

RULES AND REGULATIONS

Title 22—EDUCATION

DEPARTMENT OF EDUCATION

[22 PA. CODE CH. 19]

Educator Effectiveness Rating Tool; Principals; Nonteaching Professional Employees

The Department of Education (Department) adopts §§ 19.2 and 19.3 and Appendix A (relating to principal/school leader effectiveness rating tool; nonteaching professional employee effectiveness rating tool; and percentage weights for data components/indicators of the building level score for the educator effectiveness rating tool) to read as set forth in Annex A.

Omission of Proposed Rulemaking

Under section 1123 of the Public School Code of 1949 (act) (24 P. S. § 11-1123), regarding rating systems, amended by the act of June 30, 2012 (P. L. 684, No. 82) (Act 82), the Department is required to develop three rating tools. A rating tool to measure the effectiveness of classroom teachers was published at 43 Pa.B. 3337 (June 22, 2013). This final-omitted rulemaking adopts a rating tool for principals and a rating tool for nonteaching professional employees. Section 1123(c)(3)(i) and (d)(2)(i) of the act requires the Department to publish these two rating tools in the *Pennsylvania Bulletin* by June 30, 2014.

Under section 1123(j) of the act, the publication of a rating tool by the Department is expressly exempt from sections 201—205 the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201—1205), known as the Commonwealth Documents Law (CDL), section 204(b) of the Commonwealth Attorneys Act (71 P. S. § 732-204(b)) and the Regulatory Review Act (71 P. S. §§ 745.1—745.12). Therefore, the Department is not required to publish a proposed rulemaking as prescribed by the CDL. The rating tool is exempt from the statutory provisions requiring review by the Office of Attorney General. The publication of the rating tool is not subject to review and approval by the Independent Regulatory Review Commission.

Statutory Authority

This final-omitted rulemaking is published under the authority of section 1123(a), (c)(3), (d)(2), (e) and (j) of the act as amended by Act 82 and sections 201 and 506 of The Administrative Code of 1929 (71 P. S. §§ 61 and 186).

Purpose

This final-omitted rulemaking fulfills the directive of section 1123(c)(3)(i) and (d)(2)(i) of the act that the Department “shall develop, issue and publish in the *Pennsylvania Bulletin* a rating tool” for principals and another for nonteaching professional employees. As required under Act 82, the rating tools contain measures based on professional practice and measures of student performance. The rating tools each encompass a form and instructions. The final-omitted rulemaking also includes a process whereby the governing board of a local education agency (LEA) may submit plans for alternative rating tools to the Department for review and approval.

Background and Public Input

Under section 1123(a) of the act, the Department developed the rating tool “in consultation with education

experts, parents of school-age children enrolled in a public school, teachers and administrators. . . .” To formally implement this provision, the Department convened a Stakeholders Group. Members of the Stakeholders Group included parents, teachers, administrators, chief executive officers of charter schools, representatives from higher education and others from across this Commonwealth. The Stakeholders Group met and reviewed key elements of the rating tool and provided the Department with feedback.

Provisions of Final-Omitted Rulemaking

Sections 19.2 and 19.3 state that the rating tools function as a framework for the evaluation and summative process for professional educators. In each section, the rating tool consists of the one-page rating form used by LEAs to record the results of the data collection process which provides for a potential overall rating of Failing, Needs Improvement, Proficient or Distinguished. The rating form sets numeric values for these four rating levels on a zero to three point scale.

In Act 82, “principal” is defined as “a building principal, an assistant principal, a vice principal or a director of vocational education.” Section 19.2 defines “principal/school leader” as including all four positions. A “nonteaching professional employee” is identified as “NTPE” in § 19.3. This position includes education specialists, supervisors in positions not identified as principals/school leaders and instructional staff who are not categorized as “classroom teachers” as defined in § 19.1(I) (relating to classroom teacher effectiveness rating tool).

Sections 19.2 and 19.3 set forth descriptions of the four areas or domains for professional practice. The rating tool provides descriptions of educator performance or behavior at the four different rating levels in the four areas or domains.

For both sets of professional employees, the rating tool contains “Instructions for Rating Tool—Standards of Use” that are divided into six areas or main paragraphs. The first area includes the definitions for the rating tool. The second area, “General Provisions,” contains directions for the evaluation and rating process as well as basic instructions for completing the rating form.

The third area contains procedures for rating professional practice. For principals/school leaders, it accounts for 50% of an employee’s total rating. Under Act 82, it is 80% of the total rating for nonteaching professional employees. This area addresses the evaluation of the four domains of professional observation and practice in the form. This area sets forth descriptions of how to develop, combine and calculate the domains into one performance level. LEAs are allowed to use a variety of evidence gathering techniques.

The fourth area includes measures for student performance. For principals/school leaders, this area represents the other 50% of the total rating. It is divided into three categories each assigned a percentage factor by Act 82.

The first category is “Building Level Data” and it covers eight different measurements including exam results, graduation and promotion rates, and attendance data. It is 15% of an employee’s total rating.

The second category, “Correlation Data,” also comprises 15% of the final rating. It consists of a review of teacher-level measures and teacher observation and practice ratings.

The final area in the rating of principals/school leaders is the "Elective Data" measure which may include various options for measures of student performance. LEAs shall select and develop measures using a Student Learning Objective process. This area is 20% of a principal/school leader's total rating.

For nonteaching professional employees, the "student performance of all students in the school building in which the NTPE is employed" is 20% of the final rating. The "building level score" will be utilized to determine the rating based on student performance of students in the school building. The building level score is consistent with the measures used in the "building level data" provision of both the principal/school leader rating tool and the classroom teacher rating tool. See § 19.1(IV)(a).

Sections 19.2 and 19.3 also include provisions addressing recordkeeping and creation of alternative rating tools.

Affected Parties

Based on data for the 2011-2012 school year, the number of individuals and entities that may be directly affected by the final-omitted rulemaking includes approximately 148,520 professional staff, 1,758,000 students, school districts, area vocational-technical schools, career technology centers and intermediate units.

Benefits

The rating tools will provide for a more effective evaluation of professional employee performance in schools in this Commonwealth. The potential benefits of the rating tool are significant. It will enable LEAs and the Department to document possible trends in principal and professional employee effectiveness. Thereby, local administrators, the Department and State lawmakers will be able to identify principal and professional employee improvement programs that are successful and produce solid results in student learning, achievement and growth.

Cost, Paperwork Estimates and Fiscal Impact

The paperwork costs should be minimal. The Department will provide assistance to LEAs in using electronic formats that will reduce paperwork costs and reduce staff time allotted to tracking and filing evaluations.

Additional costs imposed by this final-omitted rulemaking will be minimal. Annual evaluations of professional employees and semiannual evaluations of untenured employees are already a standard function of LEAs across this Commonwealth.

The Department budget for educator effectiveness programs was approximately \$3.7 million in the current

fiscal year. This total is projected to be \$1.6 million in 3 years. Therefore, costs will go down as the project proceeds.

Effective Date

This final-omitted rulemaking shall take effect on July 1, 2014. The phase-in for the principal rating tool will begin in 2014-2015 school year.

Regulatory Review

Under section 1123(j) of the act, this final-omitted rulemaking is exempt from the Regulatory Review Act.

Contact Person and Information

For further information, individuals may contact Carolyn C. Dumaresq, Ed.D., Acting Secretary of Education, Department of Education, 333 Market Street, Harrisburg, PA 17126-0333, (717) 783-9780, Ra-educationsecretary@pa.gov. Persons with disabilities may use fax (717) 787-7222 or TTY at (717) 783-8445.

Order

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

(a) The regulations of the Department, 22 Pa. Code Chapter 19, are amended by adding §§ 19.2 and 19.3 and Appendix A to read as set forth in Annex A.

(b) The Acting Secretary of Education shall submit this order and Annex A to the Office of General Counsel for review and approval as to legality and form as required by law.

(c) The Acting Secretary of Education shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(d) This final-omitted rulemaking shall take effect on July 1, 2014.

CAROLYN C. DUMARESQ, Ed.D.

Acting Secretary

Fiscal Note: 6-331. (1) General Fund; (2) Implementing Year 2013-14 is \$1,963,000; (3) 1st Succeeding Year 2014-15 is \$1,875,000; 2nd Succeeding Year 2015-16 is \$1,760,000; 3rd Succeeding Year 2016-17 is \$1,760,000; 4th Succeeding Year 2017-18 is \$1,760,000; 5th Succeeding Year 2018-19 is \$1,760,000; (4) 2012-13 Program—\$0; 2011-12 Program—\$0; 2010-11 Program—\$0; (7) various appropriations; (8) recommends adoption. Funds have been included in the current fiscal year budget to cover this increase, and are built into the 2014-15 Executive Budget proposal.

Annex A

TITLE 22. EDUCATION

PART I. STATE BOARD OF EDUCATION

Subpart A. MISCELLANEOUS PROVISIONS

CHAPTER 19. EDUCATOR EFFECTIVENESS RATING TOOL

§ 19.2. Principal/school leader effectiveness rating tool.

The rating tool functions as a framework for the evaluation and summative process for principals, assistant principals, vice principals and directors of vocational education, and is designed for local education agencies providing early childhood, elementary or secondary education across this Commonwealth. The tool is comprised of the form and instructions. The following rating form shall be used to record the results of the data collection process.

The four domains for Leadership Observation and Practice in the rating form give due consideration to and incorporate the professional practice areas of planning and preparation, school environment, delivery of service, and professional development, as set forth in sections 1123(c)(1)(i)—(iv) of the Public School Code (24 P. S. §§ 11-1123(c)(1)(i)—(iv)). Descriptions of the four domains in Part (A) Leadership Observation and Practice are summarized in Table A.

Table A: Descriptions of Four Domains

Domain	Description
I. Strategic/Cultural Leadership* 25%	Principals/School Leaders systematically and collaboratively develop a positive culture to promote continuous student growth and staff development. They articulate and model a clear vision of the school's culture that involves students, families, and staff.
II. Systems Leadership* 25%	Principals/School Leaders ensure that there are processes and systems in place for budgeting, staffing, problem solving, communicating expectations and scheduling that result in organizing the work routines in the building. They must manage efficiently, effectively and safely to foster student achievement.
III. Leadership for Learning* 25%	Principals/School Leaders ensure that a Standards Aligned System is in place to address the linkage of curriculum, instruction, assessment, data on student learning and teacher effectiveness based on research and best practices.
IV. Professional and Community Leadership* 25%	Principals/School Leaders promote the success of all students, the positive interactions among building stakeholders and the professional growth of staff by acting with integrity, fairness and ethics.

* Crosswalks pertaining to the four domains in Leadership Observation and Practice in the rating form and the professional practice areas of planning and preparation, school environment, delivery of service, and professional development, as set forth in sections 1123(c)(1)(i)—(iv) of the Public School Code (24 P. S. §§ 11-1123(c)(1)(i)—(iv)) will be available at the Department's website.

Table B summarizes leadership performance levels for each of the Domain Rating Assignments and for the ratings to be assigned for each domain in the "Rating (A)" column.

Table B: Four Levels of Performance in Four Domains

Domain	Failing	Needs Improvement	Proficient	Distinguished
I. Strategic/Cultural Leadership 25%	The Principal/School Leader provides little or no strategic direction with most work being done by staff in isolation. Decisions are not student-focused and reflect opinion with little use of data. Despite the need for change, ineffective practices continue.	The Principal/School Leader provides some strategic direction with a few collaborative processes in place. Data is used sparingly to make decisions with some focus on improvement. The culture is moderately student-centered. Change occurs when required by external forces.	The Principal/School Leader utilizes a data-based vision that is student-centered. The culture is collaborative with a focus on continuous improvement. The staff is held accountable for student success. Change is evidence based.	The Principal/School Leader establishes a future-focused, data-based vision around individual student success. The culture is highly collaborative with staff accepting responsibility for the achievement of each student. Change for continuous improvement is embraced.

Table B: Four Levels of Performance in Four Domains

Domain	Failing	Needs Improvement	Proficient	Distinguished
<p>II. Systems Leadership 25%</p>	<p>The Principal/School Leader establishes an educational environment that is characterized by chaos and conflict with no plan evident for school safety. Resources are allocated with little or no focus on the needs of students. Staff is low performing with no system designed to improve instruction.</p>	<p>The Principal/School Leader establishes an educational environment that is moderately orderly with rules and regulations that partially support school safety. Teacher evaluations are completed as an administrative process. Resources are allocated solely on individual teacher requests.</p>	<p>The Principal/School Leader establishes a clear plan for the safety of all students and staff. An effective teacher evaluation system is used to improve instruction. Time schedules, student scheduling and other resources are structured to meet the needs of all students.</p>	<p>The Principal/School Leader clearly involves all staff in the development and implementation of a safe school plan. Peer observations, coaching and cooperative lesson planning are mainstays of a plan for improvement of instruction. All staff and students are highly respectful of each other and resources are allocated based upon student need and are aligned with a clearly stated vision.</p>
<p>III. Leadership for Learning 25%</p>	<p>The Principal/School Leader establishes an educational environment that is characterized by low expectations for both students and staff with curriculum, instruction and assessment viewed as independent entities. No plan for improvement exists. Significant interruptions disrupt instruction.</p>	<p>The Principal/School Leader establishes an educational environment that is characterized by varying and inconsistent expectations. Some effort is being made to align curriculum, instruction and assessment. School improvement efforts are sporadic and unclear while the quality of instruction is inconsistent. A moderate number of interruptions disrupt instruction.</p>	<p>The Principal/School Leader regularly and consistently communicates high expectations to staff, students and families. All curriculum, instruction and assessment are aligned. The Principal/School Leader is at the forefront of all improvement efforts and assures high quality instruction is delivered to all students. Instructional time is maximized with few or no interruptions.</p>	<p>The Principal/School Leader ensures students and staff support and maintain high expectations. The Principal/School Leader and staff meet on a consistent basis to align curriculum, instruction and assessment. School improvement efforts are jointly developed by the Principal/School Leader and staff. Instructional time is highly valued and maximized. Interruptions occur only when absolutely necessary.</p>
<p>IV. Professional and Community Leadership 25%</p>	<p>The Principal/School Leader establishes little or no communication among school, families and the community. Staff members exhibit low ethical standards and levels of professionalism. Little or no professional development exists.</p>	<p>The Principal/School Leader establishes moderate levels of communication among school, families and the community. Staff members exhibit moderate levels of ethical standards and professionalism. Isolated professional development activities exist.</p>	<p>The Principal/School Leader ensures all staff members communicate regularly with families about their children’s progress. Family and community members are partners in the educational program. All staff members exhibit high ethical standards and levels of professionalism. Professional development is based upon identified needs and is aligned with instructional priorities.</p>	<p>The Principal/School Leader ensures high levels of two-way communication exist between staff, families and the community. Staff members are involved in student participation opportunities outside the school day that support students’ academic needs. Staff is highly involved in developing and implementing staff development aligned with instructional priorities.</p>

INSTRUCTIONS FOR RATING TOOL—STANDARDS OF USE

The rating form and related documents are available at the Department's website in electronic versions and Excel worksheet format for scoring and rating tabulation.

