation and avoids confusion.

52 Pa. Code § 54.5(c)(6)

As we did with the analogous natural gas rule and in the interest of plain language, when describing how many months/years a contract is in effect, we proposed replacing the words "length" and "term" with "duration." We note that "term" can be particularly confusing because in addition to describing "duration" it can be used more generally to discuss all contract provisions, i.e. "terms and conditions."

Discussion

No party opposed this proposal, which we will retain in the interest of clarity and plain language.

52 Pa. Code § 54.5(c)(9)

As we did with the natural gas disclosure, we proposed removing all unnecessary references to the utility from the EGS disclosure statement. At the time these regulations were promulgated, the EDCs had robust consumer education programs and were expected to play a key role in informing consumers about the competitive market. At this time, it is unnecessary to require a display of EDC information on EGS documents, as this may invite customer confusion and even the risk of creating a false impression that the EGS is "affiliated with" or "partnering with" the EDC.

Duquesne Light generally supports the proposed removal of unnecessary references to the EDCs in the disclosure statement as eliminating customer confusion about the role played by EDCs and EGSs is important. However, Duquesne notes that § 52.5(c)(9), refers to the default service provider—not an EDC and that while EDCs currently serve in this role, there is no guarantee that EDCs will always be default service providers. Because of this, Duquesne believes that this information should remain. In addition, Duquesne believes there is still a purpose for having EDC information as part of the EGS Contract Summary, since the summary's goal is to provide, in an easy-to-read, one-page document, the most important terms of the disclosure statement.

While Duquesne acknowledges that in 2016 the Commission removed the reference to NGDCs as part of the NGS contract summary, Duquesne points out that there is no requirement that the format of NGS and EGS disclosure statements be identical. Duquesne at 5—7.

The OCA agrees with the Commission that prominent display of EDC information on EGS documents could create the false impression that the EGS is affiliated with or partnered with the EDC. The OCA reports receiving customer complaints regarding alleged EGS claims of partnership with the EDC and removing the requirement that the EGS list the EDC's name and telephone number in a prominent position is a step forward in reducing customer confusion. The OCA notes, however, that customers will still require information about their EDC and

the availability of default service and that retaining limited information about the EDC in a less prominent and less confusing manner may still be necessary. OCA at 10-11.

While the Low Income Advocates understand that the Commission's proposal was made with the well-intentioned goal of eliminating consumer confusion, they oppose the removal of information about the EDC and available universal service programming from the disclosure statement. In addition, they believe that further modifications are necessary to ensure that consumers are appropriately informed of the continued role of the EDC, the Commission, and the OCA, as well as the consumer's right to file a complaint with the Commission. The Low Income Advocates assert that the elimination of the contact information will only serve to further obscure the connection between the EDC and the EGS. The Low Income Advocates recommend requiring suppliers to include a statement in the disclosure that the EDC will remain the point of contact for quality of service, billing, collections, and termination questions, along with the contact information for the EDC. Accordingly, the Low Income Advocates offer the following revisions:

- (9) The name and telephone number of the default service provider, **along with a statement informing the customer that entering into a contract with an EGS does not end their relationship with the EDC, and that the EDC will remain the primary contact for credit and collections, service termination, and service quality issues.**

Low Income Advocates at 18—21, 27.

The CAC urges the Commission to reconsider the proposals that would remove necessary information regarding consumers' EDC and default service provider. The CAC understands that the PUC desires to eliminate consumer confusion and that this is an appropriate and admirable goal that the CAC generally supports. However, the CAC is concerned that elimination of information about the EDC and available universal service programming from the disclosure statement may create more confusion than it eliminates. The CAC recommends that the PUC revise the language to disclose EDC contact information and require the EGS to state that the customer should continue to contact the EDC for quality of service, billing, collections, termination, and universal service questions. CAC at 5—7.

Inspire supports the removal of requirements that suppliers prominently display EDC information on the disclosure statement. Inspire notes that it works hard to build a unique brand identity, distinct from any local utility. Requirements to feature EDC information on Inspire documents can cause confusion and undermine their efforts to foster a strong, personal relationship with its customers. Inspire at 10.

Discussion

While we understand the concerns expressed by some parties with the Commission's proposal to remove EDC information from the disclosure, we agree with Inspire that such a requirement is no longer needed and no longer appropriate. The disclosure is an agreement between the supplier and the potential customer—the EDC is not a party to this agreement and repeatedly naming the EDC in the disclosure simply invites confusion and possible allegations of supplier misrepresentation. We shall, as we did with the analogous natural gas rule, remove references to the utility from the disclosure and the contract summary.

We also reject the Low Income Advocates' request that potential supplier customers be told that the EDC remains responsible for billing and collections because this is not always the case. While most residential and small business customers continue to be billed by the EDC for all services, including the supplier charges through the utility-consolidated bill, and continue to pay only the EDC, suppliers are free to render their own, separate bills and to collect directly from the customer their own charges.

52 Pa. Code § 54.5(c)(11)

We proposed revisions intended to bring the electric rule into alignment with the natural gas rule at 52 Pa. Code § 62.75(c)(9). This proposed revision was intended to provide full transparency concerning the potential customer's exposure to penalties and fees. Complex penalty or fee formulas with unspecified or unknown components may make it difficult for customers to arrive at informed decisions about generation choices. In addition to early termination fees, this requirement is intended to ensure the disclosure of other fees, including non-volumetric charges such as monthly fees or one-time fees. We invited parties to comment on the sufficiency of this regulation in the context of an evolving electric marketplace where new products and pricing structures are likely.

The OCA submits that the proposed revision should be strengthened to ensure that the customer is fully informed. Specifically, the OCA suggests that the supplier should be required to give an example of how the penalty or fee structure would be implemented and should be prepared to accurately describe these fees, how they are calculated, and provide the same example in their sales presentations. The OCA also recommends that the Commission specify a type size of no less than 12-point font. The OCA proposed the following:

(10) (11) An explanation of limits on price variability, penalties, fees or exceptions, printed in type size larger than the type size appearing in the terms of service BUT NO LESS THAN 12 POINT AND AN ORAL EXPLANATION OF THE EXISTENCE OF A PENALTY OR FEE IN THE CONTRACT'S TERMS AND CONDITIONS. Penalties and fees shall be disclosed in actual dollars or a specific method for determining the actual dollars shall be disclosed WITH AN EXAMPLE OF THE CALCULATION. This explanation shall include a statement advising the customer that the customer will not be subject to any penalty or fee if the customer terminates the contract at any time between the date the initial notice required in § 54.10 (relating to notice of contract expiration or change in terms for residential and small business customers) is issued and the expiration of the fixed duration contract.

OCA at 11-12.

The Low Income Advocates strongly support this disclosure as they believe consumers are growing increasingly frustrated at the additional fees and penalties levied against them. The Low Income Advocates assert that providing increased transparency about fees and penalties is critical and will help consumers gain confidence that they will not face surprise fees and penalties that they may be unable to afford. Low Income Advocates at 21-22.

Discussion

We decline to adopt OCA's suggested language regarding requirements for sales agents as we find that this type of requirement is more appropriate for the Commis-

sion's Chapter 111 supplier marketing regulations. We also note that not all supplier enrollments involve an agent. Further, an example calculation should not be necessary if the fee is expressed in dollar terms or the result of a simple formula, which is the point of the revisions we are adopting. However, we agree with OCA in that not only should penalty language be in a larger font, we should specify that at a minimum, it should be 12-point font. As the Low Income Advocates point out, these types of fees can be a source of consumer frustration and complaint, thus making their disclosure as prominent as possible using a larger font is crucial. Accordingly, we have added language requiring that fees and penalties be disclosed in font that is not less than 12-point font. Specifically, we revised the first sentence as follows: "An explanation of limits on price variability, penalties, fees or exceptions, printed in type size larger than the type size appearing in the terms of service, **but not less than 12-point font.**"

52 Pa. Code §§ 54.5(c)(12) and (13) (Current)

As discussed above, we proposed to remove all unnecessary references to the utility from the EGS disclosure statement. Including universal service program information in the EGS disclosure risks the customer thinking that these programs are operated or provided by EGSs when they are not.

OCA argues that, given the essential nature of low-income programs, the disclosure statement should inform and educate the customer as to the existence of the low-income programs. The OCA submits that the EGS disclosure statement should include the following language:

Pennsylvania utilities offer universal service programs that help low-income customers. Call the number on your utility bill or the Pennsylvania Public Utility Commission for more information.

OCA at 12-13.

Likewise, the Low Income Advocates offer a similar revision for the same reasons as OCA:

(13) The name and telephone number for universal service program information, **along with a statement that informs the customer that low income consumers may be eligible for utility assistance programs that are provided by the EDC.**

The Low Income Advocates argue that information about universal service programming is critically important and should not be removed from the disclosure statement. Low Income Advocates 17—20.

Discussion

Again, in endeavoring to minimize the chance of misrepresentation and customer confusion between the role of the EDC and the EGS, we will maintain our proposal to eliminate references to the EDC in the EGSs disclosure. While we understand the Low Income Advocates' and CAC's desire to include universal service information in the disclosure, we find that this would again cause confusion by implying that the supplier has a universal service program or is responsible for universal service in some manner. This is not the case. The EDC is solely and entirely responsible for universal service programs. This includes promoting the programs and informing customers of their availability—a task for which the EDC can recover all associated costs via utility rates. We further find that it is inappropriate to require suppliers to also promote and inform customers of the availability the EDC

universal service program as they are ill equipped to educate customers on the particulars of each EDC program. Accordingly, we decline to adopt the changes suggested by the CAC and the Low Income Advocates.

52 Pa. Code § 54.5(c)(13) (New)

This proposed revision was intended to bring the electric rule into alignment with the natural gas rule at 52 Pa. Code § 62.75(c)(11). Both the Commission's electric shopping website, www.PaPowerSwitch.com, and the OCA's website, www.oca.state.pa.us, include helpful consumer education information along with access to supplier offers. We proposed including a reference to these websites to provide another option, in addition to the Commission's phone number, for consumers to obtain information.

While the OCA appreciates the Commission's efforts, for the sake of clarity, the OCA recommends that the OCA's full name be provided as well as the OCA's telephone number so that consumers have full information regarding shopping. The OCA's proposed modification is as follows:

[(12)] (13) A statement [that directs a customer to the Commission if the customer is not satisfied after discussing the terms of service with the EGS] providing that information about shopping for an electric supplier is available at www.PaPowerSwitch.com or other successor media platform as determined by the Commission, by calling the Commission at (800) 692-7380 and OR BY CONTACTING THE OFFICE OF CONSUMER ADVOCATE at (800)-684-6560 OR AT www.oca.state.pa.us.

OCA at 13.

While the Low Income Advocates and the CAC are supportive of including information about papower switch.com, the Commission, and the OCA, they oppose elimination of the requirement that consumers be directed to the Commission if the customer is not satisfied after discussing the terms of service with the EGS as they believe this will fail to appropriately apprise consumers of their dispute rights. As such, the Low Income Advocates offer the following revisions:

(12) A statement that directs **informs** a customer of **their right to file an informal complaint with** the Commission if the customer is not satisfied after discussing the terms of service with the EGS.

* * * * *

(14) A statement providing that information about shopping for an electric supplier is available at www.PaPowerSwitch.com or other successor media platform as determined by the Commission, by calling the Commission at (800) 692-7380 and at www.oca.state.pa.us.

Low Income Advocates at 21 and 27; CAC at 5—7.

Discussion

We reject OCA's, CAC's and the Low Income Advocates' request that we retain the language directing consumers to contact the PUC if they are not satisfied with a supplier disclosure. The first option a potential customer should exercise if unhappy with what they are being offered by a supplier is to reject that supplier and seek other options they find more satisfying. This is how a competitive market with choice is supposed to work. However, we recognize that a potential customer may have general questions or be confused by a disclosure, and we find that our proposed language directing them to

call us and/or access our shopping website and OCA's website is more inviting than the current language about not being satisfied. A potential customer does not have to be dissatisfied before seeking answers to their questions. We welcome opportunities to inform customers of their shopping options and disclosure rules regardless of customer satisfaction with the offer.

52 Pa. Code § 54.5(c)(14)(i)

We proposed an addition to reflect the analogous natural gas rule at 52 Pa. Code § 62.75(c)(2)(v) which is intended to acknowledge the reality that a price history may not be available for all products. An example would include a supplier offering a variable-price product for the first time or a new supplier just entering the market. In these types of situations, the supplier would be expected to inform the customer that a price history is not available.

OCA believes that while it is correct that a price history may not be available for all products, the potential for the misuse of this exemption is significant. The OCA recommends that the EGS not be allowed to avoid disclosure of historical price information unless the supplier documents that the variable price being offered is significantly different from prior offers or cannot be reasonably replicated. The OCA also proposes that the exemption be limited to (a) a newly licensed supplier that is not otherwise an affiliate of an existing supplier for a period of 12 months, at which time the supplier shall provide the historical pricing information that is available; and (b) introduction of an EGS product that is materially different from other products offered by the EGS and any of its affiliates and for which there is no reasonable manner to present representative historical pricing information. OCA also advises that the Commission must ensure that a common approved approach is being used to develop the average price so that proper comparisons can be made. OCA asserts that EGSs should be required to disclose the highest and lowest price over the past 36 to 60 months that has been charged for the customer's rate class and service territory to ensure that customers have more complete information. The OCA proposes the following changes to proposed Section 54.5(c)(14) to address the issues identified:

A telephone number and Internet address at which a customer may obtain the previous 24 months' average monthly billed prices for that customer's rate class and EDC service territory, AND THE HIGHEST AND LOWEST PRICE BILLED FOR THAT CUSTOMER'S RATE CLASS AND EDC SERVICE TERRITORY FOR THE PREVIOUS 60 MONTHS. If an EGS has not been providing service in a rate class and EDC service territory for 24 months OR IS NEWLY LICENSED AND NOT AFFILIATED WITH AN EXISTING LICENSED EGS, the EGS shall provide the average monthly billed prices for the months available to date. If price history or representative price information is not available for the product AND THE PRODUCT IS MATERIALLY DIFFERENT FROM OTHER PRODUCTS OFFERED BY THE EGS OR ANY OF ITS AFFILIATES, the EGS shall inform the customer of this fact. IF THE EGS HAS NOT BEEN PROVIDING SERVICE IN A CUSTOMER RATE CLASS AND SERVICE TERRITORY FOR 60 MONTHS, THE EGS SHALL PROVIDE THE CUSTOMER THE HIGHEST AND LOWEST PRICES AS SET FORTH BY THE COMMISSION FOR SUCH PURPOSE.

OCA at 13—15.

IRRC suggests that the term “product” used in § 54.5(c)(4) and (14)(i) should be defined. IRRC at 2.

Discussion

We agree with the OCA that our proposed language is too permissive and needs to be strengthened to minimize the chances of it being circumvented. We will add “and the offer is materially different from other offers made by the EGS” to clarify that the offer must be substantially different than other offers by the same EGS to be exempt from the requirement to provide a pricing history. However, we find that the OCA’s suggestion to include the products of affiliates of the EGS is not appropriate in a competitive market. We also find that requiring pricing information for 24 months is sufficient to inform potential customers about the variability of the pricing and possible seasonal fluctuations.

Regarding the request by IRRC to define the term “product” used in § 54.5(c)(4) and (14)(i), we have revised the language in § 54.5(c)(14)(i) as follows: “If price history or representative price information is not available and the offer is materially different from other offers made by the EGS, the EGS shall inform the customer of this fact.” Eliminating the term product in this context makes it clear that the rule relates to whatever it is the EGS is offering to the customer. As we stated for §§ 54.5(c)(1) and (c)(4), rather than attempting to develop a definition for product that encompasses all current and potential future product offerings, the Commission finds that simply referring to whatever the EGS is offering avoids any need for interpretation and avoids confusion.

52 Pa. Code § 54.5(e)

We proposed revisions intended to update the regulation by referring to the correct location where the glossary of terms can be found. We also proposed that basic charges should be defined to bring this requirement into alignment with the analogous natural gas rule at 52 Pa. Code § 62.75(e). We also proposed replacing the word “bill” with “disclosure statement” as to correct an apparent error as this section contains requirements for electric disclosures (requirements for electric bills can be found at 52 Pa. Code § 54.4 (relating to bill format for residential and small business customers)).

IRRC notes that § 54.3(1)(ii) requires terminology used in customer communications to use the terms in accordance with the glossary posted at www.PaPowerswitch.com or other successor media platform as determined by the Commission. IRRC suggests that the regulation should specify how the reader can determine whether the Commission has opted to use another successor media platform. IRRC at 2.

Discussion

Without any opposition to our proposed language, we will retain the revisions that we proposed. Regarding IRRC’s suggestion that the regulation should specify how the reader can determine whether the Commission has opted to use another successor media platform, we decline to codify in the regulation how the Commission will make such a determination or what other types of media platforms will be available in the future as such information or methods are unknown at this time. With that said, we note that as with the current www.PaPowerswitch.com, the Commission will use all appropriate methods and media available at the time of the change to inform customers.

52 Pa. Code § 54.5(g)

We proposed to create two options for disclosure language concerning contract expiration or change notices—

one option for contracts with a fixed duration and a second option for contracts without a fixed duration, such as a month-to-month contract. Stakeholders have noted customer confusion can result from having just one standard statement that may not be applicable to all contracts.

The OCA recommends that the Commission further define “non-fixed” to provide additional clarity. The OCA also recommends that the proposed § 54.5(g) notification language include the time frame that consumers will receive the notices. Furthermore, the OCA notes that the phrase “whenever we propose to change the terms of service in any type of contract” could be misleading to consumers, as it suggests that an EGS can unilaterally change the terms of a contract. The OCA recommends the following changes to proposed § 54.5(g):

(g)(1) Disclosure statements shall include the following customer notification: “If you have a fixed duration contract approaching the expiration date, ~~or whenever we propose to change the terms of service~~ FOR THIS CONTRACT in any type of contract, you will receive two separate written notifications, THE FIRST APPROXIMATELY 60 TO 45 DAYS IN ADVANCE AND THE SECOND 30 DAYS IN ADVANCE OF ~~that precede~~ either the expiration date or the effective date of the proposed changes. These notifications will explain your options going forward.”

(2) Disclosure statements for ANY CONTRACT OTHER THAN FIXED ~~non-fixed~~ duration contracts must include the following customer notification: “Whenever we propose to change the terms of service FOR THIS CONTRACT in any type of contract, you will receive two separate written notifications, THE FIRST APPROXIMATELY 60 TO 45 DAYS IN ADVANCE AND THE SECOND 30 DAYS IN ADVANCE OF ~~that precede~~ either the expiration date or the effective date of the proposed changes. These notifications will explain your options going forward.”

OCA at 15-16.

Duquesne urges the Commission to be mindful of the reading skills of consumers when mandating specific language. Duquesne believes that the proposed language is arguably too complex. Duquesne offers the following revisions:

“If you have a fixed duration contract that will be ending, or whenever we change the contract, you will receive two separate letters before the contract ends or the changes happen. These letters will explain your options.”

Duquesne offers a similar change to the proposed language in section (2). Duquesne at 8-9.

NEMA believes that the Commission’s proposal is reasonable in that it permits EGSs to improve the clarity and quality of the disclosures that are made to consumers and should be adopted. WGL asserts that the new language for non-fixed duration contracts might be confusing, as its references an expiration date. WGL suggests that the Commission should remove the reference to expiration date and only state that the customer will receive two separate written notices that precede the effective date of proposed changes. NEMA at 5; WGL at 5.

Discussion

While there is general support for the concept of creating two different paragraphs, the commentators offer compelling reasons for revising the language. The Commission agrees with the OCA and WGL that some of the

specific wording needs to be revised. The Commission also agrees with Duquesne that simpler, less complex language is appropriate. Further, we think that the EGS should identify itself in these paragraphs. Accordingly, we included the language suggested by the Commentators and added a placeholder for the name of the EGS.