I. Definitions.

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

Assessment—The term shall mean the Pennsylvania System of School Assessment test, the Keystone Exam, an equivalent local assessment or another test established by the State Board of Education to meet the requirements of section 2603-B(d)(10)(i) (24 P. S. § 26-2603-B(d)(10)(i)) and required under the No Child Left Behind Act of 2001 (Public Law 107-110, 115 Stat. 1425) or its successor statute or required to achieve other standards established by the Department for the school or school district under 22 Pa. Code § 403.3 (relating to single accountability system).

Chief School Administrator—An individual who is employed as a school district superintendent, an executive director of an intermediate unit or a chief school administrator of an area vocational-technical school or career technology center.

Classroom Teacher—A professional or temporary professional employee who provides direct instruction to students related to a specific subject or grade level and usually holds one of the following:

Instructional I Certificate (see § 49.82),

Instructional II Certificate (see § 49.83),

Vocational Instructional I Certificate (see § 49.142), and

Vocational Instructional II Certificate (see § 49.143).

Department—The Department of Education of the Commonwealth.

Distinguished—The employee's performance consistently reflects the employee's professional position and placement at the highest level of practice.

District-designed measures and examinations, and locally developed school district rubrics—A measure of student performance created or selected by an LEA. The development or design of the measure shall be documented via a Student Learning Objective.

Education Specialist—A person who holds an educational specialist certificate issued by the Commonwealth, including, but not limited to, a certificate endorsed in the area of elementary school counselor, secondary school counselor, school counselor K-12, school nurse, home and school visitor, school psychologist, dental hygienist, or instructional technology specialist.

Employee—A person who is a professional employee or temporary professional employee.

Failing—The employee does not meet performance expectations required for the position.

Keystone Exam—An assessment developed or caused to be developed by the Department pursuant to 22 Pa. Code § 4.51 (relating to state assessment system).

LEA—A local education agency, including a public school district, area vocational-technical school, career technology center and intermediate unit, which is re-

quired to use a rating tool established pursuant to section 1123 of the Public School Code (24 P. S. § 11-1123).

Needs Improvement—The employee is functioning below proficient for performance expectations required for continued employment.

Nonteaching Professional Employee—A person who is an education specialist or a professional employee or temporary professional employee who provides services other than classroom instruction.

Performance Improvement Plan—A plan, designed by an LEA with input of the employee, that may include mentoring, coaching, recommendations for professional development and intensive supervision based on the results of the rating provided for under this chapter.

Principal/School Leader—A building principal, an assistant principal, a vice principal or a director of vocational education.

Professional Employee—An individual who is certified as a teacher, supervisor, principal, assistant principal, vice-principal, director of vocational education, dental hygienist, visiting teacher, home and school visitor, school counselor, child nutrition program specialist, school nurse, or school librarian.

Proficient—The employee's performance consistently reflects practice at a professional level.

PSSA—The Pennsylvania System of School Assessment established in 22 Pa. Code § 4.51 (relating to state assessment system).

PVAAS—The Pennsylvania Value-Added Assessment System established in compliance with 22 Pa. Code § 403.3 (relating to single accountability system) and its data made available by the Department under Section 221 of the Public School Code (24 P. S. § 2-221).

SLO—The Student Learning Objective is a record of the development and application of student performance measures selected by an LEA. It documents the process used to determine a student performance measure and validate its assigned weight. This record will provide for quality assurance in rating a student performance measure on the zero-to-three-point rating scale.

Student Performance—A compilation of performance measures including building level, correlation and elective data as set forth in Paragraph (IV) relating to standards of use for multiple measures of student performance.

Temporary Professional Employee—An individual who has been employed to perform for a limited time the duties of a newly created position or of a regular professional employee whose service has been terminated by death, resignation, suspension or removal.

II. General Provisions.

1. The rating of a Principal/School Leader shall be performed by or under the supervision of the chief school administrator, or, if so directed by the chief school administrator, by an assistant administrator, a supervisor or a principal, who has supervision over the work of the professional employee or temporary professional employee being rated, provided that no unsatisfactory rating shall be valid unless approved by the chief school administrator. (24 P. S. § 11-1123(h)(3))

2. The rating form shall be marked to indicate whether the Principal/School Leader is a professional employee or temporary professional employee.

3. A temporary professional employee must be notified as to the quality of service at least twice a year. (24 P. S. § 11-1108)

4. The rating form includes four measures or rated areas: Leadership Observation and Practice, Building Level, Correlation, and Elective. Application of each measure is dependent on the availability of data. A rating in the range of zero to three based on the “0 to 3 Point Scale” must be given to each of the four rating areas.

5. Leadership Observation and Practice is divided into four domains: I. Strategic/Cultural Leadership; II. Systems Leadership; III. Leadership for Learning; and IV. Professional and Community Leadership. The four domains for Leadership Observation and Practice in the rating form give due consideration to and incorporate the professional practice areas of planning and preparation, school environment, delivery of service, and professional development, as set forth in sections 1123(c)(1)(i)—(iv) of the Public School Code (24 P. S. §§ 11-1123(c)(1)(i)—(iv)). For each domain, an employee must be given a rating of zero, one, two or three which is based on observation, practice models, evidence or documented artifacts.

6. The Building Level Score will be provided by the Department or its designee, and published annually on the Department’s website.

7. The Correlation Rating shall include a review of correlation data based on teacher-level measures facilitated through the Correlation Data Performance Level Descriptors and guidance provided by the Department.

8. Data, ratings and weights assigned to measures for the Elective Rating must be recorded by a process provided by the Department.

9. Each of the four measures in Final Principal/School Leader Effectiveness Rating shall be rated on the zero-to-three-point scale. Each number in Rating (C) shall be multiplied by the Factor (D) and the sum of the Earned Points or Total Earned Points shall be converted into a Performance Rating using the table marked Conversion to Performance Rating.

10. An overall performance rating of Distinguished or Proficient shall be considered satisfactory.

11. An initial overall performance rating of Needs Improvement shall be considered satisfactory.

12. The second overall performance rating of Needs Improvement issued by the same employer within 10 years of the first rating of Needs Improvement where the employee is in the same certification shall be considered unsatisfactory.

13. For professional employees, two consecutive overall unsatisfactory ratings, which include observations, and are not less than four months apart, shall be considered grounds for dismissal.

14. No temporary professional employee shall be dismissed unless rated unsatisfactory, and notification, in writing, of such unsatisfactory rating shall have been furnished the employee within 10 days following the date of such rating.

15. An employee who receives an overall performance rating of Needs Improvement or Failing must participate in a performance improvement plan. No employee will be rated Needs Improvement or Failing based solely on student test scores.

16. The rating form shall be marked to indicate the appropriate performance rating and whether the overall final rating is satisfactory or unsatisfactory.

17. The rating form must be signed by the chief school administrator or by a designated rater, who is an assistant administrator, supervisor or principal, has supervision over the work of the professional employee or temporary professional employee being rated, and is directed by the chief school administrator to perform the rating.

18. A final rating of unsatisfactory will not be valid unless approved and signed by the chief school administrator.

19. A signed copy of the rating form shall be provided to the employee.

20. The rating tool is not intended to establish mandates or requirements for the formative process of supervising professional employees.

21. This rating form, section or chapter may not be construed to limit or constrain the authority of the chief school administrator of an LEA to initiate and take action on a personnel matter, including dismissal of a Principal/School Leader, based on information and data available at the time of the action.

III. Standards of Use for Leadership Observation and Practice.

Part (A) “Leadership Observation and Practice” in the rating form shall be completed using the following standards, calculations and procedures.

(a) *Leadership observation and practice domains.* The rating of a Principal/School Leader for effectiveness in leadership practice shall be based on observation or other supervisory methods. Leadership practice shall comprise 50% of the Final Principal/School Leader Effectiveness Rating of the employee. The percentage factor for each domain is listed in Table C:

Table C: Four Domains	
Domains	% of 50% allotment
I. Strategic/Cultural Leadership	25.0
II. Systems Leadership	25.0
III. Leadership for Learning	25.0
IV. Professional and Community Leadership	25.0

(b) *Summative process of evaluation.* LEAs shall utilize leadership practice models (e.g., Department, *Framework for Leadership*) that address the areas related to professional leadership observation and practice contained in the four domains in Table C which give due consideration to and incorporate the professional practice areas of planning and preparation, school environment, delivery of service, and professional development, as set forth in sections 1123(c)(1)(i)—(iv) of the Public School Code (24 P. S. §§ 11-1123(c)(1)(i)—(iv)) and are approved by the Department. The Department shall publish a list of approved practice models for assessing the four domains annually on the Department’s website. A Principal/School Leader must be given a rating in each of the four domains. In determining a rating for a Principal/School Leader, an LEA may use any portion or combination of the practice models related to the domains. The four domains and professional practice models establish a framework for the summative process of evaluating

Principal/School Leaders. The form and standards do not impose mandates on the supervisory and formative processes utilized by an LEA.

(c) *Evidentiary sources.* Leadership observation and practice evaluation results and ratings shall be based on evidence. Information, including dates and times, if applicable, on the source of the evidence shall be noted in the employee's record. As appropriate for the employee and the employee's placement in a leadership position, records may include, but not be limited to, any combination of the following items:

(1) Notations of professional observations, employee/rater conferences or interviews, or informal observations or visits, including dates for observations, interviews and conferences.

(2) Communication logs (emails, letters, notes regarding phone conversations, etc.) to parents, staff, students, and/or community members.

(3) Utilization of formative and summative assessments that impact instruction and critiques of lesson plans.

(4) Agendas and minutes of meetings, programs, courses, or planning sessions.

(5) Family, parent, school and community feedback.

(6) Development and implementation of school improvement plans, professional growth programs, in-service programs, student assemblies, safety programs, and other events or programs that promote educational efficacy, health and safety.

(7) School budget and expenditure reports.

(8) Act 45 documentation.

(9) Examination of sources of evidence provided by the employee.

The documentation, evidence and findings of the rater shall provide a basis for the rating of the employee in the domains of observation and practice.

(d) *Scoring.* An LEA must provide a rating score in each domain. The four leadership observation and practice domains shall be rated and scored on a zero-to-three-point scale. The ratings of Failing, Needs Improvement, Proficient and Distinguished are given numeric values as shown in Table D.

<i>Performance Rating</i>	<i>Value</i>
Failing	0
Needs Improvement	1
Proficient	2
Distinguished	3

(e) *Ratings and weighted scoring.* The four domains of leadership observation and practice in Part (A) of the form are each assigned a percentage factor. Each domain shall be scored on the "0-to-3-point scale." The individual score or rating for each domain is adjusted by the percentage factor attributed to that domain. The score of zero, one, two or three for each domain is calculated into points based on its percentage factor. The sum of the points for all domains will be the total Leadership Observation and Practice Rating. The calculation for each domain is set forth in Table E.

<i>Domain</i>	<i>Title</i>	<i>Rating (A)</i>	<i>Factor (B)</i>	<i>Earned Points (A x B)</i>	<i>Max Points</i>
I.	Strategic/Cultural Leadership		25%		0.75
II.	Systems Leadership		25%		0.75
III.	Leadership for Learning		25%		0.75
IV.	Professional and Community Leadership		25%		0.75
<i>Leadership Observation & Practice Points/Rating</i>					3.00

(f) *Administrative action based on available data.* Nothing in these standards of use for leadership observation and practice, this section or this chapter shall be construed to limit or constrain the authority of the chief school administrator of an LEA to initiate and take action on a personnel matter, including dismissal of a Principal/School Leader, based on information and data available at the time of the action.

(IV) Standards of Use for Multiple Measures of Student Performance.

Student Performance is comprised of building level, correlation and elective data. In total, these three measures are 50% of the Final Principal/School Leader Effectiveness Rating. Each area has a prescribed percentage factor of the performance rating as described in Table F.

<i>Multiple Measure Rating Area</i>	<i>Factor</i>
Building Level Rating	15%
Correlation Rating	15%
Elective Rating	20%

(a) *Building level data.*

(1) For the purposes of Paragraph (IV) relating to Standards of Use for Multiple Measures of Student Performance, the term "building" shall mean a school or configuration of grades that is assigned a unique four-digit identification number by the Department unless the context clearly indicates otherwise.