52 Pa. Code § 54.5(j)

We proposed an additional paragraph to reflect the analogous natural gas rule at 52 Pa. Code § 62.75(j) concerning contract assignment. We proposed adding the requirement that if the customer's contract is assignable, the supplier must disclose this to the customer. The assignment of contracts from one supplier to another, while not common, does occur frequently enough to be a source of some customer confusion. This requirement is also consistent with the guidance provided by a Commission order addressing assignment in the electric industry.²² In these guidelines, the Commission specified that "[a]ny assignment clause used in a supplier contract must be written in plain language, be prominently printed and explained fully in terms of service and disclosure."²³

The OCA submits that the EGS should be required to disclose this information at the time the consumer enters into the agreement and be required to provide the consumer with written notice if the contract is assigned to another supplier. The OCA also submits that customers should be permitted to return to default service or select another supplier without penalty in an assignment circumstance. OCA at 16-17.

The FTC asks that even if the contract terms remain the same, the PUC may wish to consider mandating an opt-out provision (without early termination penalties) if the customer is dissatisfied with the new supplier. FTC at 9.

Discussion

While we agree with OCA that the customer should be given a timeframe for the switch to the new supplier, we think providing a specific date is impractical and not always possible. Instead, we will insert language directing the supplier to provide the month and year that the assignment can be expected. However, we disagree with OCA and the FTC that the customer should have an option to reject the assignment. The Commission has previously determined that contracts are assignable. A customer objecting to an assignment may file a complaint with the Commission but would have the burden of proving that the assignment constitutes unreasonable service on the part of the supplier pursuant to 66 Pa.C.S. § 1501.²⁴ Further, by including the assignment provision in the disclosure as we are doing, the customer is aware of this possibility prior to accepting the supplier's service. If the potential customer does not want to have an assignable contract, they are free not to enter into an agreement with that supplier.

52 Pa. Code § 54.5(k)

We proposed adding a new paragraph (k) requiring that the disclosure inform the customer if the EGS intends to obtain customer account and usage information from the utility. In our experience, many EGSs already include such a provision in their disclosures. We simply proposed making this a uniform requirement for all disclosures. Customer privacy and third-party access to information is

²² See Order on the Interim Guidelines Regarding Notification by an Electric Generation Supplier of Operational Changes Affecting Customer Service and Contracts, Docket No. M-00960890F0013 (Order entered August 14, 1998).

²³ See id. at Appendix, Guideline (II)(B)(1).

²⁴ See id. at 9—13.

becoming an increasingly sensitive issue and we think that making this as transparent as possible is in the best interest of both consumers and suppliers. We acknowledged that this was a new proposal and invited all parties to comment on what should be included in such a provision.

Making this disclosure a uniform requirement increases transparency regarding customer privacy and is necessary as a matter of Pennsylvania regulations and law and, as such, the OCA supports this addition but submits that modifications are necessary to fully address consent issues. Regarding smart meter technology, the Public Utility Code requires explicit consent to release information to third parties as follows:

(3) Electric distribution companies shall, with customer consent, make available direct meter access and electronic access to customer meter data to third parties, including electric generation suppliers and providers of conservation and load management services.

66 Pa.C.S. § 2807(f)(3).

The OCA submits that heightened specificity and explicit consent is required to obtain sensitive customer account information from the EDC, such as smart meter data. The OCA asserts that EGSs should be required to retain this explicit authorization in the event that questions arise. Additionally, the OCA submits that certain types of account information should not be provided to the EGS, such as payment history. The OCA proposes the following modifications:

(k) If the EGS intends on obtaining customer account information from the EDC, the EGS shall inform the customer OF THE SPECIFIC TYPE what type of information THAT may be obtained, INCLUDING WHETHER USAGE DATA the purpose for obtaining this information and inform the customer that they are consenting by entering into this contract. The EGS shall also inform the customer that the EGS will maintain the confidentiality of a customer's personal information including their name, address, telephone number, electric usage and historic payment information as required by applicable Commission regulations and federal and State laws. PAYMENT HISTORY SHALL NOT BE PROVIDED TO THE EGS.

The OCA also submits that the contract summary should include this information as it is critical to protecting sensitive customer information. OCA at 17-18.

The Low Income Advocates support this change, as it will better shield consumers from unwanted, unauthorized, or otherwise inappropriate disclosure of sensitive personal data. To ensure that the provision has the desired effect, they suggest two additional modifications. First, they suggest that this notice be in a larger font size, and perhaps either bolded, underlined or capitalized to draw the consumer's attention. They further recommend that the supplier be required to disclose the information it may seek from an EDC with specificity. The Low Income Advocates assert that information which the consumer does not wish to share, such as the existence of a Protection From Abuse Order, prior payment arrangements, or prior participation in an assistance program should not be included. The Low Income Advocates offer suggested language:

If the EGS intends on obtaining customer account information from the EDC, the EGS shall request the customer's consent to the EDC disclosure.

The EGS must specifically state the nature of the information requested along with reason for the request. ~~the EGS shall inform the customer what type of information may be obtained, the purpose for obtaining this information and inform the customer that they are consenting by entering into this contract. The EGS shall also inform the customer that the EGS will maintain the confidentiality of a customer's personal information including their name, address, telephone number, electric usage and historic payment information as required by applicable Commission regulations and federal and State laws.~~

Low Income Advocates at 22-23, 28.

Duquesne suggests that the disclosure also provide, in plain and simple language, that signing the contract is consent for the EGS to obtain personal information from the EDC. Duquesne proposes that the EGS disclosure be required to state that any information obtained for the purposes of providing electric service will not be provided by EDCs to third parties without the customer's express consent and that should the customer's information be inadvertently released, the customer will be notified. Duquesne at 9.

RESA supports the Commission's proposal but recommends additional language be added to make it clear that the customer is consenting to the release of information by the EDC to the EGS by entering into the contract with the EGS. RESA asserts that adding this language will streamline the ability of the EGSs to request and receive information about their customers from the EDC without the need for additional paperwork. RESA further asserts that unfettering the ability of EGSs to gain access to important customer account information will enable EGSs to provide better and more timely service to their customers and avoid time consuming disputes between the EDCs and EGSs regarding whether the EGS has the appropriate customer consent. RESA recommends the following revisions to the Commission's proposed new regulation:

Section 54.5(k) If the EGS intends on obtaining customer account information from the EDC, the EGS shall inform the customer what type of information may be obtained, the purpose for obtaining this information and inform the customer that he or she is they are providing consenting to the EDC to release this information by entering into this contract. The EGS shall also inform the customer that the EGS will maintain the confidentiality of a customer's personal information including their name, address, telephone number, electric usage and historic payment information as required by applicable Commission regulations and federal and State laws.

RESA at 15-16.

NEMA asserts that it is appropriate to memorialize this requirement in the regulations, as it has become a standard practice, and to make clear to all stakeholders—EGS, consumers, utilities—the Commission's expectations in this regard. NEMA at 5.

Discussion

No party expressed opposition to the Commission's proposal, with the commentators generally supporting the concept that the disclosure should include a section addressing the EGS's need to obtain customer data from the EDC and the customer being informed of this and consenting to such. We agree with OCA and the Low Income Advocates that just saying "type of information"

may be too broad. Accordingly, we have inserted language directing the supplier to be more specific about the information they intend to obtain from the EDC. We also agree with RESA and Duquesne that the section should be clearer and explicitly inform the customer that he or she is consenting to the EDC releasing information to the EGS by entering into the contract.

However, we disagree with OCA's request that customer payment information never be provided to an EGS. While currently, most residential customers and suppliers participate in EDC Purchase of Receivables (POR) programs where the supplier is relieved of billing and collection responsibilities, this may not always be the case. Further, the Commission has recently ruled, relative to a POR claw-back program, that suppliers have the right to customer payment data in some circumstances even while operating under a POR program.²⁵ We also decline OCA's and the Low Income Advocates' request that this information be highlighted in the disclosure and included in the contract summary. We already require other information be highlighted in the disclosure and find that highlighting too many things reduces the impact of such highlighting. While the information disclosure/consent provision is important, in our opinion this importance does not rise to the same level as information about fees, penalties, and pricing that can have financial consequences for the customer if overlooked.

§ 54.7. Marketing/sales activities

When this section was first promulgated in 1997, electric utility rate structures often featured declining or inclining block rate structures—the unit rate (per kWh) would vary depending upon the customer's usage. It was envisioned back in 1997 that EGS pricing structures might reflect similar rate structures. This regulation was created to inform consumers of how their supplier unit price would change depending upon their usage.

Since then, electric utility rate structures have been simplified, including the elimination of most block rate structures. See 52 Pa. Code § 69.1810 (relating to retail rate design).²⁶ As a result, EGSs offering block pricing structures are relatively rare, meaning that this regulation has become outdated. We proposed to update this regulation by clarifying that it is only effective if the supplier is offering a product where the unit price changes depending upon the customer's usage or if the supplier is charging a fee, such as a monthly customer service charge, in addition to the unit price. In these situations, this regulation provides important information that allows the customer to make an "apples-to-apples" comparison to another supplier's offer. We also proposed to simplify the rule by eliminating the separate requirements for fixed and variable prices as the proposed amendment applies the same rule regardless of whether the product is fixed or variable.

The OCA supports this revision and asserts that requiring usage tables only if a supplier offers a product where the unit price changes depending upon the customer's usage or if the supplier charges a monthly fee is reasonable. The Low Income Advocates support these revisions, as they will better align required marketing and sales

²⁵ See Opinion and Order Re Petition of Metropolitan Edison Company for Approval of a Default Service Program for the Period Beginning June 1, 2019 through May 31, 2023, et al., Docket Nos. P-2017-2637855, et al. (Opinion and Order entered Sept. 4, 2018).

²⁶ 52 Pa. Code § 69.1810. Retail rate design. Retail rates should be designed to reflect the actual, incurred cost of energy and therefore encourage energy conservation. The PTC should not incorporate declining blocks, demand charges or similar elements. The PTC for a particular customer class may be converted to a time of use design if the Commission finds it to be in the public interest.

activities with the requirements for the disclosure statement. OCA at 18-19; Low Income Advocates at 23-24.

The FTC applauds the PUC's practice of periodically updating marketing rules in both sectors to keep pace with new products, new services, and new marketing approaches. Overall, the FTC commends the PUC for its consistent focus on helping customers in both the electricity and natural gas retail sectors to make well-informed decisions rather than imposing particular views of what choices electricity customers should be allowed to make. FTC at 11.

RESA recommends that the Commission delete § 54.7(b) in its entirety. RESA asserts that maintaining the usage table requirement in a section that is not specifically focused on the information to be included in the customer contract is confusing for EGSs who ensure that they are compliant with § 54.5(c) but do not realize that additional requirements are located in a different section of the regulations. RESA also asserts that the requirement that this usage table be included in marketing materials is potentially confusing. RESA posits that requiring this additional information on marketing pieces is not only costly but also reduces the amount of space available on these marketing pieces to present more useful information. Finally, RESA argues that it is unnecessary for the newly proposed language for § 54.7(b) to specifically include the requirement that the usage table be included in the contract summary per § 54.5(i). RESA at 9-10.

While Shipley agrees that this provision is somewhat anachronistic at this point, since most utility rates are not declining block rates, it also believes that the proposed change is a solution in search of a problem. Shipley questions the need for the chart at all given the sheer lack of such rates in the market. If the chart will be required, however, Shipley suggests that clarification of the phrase "that offer terms of service for acceptance by customers" may be warranted. Shipley also states that it is not clear whether the supplier must include the chart if its rates do not vary on usage, but it does charge a monthly customer charge-like fee. Shipley at 4-5.

Discussion

There was general agreement among the commentators that this section is outdated and in need of revision, but varying opinions as to how to revise it—with some believing it is unnecessary, unclear, and duplicative and should be abolished altogether. As noted earlier relative to subsections (c)(1) and (c)(4), how to present pricing is one of the more complex issues we have to address. The challenge is to provide potential customers with the information they need to make informed decisions and to comparison-shop, while not being so restrictive that we inadvertently ban new and innovative supply products made possible by advanced metering. Once again, after carefully considering the comments, we find that there is a way to balance these interests and update this regulation to make it clearer and more effective.

We agree with the FTC that we need to ensure that consumers have the information needed to make well-informed decisions when selecting from an array of choices, rather than imposing particular views of what choices electricity customers should make. However, we agree with OCA and the Low Income Advocates that this proposed requirement should apply to "flat bill" products so that customers can compare the product to other products and determine if it is right for them given their needs and wants. We also agree with OCA and the Low

Income Advocates that this requirement applies to products that have one-time or monthly fees. We have inserted language clarifying that if the product also has an introductory component (see subsection (c)(2)), a table must be included showing the introductory pricing information and a separate table displaying the pricing that applies after the introductory period expires.

As we discussed previously relative to subsection (c)(4), we agree with NEMA and RESA that not all pricing structures will fit this regulation. Dynamic, time-of-use products, where the amount of the customer's monthly bill will be determined in part by *when* they use the service, will be difficult if not impossible to accurately project in advance. As we did earlier with paragraph (c)(4), we revised our proposal to create an exception for dynamic/time-of-use products. Suppliers will not be expected to provide per kWh prices for three different usage levels but instead will be expected to present time-of-use pricing information in a table format that displays what the "times" are and what the applicable per kWh rate is for the specified times. If the rate for such is variable, the supplier shall display in the table the first month's initial pricing levels (see subsection (c)(3)(iii)) and a notation that the prices displayed are initial prices only.

We agree with RESA that the language "including contract summaries" is unnecessary and possibly problematic. As RESA points out, in 2014 we deliberately decided not to codify the precise contents of the contract summary as to allow us flexibility to revise the contract summary as needed via Commission Order process rather than a rulemaking. We still want this information in the contract summary, which we discuss further in relation to paragraph (i) of § 54.5, under the "Contract Summary" section.

We agree with RESA and Shipley that the language "marketing materials that offer terms of service for acceptance by consumers" is unclear and needs to be more focused. We do not intend for this requirement to apply to all advertising and general marketing. We agree with Shipley that this requirement should be relevant only to written or electronic marketing materials that include enrollment documents that invites and allows a customer to authorize a switch of supply service and will revise the regulation accordingly.

§ 54.10. Notice of contract expiration or change in terms for residential and small business customers

We proposed some minor modifications to the Notice of Contract Expiration or Change in Terms rules at 52 Pa. Code § 54.10. As we did with the disclosure rules at 52 Pa. Code § 54.5(c) and (g) and discussed above, we proposed using the phrase "fixed duration" in place of "fixed term" to avoid confusion over the use of the word "term" with its multiple-meanings. A more significant, proposed revision to this section is to 52 Pa. Code § 54.10(1)(vi):

(vi) A statement indicating whether the existing fixed [term] duration contract has a cancellation fee, and an explanation [of the fee amount and how to avoid the fee, if possible, including notice of the date when the customer can choose a different product from the customer's existing EGS, choose an alternative EGS or return to default service] that the customer is not subject to the cancellation fee if the customer terminates the contract at any time between the date of the initial notice and the expiration date of the fixed duration contract.

We proposed this revision to align with our proposed revisions to 52 Pa. Code § 54.3 (relating to standards and

pricing practices for retail electricity service). As discussed previously, we proposed a new requirement that would in effect ban the imposition of early termination fees (ETFs) once a supplier has provided the contract expiration notices required by 52 Pa. Code § 54.10. In addition to placing this new requirement in § 54.3, we believe it is appropriate to place this same requirement in § 54.10, since this restriction is based upon the issuing of the notices required by § 54.10.

OCA again notes, as mentioned regarding § 54.3, the termination of a contract by a customer may be inadvertent due to the timing of the customer switching to another supplier. The OCA asserts that imposing an ETF on a customer for switching after receiving the notice of contract expiration discourages customers from shopping in the competitive marketplace. OCA at 19.

Discussion

As discussed earlier relative to § 54.3, we modified our proposal so that the ETF ban goes into effect from the date that the second, options notice is sent to the customer—not the first, initial notice. This second, options notice, is to go out no later than 30 days prior to the expiration of the contract. This will in effect create an ETF-ban period of approximately 30 days, compared to a 60-day period as we originally proposed. We revised § 54.10 accordingly to reflect this modification of our original proposal.

Contract Summary (Attachment A)

As discussed previously, in 2014 we developed and adopted a contract summary that highlights key provisions of a supplier contract in a plain-language box format. This increased the visibility of the most important contract items and allows the consumer to make an easier comparison of different supplier offerings when shopping.

We did not imbed the contract summary into the regulations in 2014 because we wanted to preserve the flexibility to revise it as the market evolves. However, we did commit to using a process to revise the contract summary in a way that would allow all stakeholders an opportunity to have a voice in any such revisions. Accordingly, we think this rulemaking is an appropriate venue for revising the contract summary, and proposed several revisions in our December 2017 NPRM, included with the order as Attachment A. The proposed changes are intended both to bring it into as much alignment with the natural gas contract summary as possible and to reflect changes in the market since 2014.

Among the updates, we proposed clarifying that some terms outlined in the EGS Contract Summary template may not be relevant to all contracts by specifying which ones may be omitted entirely if not applicable. We also, as discussed previously, proposed replacing the word “term” with “duration” when discussing length of the contract. Another general revision was the removal of information related to the utility. As discussed previously, we believe that including utility information is unnecessary and increases the risk that the consumer may confuse the supplier with the utility or get the impression that the supplier is affiliated with the utility. Omitting this information will also shorten the contract summary. We believe that the contract summary must be as concise as possible and needs to fit on no more than one page. The key revisions we proposed included the following:

Generation/Supply Price: Requiring that the customer be informed if the price is introductory, what the introductory price is, and what the price is upon expiration of the introductory period. As discussed

previously in the context of the proposed revisions to 52 Pa. Code § 54.5(c)(2), this proposed revision would bring the electric rule into alignment with the natural gas rule and is intended to provide for full price transparency when an EGS is offering an introductory price product.

Generation Price at Various Usage Levels: This proposed new row would only be required if the unit price varies by usage level and/or there are fees in addition to the unit price. This is intended to align with the proposed changes to 52 Pa. Code §§ 54.5(c)(4) and 54.7.

Incentives: In the interest of brevity, we proposed to clarify that if the supplier is not offering any special incentives this row can be omitted from the summary.

End of Contract: We proposed minor revisions to the language to make this contract summary the same as the NGS contract summary. This row should be informing the customer that they should look for the two notices required by 52 Pa. Code § 54.10 as their contract nears expiration.

Right of Rescission: We proposed adding this new row to highlight the customer’s 3-day right of rescission as found in 52 Pa. Code § 54.5(d). We believe this is a key consumer protection and needs to be visible and understandable to the customer.

In addition to the above proposed revisions, we invited parties to contribute any other changes they believe are needed to the contract summary, while urging all parties to keep conciseness in mind when they consider the contract summary.

OCA notes that currently, there are three documents that provide information to consumers about the supplier agreement: a contract summary, a disclosure statement, and the terms and conditions. The OCA submits that the contract summary and the disclosure statement be combined or designed for a single one-page document. The OCA asserts that it is not useful for customers to be given two different summary documents concerning their formal terms of service document. The OCA submits that there is significant confusion around the disclosure statement, the contract terms and conditions, the contract summary, and the enrollment form. The OCA states that most customers interacting with an EGS via door-to-door, telemarketing, and even kiosk locations are enrolled with the EGS before ever seeing the disclosure statement, contract, or contract summary. The OCA remains concerned that we have gone to great lengths to develop a disclosure statement and contract summary that the customer never sees until it is too late. The OCA submits that it is necessary to address these timing issues with the disclosure statement, contract summary, and contract terms and conditions.