(2) Building level data comprises 15% of the Final Principal/School Leader Effectiveness Rating. Building level data shall include, but is not limited to, the following when data is available and applicable to a building where the Principal/School Leader provides service:

- (i) Student performance on assessments.
- (ii) Value-added assessment system data made available by the Department under section 221 of the Public School Code (24 P. S. § 2-221).
- (iii) Graduation rate as reported to the Department under section 222 of the Public School Code (24 P. S. § 2-222).
- (iv) Promotion rate.
- (v) Attendance rate as reported to the Department under section 2512 of the Public School Code (24 P. S. § 25-2512).
- (vi) Industry certification examinations data.
- (vii) Advanced placement course participation.
- (viii) Scholastic aptitude test and preliminary scholastic aptitude test data.

(3) As with 22 Pa. Code § 19.1(IV)(a), the Building Level Rating shall be determined through conversion of the Building Level Score. The percentage weight given to each measure component contained in Appendix A will be utilized in Building Level Score computations using available data. The Department or its designee will provide the Building Level Score for each building within an LEA based on available data. Building Level Scores will be published annually on the Department’s website.

(4) Each LEA shall utilize the conversions in Table G below to calculate the Building Level Rating for each building with eligible building level data.

<i>Building Level Score</i>	<i>0-3 Rating Scale*</i>
90.0 to 107	2.50-3.00
70.0 to 89.9	1.50-2.49
60.0 to 69.9	0.50-1.49
00.0 to 59.9	0.00-0.49

*The Department will publish the full conversion formula on its website.

LEAs shall add the Building Level Rating to Parts (B)(2) and (C)(2) of the Rating Form.

(5) If a Principal/School Leader is assigned to two or more buildings, the LEA will use building level data from each building based on the percentage of the employee’s work performed in each building in calculating the whole 15% for this portion of the final rating.

(6) For Principal/School Leaders in positions for which there is no Building Level Score reported on the Department website, the LEA shall utilize the rating from the leadership observation and practice portion of the rating form in Part (A)(1) in place of the Building Level Rating.

(b) *Correlation data.*

(1) Correlation data will comprise 15% of the Final Principal/School Leader Effectiveness Rating and features correlation data based on teacher-level measures. For the purpose of Paragraph (IV)(b), the term “teacher-level measures” shall include, but not be limited to, any combination of one or more of the following data for classroom teachers who are evaluated by the Principal/School Leader:

- (i) Building level data (22 Pa. Code § 19.1(IV)(a)).
- (ii) Teacher specific data (22 Pa. Code § 19.1(IV)(b)).
- (iii) Elective data (22 Pa. Code § 19.1(IV)(c)).

(2) The Correlation Data Performance Level Descriptors in Table H below are provided for the rater to use as a basis for developing a rating of 0, 1, 2 or 3 for the Correlation Rating in Parts (B)(3) and (C)(3) of the Principal/School Leader Rating Form. The descriptors are designed to be used in evaluating the Principal/School Leader’s knowledge, understanding and intended application of evidence presented regarding the relationship between teacher-level measures and observation and practice ratings (22 Pa. Code § 19.1(III)) for classroom teachers who are evaluated by the Principal/School Leader. The rater shall provide the Principal/School Leader with the opportunity to present evidence and sources.

<i>Correlation Rating (15%)</i>	<i>0—Failing</i>	<i>1—Needs Improvement</i>	<i>2—Proficient</i>	<i>3—Distinguished</i>
Degree of understanding of evidence presented regarding the relationship between teacher-level measures and teacher observation and practice ratings. Quality of explanation provided for observed relationship between teacher-level measures and teacher observation and practice ratings.	Responses demonstrate no understanding of: • The presented teacher-level measures. • The nature and plausible cause of the observed relationship between teacher-level measures and teacher observation and practice ratings.	Responses demonstrate a limited understanding of: • The presented teacher-level measures. • The nature and plausible cause of the observed relationship between teacher-level measures and teacher observation and practice ratings.	Responses demonstrate a solid understanding of: • The presented teacher-level measures. • The nature and plausible cause of the observed relationship between teacher-level measures and teacher observation and practice ratings.	Responses demonstrate a comprehensive understanding of: • The presented teacher-level measures. • The nature and plausible cause of the observed relationship between teacher-level measures and teacher observation and practice ratings.

Table H: Correlation Data Performance Level Descriptors				
<i>Correlation Rating (15%)</i>	<i>0—Failing</i>	<i>1—Needs Improvement</i>	<i>2—Proficient</i>	<i>3—Distinguished</i>
Plans for how the data will be used to support school and LEA goals.	• How to use this data to support the attainment of school and LEA goals.	• How to use this data to support the attainment of school and LEA goals.	• How to use this data to support the attainment of school and LEA goals.	• How to use this data to support the attainment of school and LEA goals.

(3) The Department will provide guidance for LEAs to use in applying the Correlation Data Performance Level Descriptors in Table H and validating the Correlation Rating for a Principal/School Leader.

(4) For Principals/School Leaders in positions where their duties and responsibilities do not include evaluating and/or signing rating forms for classroom teachers, the LEA shall utilize the Elective Rating in Parts (B)(4) and (C)(4), pursuant to Paragraph (IV)(c), in place of the Correlation Rating.

(c) *Elective data.*

(1) This third area will comprise 20% of the Final Principal/School Leader Effectiveness Rating. Elective Data shall consist of measures of student achievement that are locally developed and selected by the LEA from a list approved by the Department and published in the *Pennsylvania Bulletin* by June 30 of each year, including, but not limited to, the following:

- (i) District-designed measures and examinations.
- (ii) Nationally recognized standardized tests.
- (iii) Industry certification examinations.
- (iv) Student projects pursuant to local requirements.
- (v) Student portfolios pursuant to local requirements.

(2) LEAs shall use an SLO to document the process to determine and validate the weight assigned to Elective Data measures that establish the Elective Rating. An SLO shall be used to record and verify quality assurance in validating measures of Elective Data on the zero-to-three-point scale and the assigned weight of a measure in the overall performance rating of a Principal/School Leader. The Department will provide guidance and templates for LEAs to use SLOs in selecting, developing and applying Elective Data measures.

(3) All LEAs shall have SLOs in place for collecting Elective Data and ratings for school year 2015-2016 and for school years thereafter. If Elective Data is unavailable in school year 2014-2015, an LEA shall use the rating in Part (A)(1) total Principal/School Leader Observation and Practice Rating of the form for a Principal/School Leader. The rating from Part (A)(1) in the form shall be used in Parts (B)(4) and (C)(4) for the 20% of the Principal/School Leader's overall performance rating.

(4) If multiple Elective Data measures are used for one Principal/School Leader, the LEA shall determine the percentage weight given to each Elective Data measure.

(d) *Transfer option.* A Principal/School Leader who transfers from one building, as defined for building level data (Paragraph (IV)(a)(1)), to another within an LEA, shall have the option of using the Correlation Rating, as set forth in Paragraph (IV)(b) in place of the Building Level Rating for the employee's evaluation in the new placement for two school years starting on the date when

the Principal/School Leader begins the assignment in the new location. A Principal/School Leader who elects this option shall sign a statement of agreement giving the LEA permission to calculate the final rating using this method.

(e) *Administrative action based on available data.* Nothing in these standards of use for multiple measures of student performance, this section or this chapter shall be construed to limit or constrain the authority of the chief school administrator of an LEA to initiate and take action on a personnel matter, including dismissal of a Principal/School Leader, based on information and data available at the time of the action.

(V) Recordkeeping: Maintenance of Rating Tool Data, Records and Forms.

(a) *Records to be maintained.* It shall be the duty of the LEA to establish a permanent record system containing ratings for each employee within the LEA and copies of all her or his ratings for the year shall be transmitted to the employee upon her or his request; or if any rating during the year is unsatisfactory copy of same shall be transmitted to the employee concerned. No employee shall be dismissed for incompetency or unsatisfactory performance unless such rating records have been kept on file by the LEA.

(b) *Reporting of data restricted to aggregate results.* Pursuant to Section 1123(i) of the Public School Code 11-1123(i), LEAs shall provide to the Department the aggregate results of all Principal/School Leader evaluations.

(c) *Confidentiality.* Each LEA shall maintain records in accordance with Section 708(b)(7) of the act of February 14, 2008 (P. L. 6, No. 3), known as the "Right-to-Know Law," (65 P. S. § 67.708(b)(7)), and Sections 221(a)(1) and 1123(p) of the Public School Code (24 P. S. §§ 2-221(a)(1) and 11-1123(p)).

(VI) LEA Alternative Rating Tool.

The Department will review at the request of an LEA an alternative rating tool that has been approved by the LEA governing board. The Department may approve for a maximum period of not more than five years any alternative rating tool that meets or exceeds the measures of effectiveness established under 24 P. S. § 11-1123.

§ 19.3. Nonteaching professional employee effectiveness rating tool.

The rating tool functions as a framework for the evaluation and summative process for nonteaching professional employees, and is designed for local education agencies providing early childhood, elementary or secondary education across this Commonwealth. The tool is comprised of the form and instructions. The following rating form shall be used to record the results of the data collection process.

Descriptions of the four domains in Part (A) NTPE Observation and Practice are summarized in Table A.

Domain	Description
I. Planning & Preparation* 25%	Effective nonteaching professional employees (NTPEs) plan and prepare to deliver high-quality services based upon extensive knowledge of their discipline/supervisory position relative to individual and/or systems-level needs and within the context of interdisciplinary collaboration. Service delivery outcomes are clear, measurable and represent relevant goals for the individual and/or system.
II. Educational Environment* 25%	Effective NTPEs assess and enhance the quality of the environment along multiple dimensions toward improved academic, behavioral and social-emotional outcomes. Environmental dimensions include adult-student relationships, staff interactions, security and maintenance, administration, student academic orientation, student behavioral values, student-peer relationships, parent and community-school relationships, instructional and intervention management and student activities.
III. Delivery of Service* 25%	Effective NTPE service delivery and practice emanates from a problem-solving process that can be applied to an individual and/or at the systems level and is used to: (a) identify priority areas for improvement; (b) analysis of variables related to the situation; (c) selection of relevant factors within the system; (d) fidelity of implementation of services and supports; and (e) monitoring of effectiveness of services.
IV. Professional Development* 25%	Effective NTPEs have high ethical standards and a deep sense of professionalism, focused on improving their own service delivery and supporting the ongoing learning of colleagues. Their record keeping systems are efficient and effective. NTPEs communicate with all parties clearly, frequently and with cultural sensitivity. These professionals assume leadership roles within the system and engage in a wide variety of professional development activities that serve to strengthen their practice. Reflection on their practice results in ideas for improvement that are shared across professional learning communities and contribute to improving the practice of others.

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* Crosswalks pertaining to the four domains for NTPE Observation and Practice in the rating form, as set forth in sections 1123(d)(1)(i)—(iv) of the Public School Code (24 P. S. §§ 11-1123(d)(1)(i)—(iv)), and to professional practice areas attributable to the certifications held by NTPEs will be available at the Department's website.

Table B summarizes NTPE performance levels for each of the Domain Rating Assignments and for the ratings to be assigned for each domain in the "Rating (A)" column.

Domain	Failing	Needs Improvement	Proficient	Distinguished
I. Planning & Preparation 25%	NTPE's planning and preparation reflects little understanding of their discipline/supervisory position relative to individual and/or systems-level needs. Service delivery outcomes, as a function of planning and preparation, are not clear, not measurable and do not represent relevant goals for the individual and/or system.	NTPE's planning and preparation reflects moderate understanding of their discipline/supervisory position relative to individual and/or systems-level needs. Some service delivery outcomes are clear, measurable and represent relevant goals for the individual and/or system.	NTPE's planning and preparation reflects solid understanding of their discipline/supervisory position relative to individual and/or systems-level needs. Most service delivery outcomes are clear, measurable and represent relevant goals for the individual and/or system.	NTPE's planning and preparation reflects extensive understanding of their discipline/supervisory position relative to individual and/or systems-level needs. All service delivery outcomes are clear, measurable and represent relevant goals for the individual and/or system.

Table B: Four Levels of Performance in Four Domains

Domain	Failing	Needs Improvement	Proficient	Distinguished
<p>II. Educational Environment 25%</p>	<p>Environment is characterized by chaos and conflict, with low expectations for improved academic, behavioral and social-emotional outcomes. There are no clear standards for interactions, student behavior, use of physical space, instruction and intervention with students, maintaining confidentiality, etc.</p>	<p>Adults communicate modest expectations for improved academic, behavioral and social-emotional outcomes. There are some clearly defined standards for interactions, student behavior, use of physical space, instruction and intervention with students, maintaining confidentiality, etc.</p>	<p>Environment functions smoothly, with little or no loss of service delivery time. Expectations for interactions, student behavior, use of physical space, instruction and intervention with students, and maintaining confidentiality are high. Standards for student conduct are clear and the environment supports academic, behavioral and social-emotional growth.</p>	<p>Recipients of services make a substantive contribution to various dimensions of the environment and contribute to improved academic, behavioral and social-emotional outcomes.</p>
<p>III. Delivery of Service 25%</p>	<p>Effective service delivery and practice does not emanate from a problem-solving process that can be applied to an individual and/or at the systems level and is used to: (a) identify priority areas for improvement; (b) analysis of variables related to the situation; (c) selection of relevant factors within the system; (d) fidelity of implementation of services and supports; and (e) monitoring of effectiveness of services.</p>	<p>Effective service delivery and practice partially emanates from a problem-solving process that can be applied to an individual and/or at the systems level and is used to: (a) identify priority areas for improvement; (b) analysis of variables related to the situation; (c) selection of relevant factors within the system; (d) fidelity of implementation of services and supports; and (e) monitoring of effectiveness of services.</p>	<p>Effective service delivery and practice emanates from a problem-solving process that can be applied to an individual and/or at the systems level and is used to: (a) identify priority areas for improvement; (b) analysis of variables related to the situation; (c) selection of relevant factors within the system; (d) fidelity of implementation of services and supports; and (e) monitoring of effectiveness of services.</p>	<p>Effective service delivery and practice emanates from a problem-solving process that can be applied to an individual and/or at the systems level and is used to: (a) identify priority areas for improvement; (b) analysis of variables related to the situation; (c) selection of relevant factors within the system; (d) fidelity of implementation of services and supports; and (e) monitoring of effectiveness of services. As a function of interdisciplinary collaboration and problem-solving, student and systems-level outcomes improve over time.</p>

Table B: Four Levels of Performance in Four Domains				
Domain	Failing	Needs Improvement	Proficient	Distinguished
IV. Professional Development 25%	NTPE does not adhere to ethical standards or convey a deep sense of professionalism. There is an absence of focus on improving their own service delivery and supporting the ongoing learning of colleagues. Their record keeping systems are inefficient and ineffective. NTPEs communicate ineffectively with all parties as evidenced by lack of clarity, limited frequency and absence of cultural sensitivity. NTPEs do not assume leadership roles within the system and do not engage in a wide variety of professional development activities that would serve to strengthen their practice. Reflection on their practice does not result in ideas for improvement that are shared across professional learning communities and/or contribute to improving the practice of others.	NTPE partially adheres to ethical standards and conveys an emerging sense of professionalism. There is some focus on improving their own service delivery and supporting the ongoing learning of colleagues. Their record keeping systems are approaching efficiency and effectiveness. NTPEs communicate effectively, albeit inconsistently, with all parties through clarity, frequency and cultural sensitivity. NTPEs inconsistently assume leadership roles within the system and engage in a wide variety of professional development activities that serve to strengthen their practice. Reflection on their practice is beginning to result in ideas for improvement that are shared across professional learning communities and/or contribute to improving the practice of others.	NTPE fully adheres to ethical standards and conveys an emerging sense of professionalism. There is a solid focus on improving their own service delivery and supporting the ongoing learning of colleagues. Their record keeping systems are efficient and effective. NTPEs communicate effectively with all parties through clarity, frequency and cultural sensitivity. NTPEs consistently assume leadership roles within the system and engage in a wide variety of professional development activities that serve to strengthen their practice. Reflection on their practice results in ideas for improvement that are shared across professional learning communities and/or contribute to improving the practice of others.	NTPE has exceptional adherence to ethical standards and professionalism. There is always evidence of improvement of practice and support to the ongoing learning of colleagues. Their record keeping systems are exceptionally efficient and effective. NTPEs always communicate effectively with all parties through clarity, frequency and cultural sensitivity. NTPEs always assume leadership roles within the system and engage in a wide variety of professional development activities that serve to strengthen their practice. Reflection on their practice always results in ideas for improvement that are shared across professional learning communities and/or contribute to improving the practice of others.

From *Enhancing Professional Practice: A Framework for Teacher, 2nd Edition* (pp 41-42), by Charlotte Danielson, Alexandria, VA ASCD® 2007. Adapted and reproduced with permission.

INSTRUCTIONS FOR RATING TOOL—STANDARDS OF USE

The rating form and related documents are available at the Department's website in electronic versions and Excel worksheet format for scoring and rating tabulation.

I. Definitions.

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

Assessment—The term shall mean the Pennsylvania System of School Assessment test, the Keystone Exam, an equivalent local assessment or another test established by the State Board of Education to meet the requirements of section 2603-B(d)(10)(i) (24 P. S. § 26-2603-B(d)(10)(i)) and required under the No Child Left Behind Act of 2001 (Public Law 107-110, 115 Stat. 1425) or its successor statute or required to achieve other standards established by the Department for the school or school district under 22 Pa. Code § 403.3 (relating to single accountability system).

Chief School Administrator—An individual who is employed as a school district superintendent, an executive

director of an intermediate unit or a chief school administrator of an area vocational-technical school or career technology center.

Classroom Teacher—A professional or temporary professional employee who provides direct instruction to students related to a specific subject or grade level and usually holds one of the following:

Instructional I Certificate (see § 49.82),

Instructional II Certificate (see § 49.83),

Vocational Instructional I Certificate (see § 49.142), and

Vocational Instructional II Certificate (see § 49.143).

Department—The Department of Education of the Commonwealth.

Distinguished—The employee's performance consistently reflects the employee's professional position and placement at the highest level of practice.

Education Specialist—A person who holds an educational specialist certificate issued by the Commonwealth, including, but not limited to, a certificate endorsed in the area of elementary school counselor, secondary school

counselor, school counselor K-12, school nurse, home and school visitor, school psychologist, dental hygienist, or instructional technology specialist.

Employee—A person who is a professional employee or temporary professional employee.

Failing—The employee does not meet performance expectations required for the position.

Keystone Exam—An assessment developed or caused to be developed by the Department pursuant to 22 Pa. Code § 4.51 (relating to state assessment system).

LEA—A local education agency, including a public school district, area vocational-technical school, career technology center and intermediate unit, which is required to use a rating tool established pursuant to section 1123 of the Public School Code (24 P. S. § 11-1123).

Needs Improvement—The employee is functioning below proficient for performance expectations required for continued employment.

NTPE—A nonteaching professional employee or a person who is an education specialist or a professional employee or temporary professional employee who provides services other than classroom instruction, and includes supervisors and employees with instructional certification who are not categorized as “classroom teachers” by the LEA.

Performance Improvement Plan—A plan, designed by an LEA with input of the employee, that may include mentoring, coaching, recommendations for professional development and intensive supervision based on the results of the rating provided for under this chapter.

Principal—A building principal, an assistant principal, a vice principal or a director of vocational education.

Professional Employee—An individual who is certificated as a teacher, supervisor, principal, assistant principal, vice-principal, director of vocational education, dental hygienist, visiting teacher, home and school visitor, school counselor, child nutrition program specialist, school nurse, or school librarian.

Proficient—The employee’s performance consistently reflects practice at a professional level.

PSSA—The Pennsylvania System of School Assessment established in 22 Pa. Code § 4.51 (relating to state assessment system).

PVAAS—The Pennsylvania Value-Added Assessment System established in compliance with 22 Pa. Code § 403.3 (relating to single accountability system) and its data made available by the Department under Section 221 of the Public School Code (24 P. S. § 2-221).

Student Performance—A compilation of performance measures of all students in the school building in which the NTPE is employed as set forth in Paragraph (IV) relating to standards of use for student performance measures.

Temporary Professional Employee—An individual who has been employed to perform for a limited time the duties of a newly created position or of a regular professional employee whose service has been terminated by death, resignation, suspension or removal.

II. General Provisions.

1. The rating of an employee shall be performed by or under the supervision of the chief school administrator, or, if so directed by the chief school administrator, by an assistant administrator, a supervisor or a principal, who

has supervision over the work of the professional employee or temporary professional employee being rated, provided that no unsatisfactory rating shall be valid unless approved by the chief school administrator. (24 P. S. § 11-1123(h)(3))

2. The rating form shall be marked to indicate whether the employee is a professional employee or temporary professional employee.

3. A temporary professional employee must be notified as to the quality of service at least twice a year. (24 P. S. § 11-1108)

4. The rating form includes two measures or rated areas: NTPE Observation and Practice, and Student Performance of all students in the school building. Application of each measure is dependent on the availability of data. A rating in the range of zero to three based on the “0 to 3 Point Scale” must be given to each of the two rating areas.

5. NTPE Observation and Practice is divided into four domains: I. Planning and Preparation; II. Educational Environment; III. Delivery of Service; and IV. Professional Development. For each domain, an employee must be given a rating of zero, one, two or three which is based on observation, practice models, evidence or documented artifacts.

6. The Student Performance score shall be comprised of the Building Level Score which will be provided by the Department or its designee, and published annually on the Department’s website.

7. Each of the two measures in Final NTPE Effectiveness Rating shall be rated on the zero-to-three-point scale. Each number in Rating (C) shall be multiplied by the Factor (D) and the sum of the Earned Points or Total Earned Points shall be converted into a Performance Rating using the table marked Conversion to Performance Rating.

8. An overall performance rating of Distinguished or Proficient shall be considered satisfactory.

9. An initial overall performance rating of Needs Improvement shall be considered satisfactory.

10. The second overall performance rating of Needs Improvement issued by the same employer within 10 years of the first rating of Needs Improvement where the employee is in the same certification shall be considered unsatisfactory.

11. For professional employees, two consecutive overall unsatisfactory ratings, which include professional observations, and are not less than four months apart, shall be considered grounds for dismissal.

12. No temporary professional employee shall be dismissed unless rated unsatisfactory, and notification, in writing, of such unsatisfactory rating shall have been furnished the employee within 10 days following the date of such rating.

13. An employee who receives an overall performance rating of Needs Improvement or Failing must participate in a performance improvement plan. No employee will be rated Needs Improvement or Failing based solely on student test scores.

14. The rating form shall be marked to indicate the appropriate performance rating and whether the overall final rating is satisfactory or unsatisfactory.

15. The rating form must be signed by the chief school administrator or by a designated rater, who is an assis-

tant administrator, supervisor or principal, has supervision over the work of the professional employee or temporary professional employee being rated, and is directed by the chief school administrator to perform the rating.

16. A final rating of unsatisfactory will not be valid unless signed by the chief school administrator.

17. A signed copy of the rating form shall be provided to the employee.

18. The rating tool is not intended to establish mandates or requirements for the formative process of supervising NTPEs.

19. This rating form, section or chapter may not be construed to limit or constrain the authority of the chief school administrator of an LEA to initiate and take action on a personnel matter, including dismissal of an NTPE, based on information and data available at the time of the action.

III. Standards of Use for NTPE Observation and Practice.

Part (A) "NTPE Observation and Practice" in the rating form shall be completed using the following standards, calculations and procedures.

(a) *NTPE observation and practice domains.* The rating of an NTPE for effectiveness in professional practice shall be based on observation or other supervisory methods. Professional practice shall comprise 80% of the Final NTPE Effectiveness Rating of the employee. The percentage factor for each domain is listed in Table C:

<i>Domains</i>	<i>% of 80% allotment</i>
I. Planning and preparation.	25.0
II. Educational environment.	25.0
III. Delivery of service.	25.0
IV. Professional development.	25.0

(b) *Summative process of evaluation.* LEAs shall utilize professional practice models (e.g., Danielson, *Enhancing Professional Practice: A Framework for Teaching*; Department, *Framework for Leadership*; Department-developed frameworks/rubrics for education specialists) that address the areas related to observation and practice contained in sections 1123(d)(1)(i)—(iv) of the Public School Code (24 P. S. §§ 11-1123(d)(1)(i)—(iv)) and are approved by the Department. The Department shall publish a list of approved practice models for assessing the four domains annually on the Department's website. The list of approved practice models will include frameworks for professional observation and practice, and relevant cross-walks linking frameworks to the four domains in Table C for professional and temporary professional employees holding certificates issued by the Department who are not assigned classroom teacher or principal positions. Examples of certificates for professional and temporary employees include, but are not limited to, the following:

- (1) Education specialist (22 Pa. Code §§ 49.101—105).
- (2) Instructional (22 Pa. Code §§ 49.82—83, 49.142—143).
- (3) Administrative and supervisory (22 Pa. Code §§ 49.111 and 49.121).

LEAs shall assign the appropriate practice model to each NTPE position description. LEAs shall notify NTPEs of the professional practice models assigned to the

NTPEs' positions. An NTPE must be given a rating in each of the four domains. In determining a rating for an employee, an LEA may use any portion or combination of the practice models related to the domains. The four domains and practice models establish a framework for the summative process of evaluating NTPEs. The form and standards do not impose mandates on the supervisory and formative processes utilized by an LEA.

(c) *Evidentiary sources.* NTPE observation and practice evaluation results and ratings shall be based on evidence. Information, including dates and times, if applicable, on the source of the evidence shall be noted in the employee's record. As appropriate for the employee and the employee's placement in an LEA program, records may include, but not be limited to, any combination of the following items:

- (1) Notations of professional observations, employee/rater conferences or interviews, or informal observations or visits, including dates for observations, interviews and conferences.
- (2) Lesson unit plans (types, titles and numbers), materials, technology, resource documents, visual technology, utilization of space, student assignment sheets, student work, instructional resources, student records, grade book, progress reports and report cards.
- (3) Development and implementation of improvement plans, professional growth programs, in-service programs, student assemblies, and other events or programs that promote educational efficacy, health or safety.
- (4) Communication logs (emails, letters, notes regarding phone conversations, etc.) to parents, staff, students, and/or community members.
- (5) Utilization of formative and summative assessments that impact instruction and critiques of lesson plans.
- (6) Agendas and minutes of meetings, programs, courses, or planning sessions.
- (7) Budget and expenditure reports.
- (8) Interaction with students' family members.
- (9) Family, parent, school and community feedback.
- (10) Act 48 documentation or continuing education documentation directly related to the employee's position in the LEA.
- (11) Use of professional reflections.
- (12) Examination of sources of evidence provided by the employee.

The documentation, evidence and findings of the rater shall provide a basis for the rating of the employee in the domains of observation and practice.