The OCA agrees with the Commission that the generation/supply price, the generation price at various usage levels, any applicable incentives, end of contract notification, and the right of rescission are appropriate items to include in the contract summary. The OCA also agrees that requiring the disclosure of introductory prices and the price upon expiration of the introductory period is an important revision that will lead to enhanced customer understanding of the agreement. Additionally, the OCA supports the new row that requires generation price at various usage levels if the unit price varies by usage level and/or if there are fees in addition to the unit price as it helps the residential customer make an informed decision. However, OCA believes that these important con-

tract terms should be disclosed to the customer orally as well. Since the contract summary is a concise explanation of a binding agreement between the customer and the EGS, the OCA asserts that orally stating all of the material items that are required to appear in the contract summary is logically necessary to ensure that the customer is fully informed of the key items in the agreement before the sale is complete. All too often, the OCA has heard from consumers that supplier agents make oral representations that are different from or that are not otherwise included in the terms of service. The OCA asserts that requiring suppliers and their agents to make oral disclosures that reflect the contract summary would halt this practice.

Finally, the OCA submits that, if a customer's consent to release data is included in the contract, it should also be disclosed in the contract summary. The OCA asserts that release of customer account information requires an explicit agreement between the customer and the company. To ensure that the customer's attention is properly drawn to this information, the OCA submits that an additional row be added to the contract summary if such consent is being sought as part of the contract. The OCA states that the contract summary should detail the specific type of account information that the EGS may receive from the EDC. OCA at 19—21.

The Low Income Advocates largely support the proposed changes, as they will align the contract summary with the other proposed changes throughout the Chapter and will better inform customers of important rights. However, the Low Income Advocates oppose the Commission's proposal to eliminate EDC contact information from the contract summary as well as information indicating that the EDC is responsible for outages, emergencies, and other critical service-related issues. The Low Income Advocates assert that failure to disclose and explain this information will only increase customer confusion and heighten frustration experienced by consumers who must make multiple calls to resolve a pressing service-related issue and/or access relief to which they are entitled. Low Income Advocates at 24-25.

Shipleigh generally agrees with the contract summary. However, Shipleigh would suggest making sure that the format includes the Right of Rescission section directly adjacent to the Cancellation section, simply because the two are similar and it will be easier for customers to understand. Shipleigh at 5.

Discussion

In response to OCA's questions and concerns about the timing and delivery of the disclosure statement and contract summary, we first note that § 54.5(b) addresses when a written disclosure must be provided:

- (b) The EGS shall provide the customer written disclosure of the terms of service at no charge whenever:
 - (1) The customer requests that an EGS initiate service.
 - (2) The EGS proposes to change the terms of service.
 - (3) Service commences from a default service provider.

Notably, this regulation does not include a specific time-period for providing the disclosure. However, importantly, § 54.5(d) makes it clear that the customer's 3-day right of rescission does not begin until the customer receives the disclosure:

(d) Customers shall be provided a 3-day right of rescission period following receipt of the disclosure statement.

- (1) The 3-day right of rescission is 3 business days.
- (2) The 3-day right of rescission begins when the customer receives the written disclosure.
- (3) The customer may cancel in writing, orally or electronically, if available.
- (4) Waivers of the 3-day right of rescission are not permitted.

Disclosure delivery timeframes are addressed in more detail in the Chapter 111 residential supplier marketing regulations, specifically at 52 Pa. Code § 111.11:

§ 111.11. Receipt of disclosure statement and right to rescind transaction

(a) When a transaction is completed by a customer without the presence of or interaction with an agent and is not submitted to the verification process, a supplier shall provide the customer with a copy of its disclosure statement as soon as it is practical. A customer shall have the right to rescind the transaction within 3 business days after receiving the disclosure statement. See § 54.5(d) (relating to disclosure statement for residential and small business customers), which applies to EGSs, and § 62.75(d) (relating to disclosure statement for residential and small business customers), which applies to NGSs.

(b) After a transaction that involved an agent has been completed and verified, a supplier shall provide the customer with a copy of its disclosure statement. The disclosure statement may be provided in-person or by United States mail. The disclosure statement may be provided electronically if the customer consents to electronic delivery. A customer shall have the right to rescind the transaction within 3 business days after receiving the disclosure statement.

(c) There shall be a rebuttable presumption that a disclosure statement correctly addressed to a customer with sufficient first class postage attached shall be received by the customer 3 days after it has been properly deposited in the United States mail. If delivered in-person, the disclosure will be considered received by the customer on the date of delivery. If delivered electronically, the disclosure will be considered received by the customer on the date it was transmitted electronically.

Further, the electric switching regulations at 52 Pa. Code § 57.173(1) direct the supplier to wait until the end of the 3-business day rescission period ends before transmitting the enrollment to the EDC (although different timeframes are permissible with the customer's consent):

§ 57.173. Customer contacts the EGS to request a change in electric supply service

When a customer contacts an EGS to request a change from the current EGS or default service provider to a new selected EGS, the following actions shall be taken by the selected EGS and the customer's EDC:

- (1) The selected EGS shall notify the EDC of the customer's EGS selection at the end of the 3-business day rescission period under § 54.5(d) (relating to disclosure statement for residential and small business customers) or a future date specified by the customer. The selected EGS may notify the EDC by

the end of the next business day following the customer contact upon customer consent.

As a result of the above regulations, the customer always has an opportunity to rescind the contract—a right that neither the customer nor the supplier can waive per the above-noted regulation at § 54.5(d). The enrollment cannot proceed until the customer has received a written disclosure and has been given 3 business days to review and rescind if desired. It is the critical importance of this rescission right that compels us to maintain our proposal to include information about this right in the contract summary and to agree with Shipley to place it in a more logical, prominent location in the summary. The contract summary is to accompany the disclosure statement per paragraph (i) of § 54.5.

We decline OCA's suggestion that we require an oral presentation of the disclosure in addition to a written version. First, not all sales involve an agent who would be able to provide an oral presentation (direct mail, internet, etc.). Secondly, we find this type of requirement is more appropriately addressed in the Chapter 111 residential supplier marketing regulations and, in fact, those rules do have requirements similar to what OCA is suggesting. See 52 Pa. Code §§ 111.12(4) and (5) for examples of requirements upon sales agents. If more is needed in this regard, that can be considered during a future rule-making specifically addressing marketing. We also decline to include the customer consent to the EDC information release in the contract summary. While this is important, and as such we are now including this in the disclosure statement, we find that this is not key information that a customer needs to compare or evaluate supplier offers. Again, we find that the contract summary must be kept as short and concise as possible to retain its effectiveness. For similar reasons, we reject the Low Income Advocates' appeal to keep EDC information in the summary. This information is not needed to evaluate or compare supplier offers. Further, having the EDC mentioned in the contract summary increases the risk of the customer confusing the EGS with the EDC and possibly concluding that the EDC endorses the product being offered or is a partner with the EGS.

Finally, we reiterate that the contract summary should ideally be limited to one page if possible, recognizing that some supplier products may require additional explanation that necessitates more. The contract summary should be prominent and not buried among other enrollment documents. It should be in plain language and in a prominent, easy-to-read font size. It also needs to accompany the disclosure statement.

Other Topics

RESA notes that the Commission did not propose any revisions to § 54.38 that requires EGSs to pay assessments pursuant to 66 Pa.C.S. § 510 of the Public Utility Code, even though this Section was invalidated by action of the Pennsylvania Supreme Court in 2005 and does not accurately describe the annual fee implemented by the Commission during its 2015-2016 Fiscal Year. Since the Commission does not collect the assessments as described in § 54.38, the continued inclusion of this section creates confusion because it does not accurately describe the annual fee collected by the Commission. Therefore, RESA recommends that § 54.38 be deleted in its entirety. RESA at 17.

Discussion

We decline to adopt RESA's recommendation as it is beyond the scope of this proceeding and requires the

Commission to republish the proposed changes for comment. The NPRM at this Docket addressed Subchapter A of Chapter 54 (relating to customer information). Whereas, § 54.38 is in Subchapter B of Chapter 54 (relating to electricity generation supplier licensing). See Section 202 of the Commonwealth Documents Law ("The agency text of any administrative regulation of change therein as finally adopted may contain such modifications to the proposed text as published pursuant to Section 201 as do not enlarge its original purpose..."). 45 P.S. § 1202.

Environmental Disclosure

Marion Biddle writes to request that the proposed amendments to the regulations include a requirement to identify the source of the electricity customers will be purchasing and the resulting CO₂ produced by each type of fuel. She realizes the focus of these changes is fair pricing but believes that it also extremely important to stress the environmental cost of purchasing electricity based on different fuel sources. Biddle at 1.

Discussion

Marion Biddle is correct in that the instant rulemaking concerns disclosure of terms and conditions at § 54.5, and that much of this is primarily related to pricing. We do note that if the customer is purchasing a renewable product or related products and services, this should be included in the disclosure under paragraphs (c)(5) and (c)(6) but this is not the same thing as the environmental disclosure Marion Biddle proposes. However, elsewhere, the Chapter 54 regulations do include a subsection addressing generation-source disclosure and renewable marketing. Specifically, 52 Pa. Code § 54.6 addresses supplier obligations to disclose generation-sources upon customer request, energy-efficiency information, environmental marketing claims, auditable trails of generation sources, use of the term "green," etc. Admittedly, this regulation was promulgated in the 1990's and is in possible need of updating, which can be considered during a future rule-making.

Implementation Timeline

RESA notes that, generally, the changes proposed by the Commission would require EGSs to implement new business and operational protocols to ensure that their future customer disclosure statements and communications with customers conform with the content of the final regulations. More specifically, changes to the customer contract will require EGSs to review existing contracts, identify revisions that are needed and then undertake programmatic system changes to ensure that the changes are incorporated into the EGS's systems. Given that EGSs likely will already have other information technology changes underway or scheduled, RESA suggests that the Commission provide an additional 60 days after the date of publication of the final IRRC approved rules for EGSs to implement the final regulations.

Relatedly, as part of the Commission's Final Rule-making Order specifying the approved revisions, RESA requests that the Commission clarify that the new requirements are prospective and should be incorporated into EGS contracts starting 60 days after the date of final publication of the IRRC approved revisions. Thus, pre-existing contracts prior to that start date in compliance with the current regulations will not be abrogated due to the passage of the new revised regulations. This clarity will ensure that then-existing customer contracts in compliance with then-existing regulations are not disrupted

and all EGSs will be operating in the same manner to incorporate the new requirements in their future contracts. RESA at 17-18.