(d) *Scoring.* An LEA must provide a rating score in each domain. The four NTPE observation and practice domains shall be rated and scored on a zero-to-three-point scale. The ratings of Failing, Needs Improvement, Proficient and Distinguished are given numeric values as shown in Table D.

<i>Performance Rating</i>	<i>Value</i>
Failing	0
Needs Improvement	1
Proficient	2
Distinguished	3

(e) *Ratings and weighted scoring.* The four domains of NTPE observation and practice in Part (A) of the form are each assigned a percentage factor. Each domain shall be scored on the “0-to-3-point scale.” The individual score or rating for each domain is adjusted by the percentage factor attributed to that domain. The score of zero, one,

two or three for each domain is calculated into points based on its percentage factor. The sum of the points for all domains will be the total NTPE Observation and Practice Rating. The calculation for each domain is set forth in Table E.

<i>Domain</i>	<i>Title</i>	<i>Rating (A)</i>	<i>Factor (B)</i>	<i>Earned Points (A x B)</i>	<i>Max Points</i>
I.	Planning and preparation.		25%		0.75
II.	Educational environment.		25%		0.75
III.	Delivery of service.		25%		0.75
IV.	Professional development.		25%		0.75
<i>NTPE Observation & Practice Points/Rating</i>					3.00

(f) *Administrative action based on available data.* Nothing in these standards of use for NTPE observation and practice, this section or this chapter shall be construed to limit or constrain the authority of the chief school administrator of an LEA to initiate and take action on a personnel matter, including dismissal of an NTPE, based on information and data available at the time of the action.

(IV) Standards of Use for Student Performance Measures.

(a) *Building, school or configuration.* For the purposes of Paragraph (IV) relating to Standards of Use for Student Performance Measures, the term “building” shall mean a school or configuration of grades that is assigned a unique four-digit identification number by the Department unless the context clearly indicates otherwise.

(b) *Percentage.* The student performance for all students in the school building in which the NTPE is employed will be derived from the Building Level Score. As set forth in 22 Pa. Code § 19.1(IV)(a)(3), the Department will provide the Building Level Score for each building within an LEA based on available data. Building Level Scores will be published annually on the Department’s website. The Student Performance Rating shall comprise 20% of the Final NTPE Effectiveness Rating.

(c) *Student performance measure.* The student performance measure derived from the Building Level Score shall include, but is not limited to, the following when data is available and applicable to a building where the NTPE is employed:

- (1) Student performance on assessments.
- (2) Value-added assessment system data made available by the Department under section 221 of the Public School Code (24 P. S. § 2-221).
- (3) Graduation rate as reported to the Department under section 222 of the Public School Code (24 P. S. § 2-222).
- (4) Promotion rate.
- (5) Attendance rate as reported to the Department under section 2512 of the Public School Code (24 P. S. § 25-2512).
- (6) Industry certification examinations data.
- (7) Advanced placement course participation.

(8) Scholastic aptitude test and preliminary scholastic aptitude test data.

(d) *Building level score.* Comparable to 22 Pa. Code § 19.1(IV)(a), the Student Performance Rating shall be determined through conversion of the Building Level Score. The percentage weight given to each measure component contained in Appendix A will be utilized in Building Level Score computations using available data. The Department or its designee will provide the Building Level Score for each building within an LEA based on available data. Building Level Scores will be published annually on the Department’s website.

(e) *Student performance rating.* Each LEA shall utilize the conversions in Table F below to calculate the Student Performance Rating derived from the Building Level Score for each building with eligible building level data.

<i>Building Level Score</i>	<i>0-3 Rating Scale*</i>
90.0 to 107	2.50-3.00
70.0 to 89.9	1.50-2.49
60.0 to 69.9	0.50-1.49
00.0 to 59.9	0.00-0.49

*The Department will publish the full conversion formula on its website.

LEAs shall add the Student Performance Rating to Parts (B)(2) and (C)(2) of the Rating Form.

(f) *Multiple building assignments.* If an NTPE performs professional work in two or more buildings where the NTPE is employed, the LEA will use measures from each building based on the percentage of the employee’s work performed in each building in calculating the whole 20% for this portion of the final rating.

(g) *Absence of Building Level Score.* For NTPEs employed in buildings for which there is no Building Level Score reported on the Department website, the LEA shall utilize the rating from the NTPE observation and practice portion of the rating form in Part (A)(1) in place of the Student Performance Rating.

(h) *Administrative action based on available data.* Nothing in these standards of use for student performance measures, this section or this chapter shall be

construed to limit or constrain the authority of the chief school administrator of an LEA to initiate and take action on a personnel matter, including dismissal of an NTPE, based on information and data available at the time of the action.

(V) Recordkeeping: Maintenance of Rating Tool Data, Records and Forms.

(a) *Records to be maintained.* It shall be the duty of the LEA to establish a permanent record system containing ratings for each employee within the LEA and copies of all her or his ratings for the year shall be transmitted to the employee upon her or his request; or if any rating during the year is unsatisfactory copy of same shall be transmitted to the employee concerned. No employee shall be dismissed for incompetency or unsatisfactory performance unless such rating records have been kept on file by the LEA.

(b) *Reporting of data restricted to aggregate results.* Pursuant to Section 1123(i) of the Public School Code 11-1123(i), LEAs shall provide to the Department the aggregate results of all NTPEs evaluations.

(c) *Confidentiality.* Each LEA shall maintain records in accordance with Section 708(b)(7) of the act of February 14, 2008 (P. L. 6, No. 3), known as the “Right-to-Know Law,” (65 P. S. § 67.708(b)(7)), and Sections 221(a)(1) and 1123(p) of the Public School Code (24 P. S. §§ 2-221(a)(1) and 11-1123(p)).

(VI) LEA alternative rating tool.

The Department will review at the request of an LEA an alternative rating tool that has been approved by the LEA governing board. The Department may approve for a maximum period of not more than five years any alternative rating tool that meets or exceeds the measures of effectiveness established under 24 P. S. § 11-1123.

APPENDIX A

Percentage Weights for Data Components/Indicators of the Building Level Score for the Educator Effectiveness Rating Tool

Appendix A contains the percentage weights assigned to data components for “building level data” and “student performance of all students in the school building” pursuant to section 1123 of the Public School Code (24 P. S. § 11-1123). The data components or indicators comprise the “building level score” for the professional employee or temporary professional employee rating form. The building level score is also the School Performance Profile for a school or building. For the purposes of this appendix, the term “building” shall mean a school or configuration of grades that is assigned a unique four-digit identification number by the Department unless the context clearly indicates otherwise.

<i>Components/Indicators</i>	<i>Building Configurations</i>				
	<i>K-12 Schools</i>	<i>Secondary Schools</i>	<i>Comprehensive CTCs¹</i>	<i>K-8 Schools with Grade 3</i>	<i>K-8 Schools w/out Grade 3</i>
<i>Academic Achievement (40%)</i>	<i>% Factor</i>	<i>% Factor</i>	<i>% Factor</i>	<i>% Factor</i>	<i>% Factor</i>
Mathematics/Algebra I—Percent Proficient or Advanced on PSSA/Keystone Exam	7.50	7.50	4.75	7.50	10.00
Reading/Literature—Percent Proficient or Advanced on PSSA/Keystone Exam	7.50	7.50	4.75	7.50	10.00
Science/Biology—Percent Proficient or Advanced on PSSA/Keystone Exam	7.50	7.50	4.75	7.50	10.00
Writing—Percent Proficient or Advanced on PSSA	7.50	7.50	4.75	7.50	10.00
Industry Standards-Based Competency Assessments—Percent Competent or Advanced	2.50	5.00	25.00	Not Applicable	Not Applicable
Grade 3 Reading—Percent Proficient or Advanced on PSSA	2.50	Not Applicable	Not Applicable	10.00	Not Applicable
SAT/ACT College Ready Benchmark	7.50	7.50	4.75	7.50	10.00
<i>Closing the Achievement Gap—All Group (5%)</i>	<i>% Factor</i>	<i>% Factor</i>	<i>% Factor</i>	<i>% Factor</i>	<i>% Factor</i>
Mathematics/Algebra I—Percent of Required Gap Closure Met	1.25	1.25	0.75	1.25	1.25
Reading/Literature—Percent of Required Gap Closure Met	1.25	1.25	0.75	1.25	1.25
Science/Biology—Percent of Required Gap Closure Met	1.25	1.25	0.75	1.25	1.25

**Table 1: Building Level Score—All Building Configurations
School Years 2012-2013 and 2013-2014**

Components/Indicators	Building Configurations				
	K-12 Schools	Secondary Schools	Comprehensive CTCs ¹	K-8 Schools with Grade 3	K-8 Schools w/out Grade 3
Writing—Percent of Required Gap Closure Met	1.25	1.25	0.75	1.25	1.25
<i>Closing the Achievement Gap—Historically Underperforming Students (5%)</i>	<i>% Factor</i>	<i>% Factor</i>	<i>% Factor</i>	<i>% Factor</i>	<i>% Factor</i>
Mathematics/Algebra I—Percent of Required Gap Closure Met	1.25	1.25	0.75	1.25	1.25
Reading/Literature—Percent of Required Gap Closure Met	1.25	1.25	0.75	1.25	1.25
Science/Biology—Percent of Required Gap Closure Met	1.25	1.25	0.75	1.25	1.25
Writing—Percent of Required Gap Closure Met	1.25	1.25	0.75	1.25	1.25
<i>Academic Achievement Factor Total</i>	<i>50.00</i>	<i>50.00</i>	<i>50.00</i>	<i>50.00</i>	<i>50.00</i>
<i>Academic Growth (40%)</i>	<i>% Factor</i>	<i>% Factor</i>	<i>% Factor</i>	<i>% Factor</i>	<i>% Factor</i>
Mathematics/Algebra I—Meeting Annual Academic Growth Expectations	10.00	10.00	10.00	10.00	10.00
Reading/Literature—Meeting Annual Academic Growth Expectations	10.00	10.00	10.00	10.00	10.00
Science/Biology—Meeting Annual Academic Growth Expectations	10.00	10.00	10.00	10.00	10.00
Writing—Meeting Annual Academic Growth Expectations	10.00	10.00	10.00	10.00	10.00
<i>Academic Growth Factor Total</i>	<i>40.00</i>	<i>40.00</i>	<i>40.00</i>	<i>40.00</i>	<i>40.00</i>
<i>Other Academic Indicators (10%)</i>	<i>% Factor</i>	<i>% Factor</i>	<i>% Factor</i>	<i>% Factor</i>	<i>% Factor</i>
Cohort Graduation Rate or Promotion Rate ² (If No Graduation Rate)	2.50	2.50	2.50	5.00	5.00
Attendance	2.50	2.50	2.50	5.00	5.00
Advanced Placement (AP) or International Baccalaureate (IB) or College Credit	2.50	2.50	2.50	Not Applicable	Not Applicable
PSAT/Plan Participation	2.50	2.50	2.50	Not Applicable	Not Applicable
<i>Other Academic Indicators Factor Total</i>	<i>10.00</i>	<i>10.00</i>	<i>10.00</i>	<i>10.00</i>	<i>10.00</i>
<i>Overall Factor Total</i>	<i>100.00</i>	<i>100.00</i>	<i>100.00</i>	<i>100.00</i>	<i>100.00</i>
<i>Extra Credit for Advanced Achievement</i>	<i>Added Factor is 1% of each of the following except 2% for Advanced Placement:</i>				
Mathematics/Algebra I—PSSA/Keystone Exam	Percent of Students Advanced on Mathematics/Algebra I PSSA/Keystone Exam				
Reading/Literature—PSSA/Keystone Exam	Percent of Students Advanced on Reading/Literature PSSA/Keystone Exam				
Science/Biology—PSSA/Keystone Exam	Percent of Students Advanced on Science/Biology PSSA/Keystone Exam				
Writing—PSSA	Percent of Students Advanced on Writing PSSA				
Industry Standards-Based Competency Assessments	Percent of Students Advanced on Industry Standards-Based Competency Assessments				
Advanced Placement	Percent of Grade 12 Students Scoring 3 or higher on any one AP Exam (x2.5)				

Notes for Table 1:

¹ Comprehensive CTCs include full-time career technology centers and full-time area vocational-technical schools. Comprehensive CTC academic achievement is weighted at 44% while Closing the Achievement Gap is weighted at 3% for each group.

² Promotion rate is not included in 2012-2013 calculations; it will be included in subsequent years.