IRRC points out that the expected date of delivery of the final regulation is January 2020. Given the current and ongoing problems the PUC describes in its rationale for the revised rules, IRRC encourages the PUC to work toward filing the final regulation sooner, if possible. IRRC at 2.

Discussion

We agree with RESA that suppliers will need time to revise their disclosure documents and contract summaries, and to put in place the new ban on ETFs during the last 30 days of a contract. Accordingly, we will provide 60 days after the date of publication of the final IRRC approved rules for EGSs to implement the final regulations. We further agree with RESA that the new requirements are prospective and should be incorporated into EGS contracts starting 60 days after the date of final publication. Accordingly, pre-existing contracts prior to that start date will not be interfered with nor abrogated due to the enactment of the new revised regulations.

Costs and Economic Impact

IRRC notes that economic and fiscal impacts of the regulation must be considered in their determination of whether a regulation is in the public interest. 71 P.S. § 745.5(a)(4) and (10), and § 745.5b(b)(1). IRRC indicates that the responses submitted with the proposed regulation to the Regulatory Analysis Form (RAF) Questions (19), (23) and (23a) are not sufficient to determine whether the regulation is in the public interest relating to the criterion of economic impact and clarifies that these RAF questions do not ask whether costs and savings are due or undue, but rather ask for specific cost estimates. Even if costs or savings are estimated to be zero, the PUC's responses should reflect that rather than state the required cost data is "Not Applicable." In addition, commentators have stated there are impacts on pricing relating to elimination of ETFs toward the end of the contract period. Therefore, IRRC asks the PUC to review its responses to these RAF questions and provide the best estimates of costs in the RAF submitted with the final regulation so that IRRC has the information required by the Regulatory Review Act to determine whether the final regulation is in the public interest. IRRC at 2.

Discussion

Initially, we note that EGS cost data is not available to the Commission and EGSs are not willing to provide such data as it would reveal market sensitive proprietary information. The Commission had sought EGS cost impacts through the Notice of Proposed Rulemaking (NPRM) Order. Specifically, in the NPRM Order we acknowledged that the ETF prohibition was not appropriate for large commercial or industrial customers as early exits from contracts can result in significant financial loss for the EGS. We then invited parties to provide perspectives relating to any possible unintended consequences that could result from the new rule to prohibit ETS in the last 60 days of a contract.²⁷ The Commission received several responses from suppliers indicating the potential cost impacts to EGSs if the proposed rule was adopted. While these responses indicated that there was a potential that EGSs may lose money if a customer left the contract early, these comments indicated that such losses, if incurred at all, would depend on the particular situa-

tion. See NEMA Comments at 2—4; RESA Comments at 12-13; Shipley Comments at 2-3. Thus, even the EGSs that commented on cost impacts admitted that the number and magnitude of related costs was speculative at best. With that said, the Commission recognized that there are costs involved and revised the final rule shortening the ETF prohibition period to when the options notice is given to the customer about 30 days before the end of the contract. This revision further minimizes any cost impacts to EGSs, as acknowledged by Shipley, who proposed that the ETF prohibition be subsequent to a single customer notice given 30 to 45 days before the end of a contract. See Shipley Comments at 2-3.

The Commission also recognized the cost impacts to customers, which include small business customers. We recognized that the customer is also subject to financial risk based on the actions of the supplier if a switch does not occur on the date the customer requested. We specifically noted that if the supplier would submit the request early, the customer would be subject to the ETF or if submitted late be subject to higher prices. The Commission found, in recognizing that costs may result if a customer leaves a contract early, that suppliers are sophisticated enough to be able to hedge against any potential losses that may occur due to a customer leaving a contract less than 30 days before it ends and that the supplier, not the residential or small commercial customer, should be the one to bear that risk.

Regarding potential costs related to complying with the remainder of the amendment to the EGS disclosure rules, we note that the EGSs already have an obligation to craft and provide the disclosures to customers. We also note that EGSs must revise these disclosures as necessary to conform to any new or revised offers they are making to the public. Accordingly, any new costs would be marginal to revise any existing supplier offers. We note that several of the changes are intended to reduce supplier costs by making the disclosure requirements similar to the natural gas supplier disclosure rules, for those suppliers that serve both markets, and by eliminating information, such as EDC contact information, that are likely to reduce customer confusion and result in fewer customer service calls.

Based on the best available data, the Commission believes that costs associated with the amendments to these rules are minimal and transitory. This is based on the comments provided indicating that EGSs can adjust their risk management practices to avoid or minimize any potential risk when developing new offers. In addition, at the suggestion of RESA, the Commission agreed to delay the effective date of the rules by 60 days to give suppliers time to revise their contracts and disclosure statements, further reducing the cost impacts of the rules. In addition, the new rules will reduce costs for customers, including small business customers, by eliminating ETFs in the last 30 days of a contract and providing enough information so that they can make an apples-to-apples comparison of supplier offers to determine which offer is beneficial to them. All of this demonstrates that the Commission has endeavored to obtain and present the cost information available.

Regulatory Review

Under Section 5(a) of the Regulatory Review Act, the Act of June 30, 1989 (P.L. 73, No. 19) (71 P.S. §§ 745.1—745.15), the agency submitted a copy of the proposed rulemaking, which was published as proposed at 48 Pa.B. 1696 on March 24, 2018, and served March 13, 2018, to IRRC, the Chairpersons of the House Committee on

²⁷ NPRM Order at 12-13.

Consumer Affairs, and the Chairpersons of the Senate Committee on Consumer Protection and Professional Licensure, for review and comment. In compliance with Section 5(c), the agency also provided the Commission and the Committees with copies of all comments received.

This final form regulation was deemed approved by the House Committee on Consumer Affairs, was deemed approved by the Senate Committee on Consumer Protection and Professional Licensure, and was approved by the Independent Regulatory Review Commission on June 18, 2020, in accordance with Section 5.1(e) of the Act.

Conclusion

The revisions of the standards and pricing practices for retail electricity service at Section 54.3; the disclosure statement for residential and small business customers at Section 54.5, including the proposed changes to the EGS Contract Summary; marketing/sales activities at Section 54.7; and Section 54.10, notice of contract expiration or change in terms for residential and small business customers, are intended to increase consumer protection and better inform customers about the terms and conditions of an EGS contract. The changes will also make these regulations more consistent with the analogous natural gas regulations by reducing consumer confusion and costs for suppliers that provide both services. These regulations, as developed after consideration of comments from affected parties and from the previous proceedings leading up to this, provide for enhanced information from EGSs to customers and help ensure that customers will have this information at hand when considering the various alternatives for purchasing future electric generation supply.

Well-informed customers are essential participants in a successful competitive retail market. By updating these regulations to provide customers with accurate, timely pricing information when they are shopping for electric generation supply, we intend to create a more user-friendly marketplace that should continue to attract increased numbers of customers.

Accordingly, under Sections 501 and 1501 of the Public Utility Code, 66 Pa.C.S. §§ 501 and 1501; sections 201 and 202 of the act of July 31, 1968 (P.L. 769, No. 240), known as the Commonwealth Documents Law (45 P.S. §§ 1201 and 1202), and the regulations promulgated thereunder at 1 Pa. Code §§ 7.1, 7.2 and 7.5; the Regulatory Review Act, 71 P.S. §§ 745.1 et seq.; section 204(b) of the Commonwealth Attorneys Act, 71 P.S. § 732-204(b); and section 612 of The Administrative Code of 1929 (71 P.S. § 232), and the regulations promulgated thereunder at 4 Pa. Code §§ 7.231—7.234, the Commission seeks to finalize amendments to regulations at 52 Pa. Code §§ 54.3, 54.5, 54.7, and 54.10, as set forth in Annex A, attached hereto; *Therefore*,

It Is Ordered That:

1. The regulations of the Commission, 52 Pa. Code Chapter 54, are amended by amending §§ 54.3, 54.5, 54.7 and 54.10 to read as set forth in Annex A,

2. The Law Bureau shall submit this Order, Attachment A and Annex A for review by the Independent Regulatory Review Commission and the Legislative Standing Committees.

3. The Law Bureau shall submit this Order, Attachment A and Annex A to the Office of Attorney General for review and approval and to the Governor’s Budget Office for review for fiscal impact.

4. The Law Bureau shall deposit this Order, Attachment A and Annex A with the Legislative Reference Bureau to be published as final in the *Pennsylvania Bulletin*.

5. The final regulations embodied in Annex A shall become effective 60 days after publication in the *Pennsylvania Bulletin*.

6. The Secretary shall serve a copy of this Order, Attachment A and Annex A upon all licensed Electric Generation Suppliers, jurisdictional electric distribution companies, the Bureau of Investigation and Enforcement, the Office of Consumer Advocate, and the Office of Small Business Advocate.

7. The Office of Competitive Market Oversight shall electronically send a copy of this Order, Attachment A and Annex A, to all persons on the contact list for the Committee Handling Activities for Retail Growth in Electricity.

8. A copy of this Order, Attachment A and Annex A, shall be posted on the Commission’s website at the Office of Competitive Market Oversight web page.

9. The contact persons for this matter are Daniel Mumford in the Office of Competitive Market Oversight (717) 783-1957, dmumford@pa.gov; Matthew Hrivnak in Bureau of Consumer Services (717) 783-1678, mhrivnak@pa.gov, and Kriss Brown in the Law Bureau (717) 787-4518, kribrown@pa.gov. Alternate formats of this document are available to persons with disabilities and may be obtained by contacting Laura Griffin, Regulatory Review Assistant, Law Bureau, (717) 772-4597.

ROSEMARY CHIAVETTA,
Secretary

(Editor’s Note: See 50 Pa.B. 3355 (July 4, 2020) for IRRC’s approval order.)

Fiscal Note: Fiscal Note 57-319 remains valid for the final adoption of the subject regulations.