<i>Components/Indicators¹</i>	<i>Building Configurations</i>				
	<i>K-12 Schools</i>	<i>Secondary Schools</i>	<i>Comprehensive CTCs²</i>	<i>K-8 Schools with Grade 3</i>	<i>K-8 Schools w/out Grade 3</i>
<i>Academic Achievement (40%)</i>	<i>% Factor</i>	<i>% Factor</i>	<i>% Factor</i>	<i>% Factor</i>	<i>% Factor</i>
Mathematics/Algebra I—Percent Proficient or Advanced on PSSA/Keystone Exam	7.50	7.50	4.75	7.50	10.00
English Language Arts/Literature—Percent Proficient or Advanced on PSSA/Keystone Exam	15.00	15.00	9.50	15.00	20.00
Science/Biology—Percent Proficient or Advanced on PSSA/Keystone Exam	7.50	7.50	4.75	7.50	10.00
Industry Standards-Based Competency Assessments—Percent Competent or Advanced	2.50	5.00	25.00	Not Applicable	Not Applicable
Grade 3 English Language Arts—Percent Proficient or Advanced on PSSA	2.50	Not Applicable	Not Applicable	10.00	Not Applicable
SAT/ACT College Ready Benchmark	5.00	5.00	Not Applicable	Not Applicable	Not Applicable
<i>Closing the Achievement Gap—All Group (5%)</i>	<i>% Factor</i>	<i>% Factor</i>	<i>% Factor</i>	<i>% Factor</i>	<i>% Factor</i>
Mathematics/Algebra I—Percent of Required Gap Closure Met	1.25	1.25	0.75	1.25	1.25
English Language Arts/Literature—Percent of Required Gap Closure Met	2.50	2.50	1.50	2.50	2.50
Science/Biology—Percent of Required Gap Closure Met	1.25	1.25	0.75	1.25	1.25
<i>Closing the Achievement Gap—Historically Underperforming Students (5%)</i>	<i>% Factor</i>	<i>% Factor</i>	<i>% Factor</i>	<i>% Factor</i>	<i>% Factor</i>
Mathematics/Algebra I—Percent of Required Gap Closure Met	1.25	1.25	0.75	1.25	1.25
English Language Arts/Literature—Percent of Required Gap Closure Met	2.50	2.50	1.50	2.50	2.50
Science/Biology—Percent of Required Gap Closure Met	1.25	1.25	0.75	1.25	1.25
<i>Academic Achievement Factor Total</i>	<i>50.00</i>	<i>50.00</i>	<i>50.00</i>	<i>50.00</i>	<i>50.00</i>
<i>Academic Growth (40%)</i>	<i>% Factor</i>	<i>% Factor</i>	<i>% Factor</i>	<i>% Factor</i>	<i>% Factor</i>
Mathematics/Algebra I—Meeting Annual Academic Growth Expectations	10.00	10.00	10.00	10.00	10.00
English Language Arts/Literature—Meeting Annual Academic Growth Expectations	20.00	20.00	20.00	20.00	20.00
Science/Biology—Meeting Annual Academic Growth Expectations	10.00	10.00	10.00	10.00	10.00

**Table 2: Building Level Score—All Building Configurations
School Year 2014-2015 and Thereafter**

<i>Components/Indicators¹</i>	<i>Building Configurations</i>				
	<i>K-12 Schools</i>	<i>Secondary Schools</i>	<i>Comprehensive CTCs²</i>	<i>K-8 Schools with Grade 3</i>	<i>K-8 Schools w/out Grade 3</i>
<i>Academic Growth Factor Total</i>	40.00	40.00	40.00	40.00	40.00
<i>Other Academic Indicators (10%)</i>	% Factor	% Factor	% Factor	% Factor	% Factor
Cohort Graduation Rate or Promotion Rate ³ (If No Graduation Rate)	2.50	2.50	2.50	5.00	5.00
Attendance	2.50	2.50	2.50	5.00	5.00
Advanced Placement (AP) or International Baccalaureate (IB) or College Credit	2.50	2.50	2.50	Not Applicable	Not Applicable
PSAT/Plan ⁴ Participation	2.50	2.50	2.50	Not Applicable	Not Applicable
<i>Other Academic Indicators Factor Total</i>	10.00	10.00	10.00	10.00	10.00
<i>Overall Factor Total</i>	100.00	100.00	100.00	100.00	100.00
<i>Extra Credit for Advanced Achievement</i>	<i>Added Factor is 1% of each of the following except 2% for English Language Arts/Literature and Advanced Placement:</i>				
Mathematics/Algebra I—PSSA/Keystone Exam	Percent of Students Advanced on Mathematics/Algebra I PSSA/Keystone Exam				
English Language Arts/Literature—PSSA/Keystone Exam	Percent of Students Advanced on English Language Arts/Literature PSSA/Keystone Exam				
Science/Biology—PSSA/Keystone Exam	Percent of Students Advanced on Science/Biology PSSA/Keystone Exam				
Industry Standards-Based Competency Assessments	Percent of Students Advanced on Industry Standards-Based Competency Assessments				
Advanced Placement	Percent of Grade 12 Students Scoring 3 or higher on any one AP Exam (x2.5)				

Notes for Table 2:

¹ Previous factor weightings assigned to Writing are included in English Language Arts/Literature factor weightings.

² Comprehensive CTCs include full-time career technology centers and full-time area vocational-technical schools. Comprehensive CTC academic achievement is weighted at 44% while Closing the Achievement Gap is weighted at 3% for each group.

³ Promotion rate is not included in 2012-2013 calculations; it will be included in subsequent years.

⁴ Plan will be replaced by ACT Aspire when ACT Aspire is fully operational.

[Pa.B. Doc. No. 14-1244. Filed for public inspection June 13, 2014, 9:00 a.m.]

Title 25—ENVIRONMENTAL PROTECTION

ENVIRONMENTAL QUALITY BOARD [25 PA. CODE CH. 78] Oil and Gas Well Fee Amendments

The Environmental Quality Board (Board) amends §§ 78.1 and 78.19 (relating to definitions; and permit application fee schedule) to read as set forth in Annex A. These amendments satisfy the obligation of the Department of Environmental Protection (Department), as specified in § 78.19(f), to provide the Board with an evaluation of the Chapter 78 fees and recommend regulatory changes to address any disparity between Oil and Gas Program (Program) income generated by the fees and the Department's cost of administering the Program. These amendments include several changes to the structure of oil and gas well permit fees, including establishing

increased flat fees for unconventional well permits.

This final-form rulemaking was adopted by the Board at its meeting of January 21, 2014.

A. Effective Date

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

B. Contact Persons

For further information, contact Kurt Klapkowski, 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 Trisha Salvia, Assistant Counsel, 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 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.state.pa.us (DEP Search/Keyword: EQB).

C. Statutory Authority

The final-form rulemaking is adopted under the authority of 58 Pa.C.S. § 3274 (relating to regulations), which directs the Board to adopt regulations necessary to implement 58 Pa.C.S. Chapter 32 (relating to development), 58 Pa.C.S. § 3211(d) (relating to well permits), which authorizes the Board to establish permit fees that bear a reasonable relationship to the cost of administering 58 Pa.C.S. Chapter 32, and section 1920-A of The Administrative Code of 1929 (71 P.S. § 510-20), which authorizes the Board to promulgate regulations of the Department.

D. Background of the Final-Form Rulemaking

Applicants for permits to drill oil and gas wells in this Commonwealth shall pay the permit fee established by the Board. These permits fees fund the entire operation of the Department's Office of Oil and Gas Management (Oil and Gas Program), which is responsible for Statewide oil and gas conservation and environmental programs to facilitate the safe exploration, development and recovery of oil and gas reservoirs in this Commonwealth in a manner that will protect this Commonwealth's natural resources, the environment and public health, safety and welfare. The permit fees are placed in the Well Plugging Fund.

The Department prepared and presented to the Board a 3-Year Regulatory Fee and Program Cost Analysis Report (Report) as part of this final-form rulemaking. A copy of the Report is available from the persons listed in Section B. The conclusions of the Report are outlined as follows.

The Well Plugging Fund balance is declining as the Department's expenses to operate the Program have exceeded permit fee revenues for the past several fiscal years. Fiscal Year (FY) 2011-12 revenues totaled \$13.5 million and expenditures exceeded \$16.6 million. The Program is projected to have increasing expenditures with declining revenues in future fiscal years, which will continue to deplete the existing Well Plugging Fund reserves. At current permit fee and expenditure levels, with projected permitting levels, the Well Plugging Fund will be insufficient to maintain the operations of the Program through FY 2015-16.

In addition to declining Well Plugging Fund balances, the Program is facing increasing operational expenditures due to increased activity in the area of oil and gas exploration associated with previously unexplored unconventional gas formations, as well as the development of natural gas infrastructure throughout this Commonwealth. These expenditures are only expected to increase as exploration of other unconventional formations and infrastructure development expands.

These amendments increase the well permit fee to provide adequate revenue to support the ongoing operations of the Program as well as to meet future Program needs, including permitting, inspection, enforcement and information technology needs. Compounding the problem of declining funds due to increasing expenditures is the decrease of well permit applications. Since 2010, the Department has experienced a year-over-year decrease in the number of unconventional well permit applications received. The decline in permit applications is met with declining revenues but with the passage of the act of February 2, 2012 (P.L. 67, No. 9) (Act 9) and the act of February 14, 2012 (P.L. 87, No. 13) (Act 13), the overall responsibility of the Program has increased. It is imperative that the Department has the resources and technology necessary to ensure industry compliance and environ-

mental protection as Office of Oil and Gas Management responsibilities in this area continue to expand.

This increase in workload coupled with declining permit revenues creates a situation where the incoming permit revenue is insufficient to cover the current operational costs of the Program, not allowing any room for flexibility in terms of future staff and resource needs. As the oil and gas industry continues to expand in this Commonwealth, additional Department staff and technology will be critical to ensure the Department's proper oversight of the industry.

Two areas where this increased workload and expenditures make this permit fee increase critical are streamlined electronic review and staffing.

Streamlined electronic review

The Department will allocate a substantial portion of the increased fee revenue to information technology projects for the Program, such as electronic permitting, mobile digital inspections, upgrades to existing reporting systems and modernization of forms and databases. This investment in technology will yield efficiencies for both the Department 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 Department's work more transparent to the public as electronic documents can be easily made available on the Internet. The two key initiatives on the forefront of information technology priorities for the Department are the ePermitting initiative and enabling staff with devices and the capability to conduct mobile digital inspections.

The ePermitting system will provide the ability to process applications for oil and gas permits online. The new system will replace the manual process that requires applicants to complete paper forms and deliver multiple copies of documentation to a Department district office. This change should reduce data transcription errors from entering data on paper forms into the Department's databases. The new ePermitting system is designed to increase review efficiency through electronic workflow and to significantly decrease the time from initial application submission to permit issuance. It will enable applicants to submit online payment and provide for permit review transparency as an applicant will be able to closely follow a permit through the approval process and receive automatic notifications as it completes the outlined benchmarks. Upon approval, the system will deliver the permit electronically to the applicant, thereby eliminating the lag time from permit issuance to receipt by the applicant.

Electronic receipt and storage of the permitting documents will also result in significant savings in terms of storage and of staff time and costs associated with related Right-to-Know requests. The Department is second in the Commonwealth in terms of Right-to-Know requests, much of which is attributed to the Program. The public will enjoy greater access to timely data as the Department receives it.

Creation and deployment of a mobile digital inspection platform and mobile devices will create marked improvement and efficiencies in terms of how the organization conducts site inspections. Current paper based inspection forms necessitate staff spending at least 1 day a week in the office to manually enter data from paper inspection reports and mail the resulting inspection report and

findings to operators. Mobile digital inspections will allow entry of data into the system while onsite, eliminate the need to return to the office for data entry and enable employees to spend their time where they are needed, on location for inspections and compliance assistance.

Staffing needs

Currently, there are 202 full time equivalents (FTE) assigned to the Office of Oil and Gas Management. The Program has grown considerably; in 2004 the Program had 64 FTEs. Approximately 80% of the current staff is assigned to engineering, scientific or permit/inspection-related work, as oil and gas inspectors or oil and gas inspector supervisors. Another 20% are assigned to clerical, administrative or legal work to support the Program.

The Department is proposing that additional positions are needed within the Office of Oil and Gas Management to implement the additional responsibilities required under 58 Pa.C.S. Chapter 32 to review well pad and pipeline development permit applications in an efficient and timely manner and to support the Bureau of Oil and Gas Planning and Program Management.

Chapter 32 of 58 Pa.C.S. comprehensively amended the Oil and Gas Act of 1984 (repealed) and established a number of new responsibilities on the oil and gas industry as well as the Department. Under 58 Pa.C.S. Chapter 32, the Department must inspect well sites before drilling can begin and well drillers must now notify the Department prior to cementing all strings of casing and before hydraulic fracturing operations begin. These new requirements have stretched thin the current staff and therefore necessitate additional inspectors to fulfill the increased inspection requirements and expectations of 58 Pa.C.S. Chapter 32. Absent additional inspection staff, well sites will not be inspected at the frequency envisioned by 58 Pa.C.S. Chapter 32.

In addition to responding to new requirements, additional staff is needed to timely review the increase in permits received by the Department due to substantial natural gas infrastructure development throughout this Commonwealth. Failure to review permit applications within a reasonable time period can result in substantial cost increases for these projects and ultimately prevents natural gas from reaching consumers, thus increasing commodity costs.

Finally, as a result of the Department's 2011 reorganization, the Office of Oil and Gas Management was created to unify the planning and program management staff with the permitting, inspection and enforcement staff under a common Deputate. As a result of this reorganization, additional staff is necessary to support the Office of Oil and Gas Management's Bureau of Oil and Gas Planning and Program Management. These additional staff will enable the Office of Oil and Gas Management to better develop new regulations, policies and technical guidance documents pertaining to well construction and surface activities on a timely basis. Failure to promptly develop these rules and policies can lead to uncertainty and inconsistent application of 58 Pa.C.S. Chapter 32. Additional staff will better serve the public as well as the industry by making more transparent how the Department interprets and implements 58 Pa.C.S. Chapter 32.

Without additional revenue provided by a regulatory fee package, additional staff complement will not be possible, which will jeopardize the Department's ability to provide high quality compliance assistance, ensure timely permitting, ensure adequate inspection and enforcement opera-

tions, and leverage existing technology to streamline inspection and permitting activities.

The Department consulted with the Oil and Gas Technical Advisory Board (TAB) in the development of the proposed rulemaking. The Department presented the draft proposed rulemaking to TAB at its April 23, 2013, meeting. Because the proposed rulemaking did not address technical issues relating to oil and gas, TAB did not take a formal action relative to the proposed rulemaking.