Attachment A

Electric Generation Supplier Contract Summary

Electric Generation Supplier Information	<i>Name, telephone number, website, etc. Plain language statement that EGS is responsible for generation charges.</i>
Price Structure	<i>Fixed or variable. If variable, based on what? If variable, how often is the rate expected to vary? If variable, give any applicable ranges/ceilings. If no ranges/ceilings, a plain language statement indicating this fact. If variable, describe when the customer will receive notification of price changes in relation to time of month, final monthly meter read, billing cycle or when the price takes effect.</i>

Electric Generation Supplier Information	<i>Name, telephone number, website, etc. Plain language statement that EGS is responsible for generation charges.</i>			
Generation/Supply Price	<i>\$/kWh or ¢/kWh. If variable rate, the first billing cycle's rate. Full disclosure of any introductory price, including the introductory price and the price after the introductory period expires. Full disclosure of any fees in addition to the per kWh price.</i>			
Generation Price at Various Usage Levels <i>(This row is required only if the price varies by usage and/or there are fees in addition to the per kWh price. See 52 Pa. Code §§ 54.5(c)(4) and 54.7.)</i>	Usage:	500 kWh	1,000 kWh	2,000 kWh
	Price per kWh:			
Statement Regarding Savings	<i>Plain language that the supply price may not always provide savings to the customer.</i>			
Deposit Requirements	<i>Any deposit requirements necessary for a customer and any terms associated with that deposit, in plain language.</i>			
Incentives <i>(This row is required only if the supplier is offering any special incentives.)</i>	<i>Any bonuses, discounts, cashback, etc. offers and any associated terms, in plain language.</i>			
Contract Start Date	<i>Plain language regarding start of EGS service (meter reads/billing cycles/etc.).</i>			
Contract Duration/Length	<i>In months, billing cycles, etc.</i>			
Cancellation/Early Termination Fees	<i>Yes or no. If yes, describe the amount of the fee and how to avoid that fee, if possible.</i>			
End of Contract	<i>Treatment of customer at end of contract. Timing of notices.</i>			
Right of Rescission:	<i>An explanation of the customer's 3-day right of rescission per 52 Pa. Code § 54.5(d) and how to exercise this right.</i>			

Annex A

TITLE 52. PUBLIC UTILITIES

PART I. PUBLIC UTILITY COMMISSION

Subpart C. FIXED SERVICE UTILITIES

CHAPTER 54. ELECTRICITY GENERATION CUSTOMER CHOICE

Subchapter A. CUSTOMER INFORMATION

§ 54.3. Standards and pricing practices for retail electricity service.

In furnishing retail electricity service, EDCs and EGSs or any entity that otherwise provides retail electricity service information to customers, shall comply with the following:

(1) Use common and consistent terminology in customer communications, including marketing, billing and disclosure statements.

(i) Use the term EDC as described in § 54.2 (relating to definitions) as a standard term.

(ii) Use the terms in accordance with the glossary posted at www.PaPowerswitch.com or other successor media platform as determined by the Commission.

(2) For residential and small commercial customers, contracts for retail electric service entered into after September 30, 2020, may not include any fees to be paid by the retail electric customer for terminating a fixed duration contract between the date the options notice required in § 54.10(2) (relating to notice of contract

expiration or change in terms for residential and small business customers) is issued and the expiration of the fixed duration contract.

§ 54.5. Disclosure statement for residential and small business customers.

(a) The agreed upon prices in the disclosure statement must reflect the marketed prices and the billed prices.

(b) The EGS shall provide the customer written disclosure of the terms of service at no charge whenever:

- (1) The customer requests that an EGS initiate service.
- (2) The EGS proposes to change the terms of service.
- (3) Service commences from a default service provider.

(c) The contract's terms of service shall be disclosed, including the following terms and conditions, if applicable:

(1) Disclosure of generation charges must conform to the following requirements:

(i) If the customer will be billed under a price per kilowatt-hour price structure, generation charges must be disclosed according to the actual prices per kilowatt-hour.

(ii) If a customer will not be billed under a price per kilowatt-hour price structure, the contract's terms must clearly explain the pricing structure and what the customer's price for generation charges will be for a given period of time.

(iii) Generation charges must include an estimate of all applicable taxes except for State sales tax and county tax.

(2) If the price is introductory, the pricing statement must include a statement that the price is an introductory price, the duration of the introductory period and the price for the first billing cycle after the introductory period.

(3) If the price is variable, the variable pricing statement must include:

(i) Conditions of variability (state on what basis prices will vary) including the factors that the EGS will rely upon to establish the variable price.

(ii) Limits on price variability:

(A) If there is a limit on price variability, such as a specific price cap, a maximum percentage increase in price between billing cycles or minimum/maximum charges per kilowatt-hour for electricity during the duration of the contract, the EGS shall clearly explain the applicable limits. The EGS shall also state that the price can change each billing period, which must be printed in font size larger than the font size appearing in the terms of service.

(B) If there is not a limit on price variability, the EGS shall clearly and conspicuously state that there is not a limit on how much the price may change from one billing cycle to the next. The EGS shall also state that the price can change each billing period, which must be printed in font size larger than the font size appearing in the terms of service.

(iii) The price to be charged, per kilowatt-hour, for the first billing cycle of generation service.

(iv) A description of when and how the customer will receive notification of price changes. If the customer will not know the price until the time of billing, this must be disclosed in font size larger than the font size appearing in the terms of service.

(4) If the unit price changes based on actual customer usage or if the offer includes fees in addition to the unit price, the price per kWh must factor in all costs associated with the rate charged to the customer, including any fees, and show the average price per kWh for usages of 500, 1,000 and 2,000 kWh of electricity in a table format. If the offer includes an introductory price, the disclosure statement must show the average price per kWh of the introductory price, including any fees, and the price offered after the introductory period, including any fees, in separate tables.

(i) If the price is a fixed monthly amount, including any fees, that does not change based on actual customer usage, the disclosure statement must show the average price per kWh for usages of 500, 1,000 and 2,000 kWh of electricity in a table format.

(ii) If the price varies based on when the customer actually uses electricity, such as a time-of-use offer, the disclosure statement must show the price per kWh for each time period in table format.

(5) An itemization of basic and nonbasic charges distinctly separate and clearly labeled.

(6) The duration of the agreement, which includes:

(i) The starting date.

(ii) The expiration date, if applicable.

(7) An explanation of sign-up bonuses, add-ons, limited time offers, other sales promotions and exclusions, if applicable.

(8) An explanation of prices, terms and conditions for special services, including advanced metering deployment, if applicable.

(9) The cancellation provisions, if applicable.

(10) The renewal provisions, if applicable.

(11) An explanation of limits on price variability, penalties, fees or exceptions, printed in font size larger than the font size appearing in the terms of service, but not less than 12-point font. Penalties and fees must be disclosed in actual dollars or a specific method for determining the actual dollars must be disclosed. This explanation must include a statement advising the customer that the customer will not be subject to a penalty or fee if the customer terminates the contract at any time between the date the options notice required under § 54.10(2) (relating to notice of contract expiration or change in terms for residential and small business customers) is issued and the expiration of the fixed duration contract.

(12) Customer contact information that includes the name of the EGS, the EGS's address, telephone number, Commission license number and Internet address, if available.

(13) A statement providing that information about shopping for an electric supplier is available at www.PaPowerSwitch.com or other successor media platform as determined by the Commission, by calling the Commission at (800) 692-7380 and the Office of Consumer Advocate at (800) 684-6560 or at www.oca.state.pa.us.

(14) For contracts with variable pricing, the EGS shall provide:

(i) A telephone number and Internet address at which a customer may obtain the previous 24 months' average monthly billed prices for that customer's rate class and EDC service territory. If an EGS has not been providing generation service in a rate class and EDC service territory for 24 months, the EGS shall provide the average monthly billed prices for the months available to date. If price history or representative price information is not available and the offer is materially different from other offers made by the EGS, the EGS shall inform the customer of this fact.

(ii) In plain language, a statement that historical pricing is not indicative of present or future pricing.

(d) Customers shall be provided a 3-day right of rescission period following receipt of the disclosure statement.

(1) The 3-day right of rescission is 3 business days.

(2) The 3-day right of rescission begins when the customer receives the written disclosure.

(3) The customer may cancel in writing, orally or electronically, if available.

(4) Waivers of the 3-day right of rescission are not permitted.

(e) Definitions for generation charges and transmission charges, if applicable, are required on electric disclosure statements and must be defined in accordance with the glossary posted at www.PaPowerSwitch.com or other successor media platform as determined by the Commission. Definitions for each of the basic and nonbasic services, if applicable, are required. The definition section of the disclosure statement must be distinctly separate.

(f) The EGS shall include in the customer's disclosure statement the following statements which may appear together in a paragraph:

(1) "Generation prices and charges are set by the electric generation supplier you have chosen."

(2) "The Public Utility Commission regulates distribution prices and services."

(3) "The Federal Energy Regulatory Commission regulates transmission prices and services."

(g) Disclosure statements must include the following customer notifications for fixed duration or non-fixed duration contracts:

(1) For fixed-duration contracts, disclosure statements must include the following notification: "If you have a fixed duration contract that will be ending, or whenever <EGS name> wants to change the contract, you will receive two separate notices before the contract ends or the changes happen. You will receive the first notice 45 to 60 days before, and the second notice 30 days before the expiration date or the date the change becomes effective. These notices will explain your options."

(2) For contracts that are not fixed-duration contracts, disclosure statements must include the following notification: "If <EGS name> wants to change the contract, you will receive two separate notices before the changes happen. You will receive the first notice 45 to 60 days before the change, and the second notice 30 days before the change. These notices will explain your options."

(h) If the default service provider changes, the new default service provider shall notify customers of that change, and provide customers with its name, address, telephone number and Internet address, if available.

(i) The EGS shall provide, with the disclosure statement, a separate EGS contract summary in a format provided by the Commission.

(j) If the contract is assignable, the EGS shall inform the customer at the time the parties enter into the contract. Prior to a contract assignment, the EGS shall provide notice to the affected customer, the affected EDC and the Commission. The customer notice must include the name of the new EGS, the contact information for the new EGS, the estimated month and year that the assignment is expected to occur, and language informing the customer that contract terms and conditions remain unchanged.

(k) If the EGS intends on obtaining customer account information from the EDC, the EGS shall inform the customer of the specific type of information that may be obtained, such as usage data, the purpose for obtaining this information and that the customer is consenting to the EDC releasing this information by entering into this contract. The EGS shall also inform the customer that the EGS will maintain the confidentiality of a customer's personal information including the customer's name, address, telephone number, electric usage and historic payment information, as required by applicable Commission regulations and Federal and State laws.

§ 54.7. Marketing/sales activities.

(a) Advertised prices must reflect prices in disclosure statements and billed prices.

(b) If the unit price changes based on actual customer usage or if the offer includes fees in addition to unit prices, written or electronic marketing materials that offer terms of service for acceptance by consumers and authorizes enrollment must factor in all costs associated

with the rate charged, including any fees, and show the average price per kWh for usages of 500, 1,000 and 2,000 kWh of electricity in a table format. If the offer includes an introductory price, the EGS shall show the average price per kWh of the introductory price, including any fees, and the price offered after the introductory period, including any fees, in separate tables.

(1) If the price is a fixed monthly amount, including any fees, that does not change based on actual customer usage, the EGS shall show the average price per kWh for usages of 500, 1,000 and 2,000 kWh of electricity in a table format.

(2) If the price varies based on when the customer uses electricity, such as a time-of-use offer, the EGS shall show the price per kWh for each time period in a table format.

(3) The EGS shall note the effective date of the prices shown in the table provided under paragraph (1) or (2).

(c) Advertising materials targeted for residential and small business sales shall be made available upon request of the Commission in the event of a formal or informal complaint or investigation.

§ 54.10. Notice of contract expiration or change in terms for residential and small business customers.

An EGS shall provide the following notices to customers prior to the expiration of a fixed duration contract or prior to a change in contract terms:

(1) An initial notice shall be provided to each affected customer 45 to 60 days prior to the expiration date of the fixed duration contract or the effective date of the proposed change in terms. For customers who have elected to receive electronic communications from the EGS, the notice shall be transmitted in the manner chosen by the customer. The initial notice must include:

(i) A general description of the proposed change in terms of service.

(ii) The date a change shall be effective or when the fixed duration contract is to expire.

(iii) An explanation of why a change in contract terms is necessary.

(iv) A statement indicating when a follow-up options notice shall be issued with details regarding the proposed change.

(v) A statement explaining that the options notice must discuss the customer's options to the proposed change in terms of service or expiring fixed duration contract.

(vi) A statement indicating whether the existing fixed duration contract has a cancellation fee, and an explanation of the fee amount and how to avoid the fee, including a notice that the customer is not subject to the cancellation fee if the customer terminates the contract at any time after the customer receives the options notice required under § 54.10(2).

(2) An options notice shall be provided, by first class mail, to each affected customer at least 30 days prior to the expiration date of the fixed duration contract or the effective date of the proposed change in terms. The options notice must include:

(i) A statement advising the customer of the specific changes being proposed by the EGS and informing the customer of how to exercise the customer's options, including the customer's ability to accept the proposed

changes, to choose another product offering from the customer's existing EGS, to select another EGS or to return to default service.

(ii) Information regarding new pricing or renewal pricing including the price to be charged, per kilowatt-hour, for the first billing cycle of generation service:

(A) If a customer fails to respond to the options notice and is converted to a month-to-month contract, the EGS shall provide a disclosure statement under § 54.5 (relating to disclosure statement for residential and small business customers).

(I) Notice of a subsequent change in pricing shall be provided to the customer at least 30 days prior to the new price being charged.

(II) For customers who have elected to receive electronic communications from the EGS, notice of the change in pricing shall be transmitted in the manner chosen by the customer. For all other customers, notice shall be provided by first class mail.

(B) If a customer fails to respond to the options notice and is entered into a new fixed duration contract, the EGS shall provide the fixed, per kilowatt-hour price to be charged and term length of the contract.

(iii) The telephone numbers and Internet addresses, as applicable, for the Office of Consumer Advocate, the Commission and PaPowerSwitch.com.

(iv) Language clearly visible on the front of the envelope used to provide the options notice stating that it contains important information regarding the expiration or changes in terms of the customer's electric supply contract.

(v) A statement indicating whether the existing fixed duration contract has a cancellation fee and, if so, that the customer is not subject to the cancellation fee if the customer terminates the contract at any time between the date of the options notice and the expiration date of the fixed duration contract.

(3) When a customer fails to respond to either notice, the following apply:

(i) A fixed duration contract shall be converted to one of the following:

(A) A month-to-month contract, either at the same terms and conditions or at revised terms and conditions, as long as the contract does not contain cancellation fees.

(B) Another fixed duration contract, as long as the new contract includes a customer-initiated cancellation provision that allows the customer to cancel at any time, for any reason, and does not contain cancellation fees.

(ii) The converted contracts shall remain in place until the customer chooses one of the following options:

(A) Select another product offering from the existing EGS.

(B) Enroll with another EGS.

(C) Return to the default service provider.

[Pa.B. Doc. No. 20-1029. Filed for public inspection July 31, 2020, 9:00 a.m.]

Title 58—RECREATION

FISH AND BOAT COMMISSION

[58 PA. CODE CH. 63]

Fishing; General Fishing Regulations

The Fish and Boat Commission (Commission) amends Chapter 63 (relating to general fishing regulations). The Commission is publishing this final-form rulemaking under the authority of 30 Pa.C.S. (relating to Fish and Boat Code) (code). The amendments update the Commission's regulations for enforcing tautog tagging requirements in accordance with the Atlantic States Marine Fisheries Commission (ASMFC).

A. Effective Date

This final-form rulemaking will go into effect upon publication in the *Pennsylvania Bulletin*.

B. Contact Person

For further information on this final-form rulemaking, contact Wayne Melnick, Esq., P.O. Box 67000, Harrisburg, PA 17106-7000, (717) 705-7810. This final-form rulemaking is available on the Commission's web site at www.fishandboat.com.

C. Statutory Authority

The amendments to § 63.50 (relating to importation of tautog) are published under the statutory authority of section 2102(c) of the code (relating to rules and regulations).

D. Purpose and Background

The specific purpose and background of the amendments is described in more detail under the summary of changes.

E. Summary of Changes

Tautog (*Tautoga onitis*), also known as "Tog" or "Blackfish," are an Atlantic Ocean, coastal, bottom-dwelling marine fish most commonly found around structures such as wrecks and reefs in offshore waters and jetties, piers and rocky areas in near shore waters. Tautog range from Nova Scotia to Georgia, but their core populations reside between Virginia and Massachusetts. They are stout, solidly built fish averaging between 2 and 8 pounds, with the current world record at 28 pounds. They are slow growing and can reach 35 to 40 years of age. Because they strongly relate to structure, tautog are easy for commercial and recreational anglers to locate and not difficult to catch with the right bait and tackle. Tautog are considered excellent table fare by both recreational and commercial fishers. In the mid-1980s, tautog harvests peaked at over 7 million fish but in recent years declined to approximately 500,000 fish. There was a trend towards substantial numbers of tautog being caught by "recreational" anglers without commercial licenses and sold into the commercial market. These fish are unaccounted for in distribution between recreational and commercial fishing quotas and confound fisheries management planning. Due to their commercial value and reduced population levels, the ASMFC determined that additional regulatory action must take place to address illegal harvest.

The Commonwealth is a member of the ASMFC and the Commission's Executive Director, Timothy D. Schaeffer, is the administrative member for the Commonwealth. At its fall 2019 meeting, the ASMFC requested the Commonwealth develop regulations requiring all tautog

possessed for commercial purposes or sold in this Commonwealth to be properly tagged following the ASMFC tautog tagging program guidelines. States along the Atlantic Coast with commercial tautog fisheries must issue serial numbered tags to commercial harvesters and all fish sold in these states must be tagged with a metal band on the fish's gill cover. The Commonwealth will not be tagging tautog, but this Commonwealth is an important marketplace of commercial seafood including tautog. Providing Commission waterways conservation officers with the authority to inspect for and enforce tautog tagging regulations will close a potential loophole in the ASMFC tautog tagging program and advance tautog conservation along the Atlantic Coast.

The Commission therefore amends § 63.50 to read as set forth in the proposed rulemaking published at 50 Pa.B. 1247 (February 29, 2020).

F. Paperwork

This final-form rulemaking will not increase paperwork and will not create new paperwork requirements.

G. Fiscal Impact

This final-form rulemaking will have no adverse fiscal impact on the Commonwealth or its political subdivisions.

H. Public Comments

A notice of proposed rulemaking was published at 50 Pa.B. 1247. The Commission did not receive any public comments regarding the proposal.

Findings

The Commission finds that:

(1) Public notice of intention to adopt the amendments adopted by this order has been given under sections

201 and 202 of the Act of July 31, 1968 (P.L. 769, No. 240) (45 P.S. §§ 1201 and 1202), known as the Commonwealth Documents Law, and the regulations promulgated thereunder, 1 Pa. Code §§ 7.1 and 7.2 (relating to notice of proposed rulemaking required; and adoption of regulations).

(2) A public comment period was provided, and no comments were received.

(3) The adoption of the amendments of the Commission in the manner provided in this order is necessary and appropriate for administration and enforcement of the authorizing statutes.

Order

The Commission, acting under the authorizing statutes, orders that:

(a) The regulations of the Commission, 58 Pa. Code Chapter 63, are amended by amending § 63.50 to read as set forth at 50 Pa.B. 1247.

(b) The Executive Director will submit this order and 50 Pa.B. 1247 to the Office of Attorney General for approval as to legality and form as required by law.

(c) The Executive Director shall certify this order and 50 Pa.B. 1247 and deposit them with the Legislative Reference Bureau as required by law.

(d) This order shall take effect upon publication in the *Pennsylvania Bulletin*.

TIMOTHY D. SCHAEFFER,
Executive Director

Fiscal Note: Fiscal Note 48A-296 remains valid for the final adoption of the subject regulation.

[Pa.B. Doc. No. 20-1030. Filed for public inspection July 31, 2020, 9:00 a.m.]