E. Summary of Regulatory Requirements

Former fee structure

The permit fee structure is outlined in § 78.19. Former § 78.19 established three classes of wells. Two were based on the type of wellbore that were used to produce oil or natural gas—vertical or nonvertical (deviated or horizontal) and the third was based on the Marcellus Shale being the target formation. Permit fees for an individual well were determined by use of a sliding scale based on the total well bore length in feet. The sliding scales for the nonvertical and Marcellus wells were identical and were roughly two to three times the fee paid for a vertical well of the same total well bore length. As an example, an applicant requesting a permit for a 5,000-foot vertical well paid a fee of \$550, while an applicant for a nonvertical or Marcellus Shale well of the same well bore length paid \$1,600. The current average nonvertical unconventional well permit fee is approximately \$3,200 and the current average vertical unconventional well permit fee is \$2,900.

Amended fee structure

The final-form rulemaking amends § 78.19 to create two classes of wells for permit fee purposes. These classes are “conventional wells” and “unconventional wells.” These amendments follow the general structure of 58 Pa.C.S. Chapter 32, which established the “conventional vs. unconventional well” distinction in a number of different areas. For example, 58 Pa.C.S. § 3215 (relating to well location restrictions) establishes differing setback requirements for the two classes of wells and 58 Pa.C.S. § 3218 (relating to protection of water supplies) establishes differing presumptions of liability for the two classes of wells.

It is important to be clear that the final-form rulemaking does not include any changes to the current permit fee structure for applicants for permits to drill “conventional” oil and gas wells. Although “conventional” wells and formations are not defined in 58 Pa.C.S. § 3203 (relating to definitions), the amendments to § 78.19 define those terms with reference to definitions in 58 Pa.C.S. § 3203 of “unconventional well” and “unconventional formation.”

By reviewing the “unconventional” definitions, “conventional wells” include: (1) any wells drilled to produce oil; (2) wells drilled to produce natural gas from formations other than shale formations; (3) wells drilled to produce natural gas from shale formations located above the base of the Elk Group or its stratigraphic equivalent; and (4) wells drilled to produce natural gas from shale formations located below the base of the Elk Group where natural gas can be produced at economic flow rates or in economic volumes without the use of vertical or nonvertical well bores stimulated by hydraulic fracture treatments or by using multilateral well bores or other techniques to expose more of the formation to the well bore. For permit applicants to drill these wells, these amendments do not have any impact.

Permit applicants for conventional wells will not see an impact from these amendments because the final-form rulemaking retains the current “vertical well” fee structure as the new “conventional well” fee structure. Typically, “conventional wells,” as defined in this final-form rulemaking, would pay the “vertical well” fee if permitted prior to these amendments taking effect.

For “unconventional nonvertical wells” and “unconventional vertical wells,” these amendments establish flat permit fees of \$5,000 and \$4,200, respectively, regardless of the total well bore length of the well. The Department determined that this increase will enable the Department to operate the Program in the manner contemplated by the current rules and regulations, as well as undertake the initiatives previously described.

F. Summary of Comments and Responses on the Proposed Rulemaking and Changes to the Proposed Rulemaking

The Board received comments from six commentators during the 30-day public comment period. The Independent Regulatory Review Commission (IRRC) also commented on the proposed rulemaking.

The comments received on the proposed rulemaking are summarized in this section and are more extensively addressed in a Comment and Response Document which is available from the Department.

Four commentators, including the Pennsylvania Independent Oil and Gas Association and IRRC, suggested adding more detail to the proposed definition of “conventional well.” This suggestion was accepted and final-form § 78.1 contains additional detail.

Two commentators explicitly supported the concept of fee increases, with one requesting that the fee be doubled above what was proposed. One commentator was opposed to fee increases to support staffing increases until the Department’s electronic permitting initiative is in place and the efficiencies gained from that development can be assessed. This comment fails to acknowledge the additional responsibilities placed on the Department by Acts 9 and 13 as well as the expanding universe of regulated oil and gas wells (more wells are permitted and drilled each year than are plugged so the regulated universe continues to expand), as well as the infrastructure development oversight carried out by the Office of Oil and Gas Management. As previously noted, the Department has conducted a thorough analysis of the Program’s current resources and expenditures, as well as future requirements necessary to carry out the Program’s responsibilities under Commonwealth statutes and believes that the fee and staff increases are adequate given the Program’s needs.

G. Benefits, Costs and Compliance

Benefits

The increased oil and gas permit fee revenue would be used to adequately fund the Department’s Office of Oil and Gas Management. Revenue to the Department from the fee increase would be used solely to operate the regulatory program overseeing the responsible development of this Commonwealth’s oil and natural gas resources. In addition, the Department will be able to pursue streamlined electronic review initiatives and increase the Office of Oil and Gas Management staffing levels to meet the challenges of increased responsibilities and timely oversight, responsiveness and transparency. Finally, these amendments reduce the burden on the regulated community and the Department because the

sliding scale permit fees, which require proper calculation and review, are replaced with flat fees that are easy to understand and implement.

Compliance Costs

Nonvertical unconventional wells

The average permit fee paid for a nonvertical unconventional well or Marcellus Shale well during 2012 was approximately \$3,200 per well. The amendments establish a fixed \$5,000 fee for each nonvertical unconventional well which is an increase of \$1,800 per well. The Department projects that approximately 2,600 well permit applications will be received annually following the effective date of this final-form rulemaking. This would result in an additional annual incremental permit cost of \$4.68 million to the regulated community.

Vertical unconventional wells

The amendments establish a fixed \$4,200 fee for each vertical unconventional well. The Department projects that approximately 80 well permit applications for vertical unconventional wells will be received annually following the effective date of this final-form rulemaking. This would result in an additional annual incremental permit cost of \$104,000 to the regulated community.

No new legal, accounting or consulting procedures are required.

Compliance Assistance Plan

The Department plans to educate and assist the public and regulated community in understanding these amendments 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 have been amended to reflect the new permit fee structure.

Paperwork Requirements

There are no additional paperwork requirements associated with these amendments with which the industry would need to comply.

H. 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.

I. Sunset Review

These regulations will be reviewed in accordance with the sunset review schedule published by the Department to determine whether the regulations effectively fulfill the goals for which they were intended. In addition, in accordance with § 78.19(f), the Department will evaluate these fees and recommend regulatory changes 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 programs are self-sustaining. This report and any proposed regulatory changes will be presented to the Board no later than 3 years after the effective date of this final-form rulemaking.

J. Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on September 4, 2013, the Department submitted a copy of the notice of proposed rulemaking, published at 43 Pa.B. 5457 (September 14, 2013), to IRRC and the Chairpersons of the House and Senate Environmental Resources and Energy Committees for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC and the House and Senate Committees were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing the 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 April 30, 2014, 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 May 1, 2014, and approved the final-form rulemaking.

K. 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) and regulations promulgated thereunder, 1 Pa. Code §§ 7.1 and 7.2.

(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 43 Pa.B. 5457.

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

L. Order

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

(a) The regulations of the Department, 25 Pa. Code Chapter 78, are amended by amending §§ 78.1 and 78.19 to read as set forth in Annex A, with ellipses referring to the existing text of the regulations.

(b) The Chairperson of the Board shall submit this order and Annex A 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 order and Annex A to IRRC and the Senate and House Environmental Resources and Energy Committees as required by the Regulatory Review Act.

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

(e) This order shall take effect immediately.

E. CHRISTOPHER ABRUZZO,
Chairperson

(Editor's Note: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 44 Pa.B. 2965 (May 17, 2014).)

Fiscal Note: Fiscal Note 7-483 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 78. OIL AND GAS WELLS

Subchapter A. GENERAL PROVISIONS

§ 78.1. 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:

* * * * *

Conductor pipe—A short string of large-diameter casing used to stabilize the top of the wellbore in shallow unconsolidated formations.

Conventional formation—A formation that is not an unconventional formation.

Conventional well—

(i) A bore hole drilled or being drilled for the purpose of or to be used for construction of a well regulated under 58 Pa.C.S. §§ 3201—3274 (relating to development) that is not an unconventional well, irrespective of technology or design.

(ii) The term includes, but is not limited to:

(A) Wells drilled to produce oil.

(B) Wells drilled to produce natural gas from formations other than shale formations.

(C) Wells drilled to produce natural gas from shale formations located above the base of the Elk Group or its stratigraphic equivalent.

(D) Wells drilled to produce natural gas from shale formations located below the base of the Elk Group where natural gas can be produced at economic flow rates or in economic volumes without the use of vertical or nonvertical well bores stimulated by hydraulic fracture treatments or multilateral well bores or other techniques to expose more of the formation to the well bore.

(E) Irrespective of formation, wells drilled for collateral purposes, such as monitoring, geologic logging, secondary and tertiary recovery or disposal injection.

Deepest fresh groundwater—The deepest fresh groundwater bearing formation penetrated by the wellbore as determined from drillers logs from the well or from other wells in the area surrounding the well or from historical

records of the normal surface casing seat depths in the area surrounding the well, whichever is deeper.

* * * * *

L.E.L.—Lower explosive limit.

Noncementing material—A mixture of very fine to coarse grained nonbonding materials, including unwashed crushed rock, drill cuttings, earthen mud or other equivalent material approved by the Department.

* * * * *

Nonvertical unconventional well—

(i) An unconventional well drilled intentionally to deviate from a vertical axis.

(ii) The term includes wells drilled diagonally and wells that have horizontal bore holes.

* * * * *

Vertical unconventional well—An unconventional well with a single vertical well bore.

* * * * *

Subchapter B. PERMITS, TRANSFERS AND OBJECTIONS

PERMITS AND TRANSFERS

§ 78.19. Permit application fee schedule.

(a) An applicant for a conventional well shall pay a permit application fee according to the following schedule:

Conventional Wells

<i>Total Well Bore Length in Feet</i>	<i>Total Fee</i>
0 to 2,000	\$250
2,001 to 2,500	\$300
2,501 to 3,000	\$350
3,001 to 3,500	\$400
3,501 to 4,000	\$450
4,001 to 4,500	\$500
4,501 to 5,000	\$550
5,001 to 5,500	\$650
5,501 to 6,000	\$750
6,001 to 6,500	\$850
6,501 to 7,000	\$950
7,001 to 7,500	\$1,050
7,501 to 8,000	\$1,150
8,001 to 8,500	\$1,250
8,501 to 9,000	\$1,350
9,001 to 9,500	\$1,450
9,501 to 10,000	\$1,550
10,001 to 10,500	\$1,650
10,501 to 11,000	\$1,750
11,001 to 11,500	\$1,850
11,501 to 12,000	\$1,950

(b) An applicant for a conventional well exceeding 12,000 feet in total well bore length shall pay a permit application fee of \$1,950 + \$100 for every 500 feet the well bore extends over 12,000 feet. Fees shall be rounded to the nearest 500-foot interval under this subsection.

(c) An applicant for an unconventional well shall pay a permit application fee according to the following:

(1) \$4,200 for a vertical unconventional well.

(2) \$5,000 for a nonvertical unconventional well.

(d) If, when drilled, the total well bore length of the conventional well exceeds the length specified in the permit application due to target formation being deeper than anticipated at the time of application submittal, the operator shall pay the difference between the amount paid as part of the permit application and the amount required under subsections (a) and (b).

(e) An applicant for a conventional well with a well bore length of 1,500 feet or less for home use shall pay a permit application fee of \$200.

(f) 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. 14-1245. Filed for public inspection June 13, 2014, 9:00 a.m.]

Title 52—PUBLIC UTILITIES

PENNSYLVANIA PUBLIC UTILITY COMMISSION

[52 PA. CODE CH. 54]

[L-2014-2409385]

Disclosure Statement for Residential and Small Business Customers; Notices of Contract Expiration or Changes in Terms for Residential and Small Business Customers

The Pennsylvania Public Utility Commission (Commission), on April 3, 2014, adopted a final-omitted rule-making order amending regulations regarding disclosure statements for residential and small business customers, and adding § 54.10 (relating to notice of contract expiration or change in terms for residential and small business customers).

Executive Summary

The Commission adopts this Final-Omitted Rulemaking Order to amend our customer information regulations at 52 Pa. Code § 54.5 and add regulations at 52 Pa. Code § 54.10 providing for a disclosure statement for residential and small business customers and providing for the provision of notices of contract expiration or changes in terms for residential and small business customers. With this Final-Omitted Rulemaking Order, the Commission enhances these rules to guarantee ample customer protections are in place and that customers are provided with 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 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 a more specific explanation of limits on variability.

Public Meeting held
April 3, 2014

Commissioners Present: Robert F. Powelson, Chairperson;
John F. Coleman, Jr., Vice Chairperson; James H.
Cawley; Pamela A. Witmer; Gladys M. Brown

*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;
L-2014-2409385*

Final-Omitted Rulemaking Order

By the Commission:

The Pennsylvania Public Utility Commission (Commission) adopts this Final-Omitted Rulemaking Order to amend our customer information regulations at 52 Pa. Code § 54.5 and add regulations at 52 Pa. Code § 54.10 providing for a disclosure statement for residential and small business customers and providing for the provision of notices of contract expiration or changes in terms for residential and small business customers. The existing regulations at 52 Pa. Code §§ 54.1—54.9 require that electric generation suppliers (EGSs) enable customers to make informed choices regarding the purchase of electricity offered by providing adequate and accurate customer information in an understandable format, including rules regarding the disclosure of contract terms and conditions. Section 54.5 directs EGSs to provide residential and small business customers with a disclosure statement containing written terms and conditions including, but not limited to: pricing information, length of agreement, cancellation provisions, penalties, and an explanation of any bonuses or incentives. See 52 Pa. Code § 54.5.

With this Final-Omitted Rulemaking Order, the Commission enhances these rules to guarantee ample customer protections are in place and that customers are provided with 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 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 a more specific explanation of limits on variability.

The Commission has also added a new section to Chapter 54, 52 Pa. Code § 54.10, which provides the notice provisions EGSs must follow before expiration or changing the terms of a residential or small business customer's contract. Specifically, this new section directs EGSs to provide two notices, the first to be issued between 45 and 60 days before the expiration or change in terms of the contract and the second to be issued no less than 30 days before the expiration or change in terms of the contract. These notices will provide customers with information regarding their option to stay with their existing EGS, to purchase generation supply from a different EGS or to return to default service.

For the reasons more fully explained herein, the Commission finds good cause that undergoing the traditional notice and comment procedures for these regulations is impracticable, unnecessary, and contrary to the public interest. See 45 P.S. § 1204(3). In light of the record-

breaking recent wave of informal and formal complaints filed with the Commission concerning energy price increases in January 2014, the Commission believes it is essential to the public interest to act promptly and expeditiously to amend its regulations to require EGSs to provide more sufficient disclosures and notices to customers regarding products offered in the retail electric market. Accordingly, for good cause, we issue this Final-Omitted Rulemaking Order to amend our regulations at 52 Pa. Code § 54.5 and add regulations at 52 Pa. Code § 54.10 in order to ensure that residential and small business consumers receive adequate disclosures and notices when shopping for electricity in the Commonwealth.

Background

The Public Utility Code requires EGSs to provide adequate and accurate information to customers. See 66 Pa.C.S. § 2807(d)(2). Specifically, Section 2807(d)(2) requires the Commission to:

[E]stablish 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 service 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 promulgated regulations in 1998 to enable customers to make informed choices when purchasing electricity generation. See 52 Pa. Code §§ 54.1—54.9 (relating to customer information). The regulations at 52 Pa. Code §§ 54.4—54.6 (relating to the bill format and disclosure statements for residential and small business customers and to requests for information about generation supply) were later amended in 2007, after receiving and incorporating comments from numerous stakeholders.

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

With this Final-Omitted Rulemaking, the Commission specifically examines and updates 52 Pa. Code § 54.5 regarding disclosure statements for residential and small business customers. This Section 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 a fixed term agreement. See Annex A, § 54.5.

Additionally, in this Final-Omitted Rulemaking, the Commission seeks to add a new section outlining require-

ments for EGSs to provide notices to residential and small business customers when a fixed term contract is expiring or when an EGS is proposing to change the terms of a contract. See Annex A, § 54.10.

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.

Section 54.5(g) of the Commission's regulations currently states that an EGS must send a notice to alert a customer about the pending expiration or a change in terms of a contract for electric generation. This Section reads as follows:

(g) Disclosure statements must include the following customer notification:

(1) "If you have a fixed term agreement with us and it is approaching the expiration date or whenever we propose to change our terms of service in any type of agreement, you will receive written notification from us in each of our last three bills for supply charges or in corresponding separate mailings that precede either the expiration date or the effective date of the proposed changes. We will explain your options to you in these three advance notifications."

52 Pa. Code § 54.5(g)(1).

According to the Interim Guidelines, an "Initial Notice" is to be provided to a customer between 52 and 90 days before a contract expires or before a change in contract terms takes effect, and is to include a general description of the proposed changes to the terms of service; the effective date of the change; and the reason for the change(s). Additionally, this Initial Notice is to explain that a customer will receive a second notice with more details, including an explanation of the customer's options. See Interim Guidelines at Appendix A, Section II(a).

A second notice (the "Options Notice") is to be provided to the customer at least 45 days prior to the expiration or a change in terms of the contract. The Options Notice is to include the specific changes to the terms of service being proposed; information on new prices; an explanation of the customer's options and how to exercise those options; the date by which the customer must exercise one of the options; the telephone numbers and website addresses for the Commission and the Office of Consumer Advocate (OCA); and the electric distribution company's (EDC's) Price To Compare (PTC). See Interim Guidelines at Appendix A, Section II(b).

During the winter of 2014, numerous retail electric customers with variable-rate contracts experienced sharp price increases resulting from price fluctuations in the wholesale and retail electricity markets. In light of this and after a renewed review of the Interim Guidelines adopted over three years ago, the Commission finds that codifying, strengthening, and augmenting those guidelines as expeditiously as possible is in the public interest. Through this Final-Omitted Rulemaking Order, the Commission seeks to promulgate regulations, as soon as practicable, to require EGSs to provide stronger disclosures that contain more concise, transparent terms and conditions, especially concerning variable-rate products.

Recently, the Commission sought from its Office of Competitive Market Oversight (OCMO), recommendations on how to provide shopping customers with a disclosure statement that contains more concise, transparent terms and conditions, especially concerning variable-rate products, and how to provide greater clarity of customers' rights and responsibilities when shopping for electricity generation supply. In an Order adopted at its February 20, 2014 Public Meeting, the Commission reaffirmed the General Assembly's directive that EGSs provide:

... [A]dequate 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.

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

In the Variable Rate Order, the Commission expressed particular concern for customers receiving their electric supply service from an EGS under a contract with a monthly adjusted variable rate. As indicated supra, many of these customers experienced sharp increases in their monthly 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 contracts, including conditions of variability, the Commission believes that EGSs must take further steps to ensure that customers can easily find and understand information related to price, price variability and history, cancellation fees, renewal notices, and other terms and conditions.

Additionally, in the Variable Rate Order, the Commission outlined measures it had immediately undertaken following the events of early 2014. Specifically, Commission staff initiated the following measures to help ensure that consumers are more informed about variable rate products:

- Posting of a "consumer alert" as a slider on the Commission's website at www.puc.pa.gov informing customers that they may see price fluctuations if enrolled in a variable-priced contract and provided a number of steps a customer should take to become more aware of their options;
- Posting of an abridged version of the "consumer alert" referenced above on the Commission's www.PaPowerSwitch.com website;
- Reissuing the Commission's January 31, 2014 press release noting information on the Commission's website and PaPowerSwitch.com;
- Development of a separate page on www.PaPowerSwitch.com outlining the difference between fixed and variable-priced contracts;
- Development of a fact sheet regarding fixed versus variable rates; and,
- Addition of a fixed versus variable question-and-answer ("Q&A") on the Commission's "Shopping for Electricity" fact sheet and on www.PaPowerSwitch.com.

In an effort to obtain feedback from stakeholders on the proposed changes to our Disclosure Regulations included in this Final-Omitted Rulemaking Order, the Commission

issued a Secretarial Letter on March 19, 2014, alerting affected parties of the 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. 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, (Secretarial Letter served Mar. 19, 2014) (Secretarial Letter). This Secretarial Letter noted that while some amendments would codify, with modifications, existing contract renewal/change in terms notice requirements contained in the Interim Guidelines, other changes raise new issues that had not previously been considered. As a result, the Commission requested comments on its proposed regulations in order to give an opportunity for those entities most affected to provide recommendations prior to the issuance of this Final-Omitted Rulemaking Order.

In response to the March 19, 2014 Secretarial Letter, the Commission received comments related to these and other issues regarding the effect the proposed amendments would have on the Commission's existing regulations and EGS operations. Comments were filed by the following parties: Pennsylvania Representatives Robert W. Godshall and Peter J. Daley (Representatives Godshall and Daley); the Office of Consumer Advocate (OCA), the Office of Small Business Advocate (OSBA), Citizen Power, UGI Energy Services, LLC (UGIES), Washington Gas Energy Services, Inc. (WGES), Constellation NewEnergy, Inc. (CNE) and Constellation Energy Power Choice, Inc. (formerly MXenergy Electric, Inc.) (CEPCI) (collectively, Constellation), IGS Energy (IGS), the Retail Energy Supply Association (RESA), NRG Retail Northeast Companies¹ (NRG), Alphabuyer, the National Energy Marketers Association (NEM), and FirstEnergy Solutions Corp. (FES).

On March 18, 2014, Pennsylvania Senators Robert M. Tomlinson and Lisa M. Boscola (Senators Tomlinson and Boscola) sent to the Commission a letter notifying us that they had received numerous complaints from constituents enrolled in variable-priced contracts. These complaints were specifically in regard to high electric bills caused by retail electric rates spikes over this past winter. Additionally, the letter stated that Senators Tomlinson and Boscola had also received constituent complaints about being unknowingly placed on a variable-priced plan at the end of a fixed-term contract. Senators Tomlinson and Boscola stated that the Commission should immediately begin revising its regulations with regard to variable-priced contracts and the treatment of customers who have an expiring fixed-term contract. The letter stated that customers should be fully informed of the rates they will be paying and that the requirements regarding the timing and type of notifications provided to customers should be strengthened. Lastly, Senators Tomlinson and Boscola encouraged EGSs to provide to customers more information regarding price variability and to provide more timely and complete notices of changes to or expiration of a fixed-term contract.

In addition, two residential customers e-mailed either the Commission's website or www.PaPowerSwitch.com with comments regarding the Commission's proposed

regulatory changes to EGS disclosure statements, as well as changes to customer notices regarding "contract renewals" and "changes in terms."

One customer, Mr. David Tranquillo, was supportive of changes to contract terms and conditions, including rebates and incentives, being explained "in bold print in a size larger than the rest of the offer." Another customer, Mr. Ron Brenize, was supportive of changes that would require suppliers to notify customers of rate increases via mail, e-mail, or on the bill. He added "this would give the consumer time to review and make changes if they desire."

Discussion

The Commission has reviewed the comments filed in regard to its proposals and will address those that necessitate more discussion below. As a preliminary matter, we note that any issue or comment that we do not specifically address has been duly considered and will be denied without further discussion. It is well settled that the Commission is not required to consider, expressly or at length, each contention or argument raised by the parties. *Consolidated Rail Corp. v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); see also, generally, *University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

1. *Amendment to § 54.5(c) Contracts with variable pricing*

Currently, Section 54.5(c) states the following:

(2) The variable pricing statement, if applicable, must include:

52 Pa. Code § 54.5(c)(2).

a. *Comments*

UGIES believes the "if applicable" language is ambiguous and can be misinterpreted. One interpretation may be that a statement on the limits of price variability must be included only "if applicable." As such, UGIES states that existing EGS disclosure statements may not contain a statement that there is no limit on price variability and believes that a revision to the language is warranted to clarify the EGSs with variable prices must clearly and conspicuously explain any limits (or lack thereof) on how a price may change. UGIES Comments at 4. Notably, OCA also made a similar suggestion to this regulation. OCA Comments at 6.

b. *Resolution*

The Commission agrees with UGIES's comments regarding the potential misinterpretation of the current language at § 54.5(c) and has revised the language as follows:

(2) The variable pricing statement[, if applicable,] must include:

52 Pa. Code § 54.5(c)(2).

2. *Additions to § 54.5(c)(2)(ii) Limits on price variability*

As previously discussed, the Commission believes that changes to its regulations regarding the disclosure statements provided to residential and small business customers are required to provide more ample consumer protections and to increase customer awareness and education about the competitive electric marketplace. Specifically, we have concerns that customers are not receiving enough information regarding the rates being charged by EGSs and the circumstances under which those rates

¹ The NRG Retail Northeast Companies include NRG Residential Solutions, Green Mountain Energy Company and Energy Plus Holdings Company.

may vary. Currently, Section 54.5(c)(2)(ii) only requires that the limits on price variability be disclosed. Because many customers on variable-priced contracts during the events of early 2014 either were not enrolled in contracts that contained any sort of pricing limitations or perhaps were unaware of those limitations, or lack thereof, there was significant confusion and frustration with the shopping experience (as evidenced by the thousands of inquiries and complaints we have received on this subject). Due to such a negative turn of events and in the interest of all residential and small business customers participating in the competitive market now and in the future, we believe that more specific direction should be provided to EGSs regarding the level of detail the Commission expects regarding the variability in retail generation supply pricing. As such, the Commission is amending its regulations regarding the disclosure of limits on price variability. Specifically, the following language has been added to § 54.5(c)(2)(ii), Limits on price variability:

(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.

(b) If there is no limit on price variability, the EGS shall clearly and conspicuously state that there is no limit on how much the price may change from one billing cycle to the next.

52 Pa. Code § 54.5(c)(2)(ii).

a. *Comments*

NRG agrees with these changes. NRG Comments at 4. WGES agrees with the addition of § 54.5(c)(2)(ii)(b) but believes that § 54.5(c)(2)(ii)(a) is redundant with § 54.5(c)(2)(ii). WGES Comments at 3.

OCA and NEM question the usefulness of providing a statement regarding the lack of limits on price variability. OCA Comments at 5 and NEM Comments at 4, 5. Specifically, in OCA's opinion, having a statement that contemplates no price limit may not confirm with the Commission's current regulations at § 54.5 that specifically reference price limit. OCA Comments at 6. However, OCA recommends that, if this requirement is maintained, the Commission should provide the exact language to be used by EGSs to convey this message. OCA Comments at 5.

b. *Resolution*

We disagree with OCA and NEM that information regarding the lack of limits on price variability is not helpful to customers. We further disagree with the OCA that allowing a statement or explanation of "no limit" is "taking a step in the wrong direction." OCA Comments at 6. Conversely, we see the clear benefit to customers of requiring an EGS to make it explicitly known if it does not have any limitations on the variable prices charged. This Commission strongly believes that disclosure of this information will be invaluable to customers enrolling in variable-priced contracts with an EGS, since customers will be provided clear, plain language descriptions of any floors and/or ceilings on their rates. Through the promulgation of these regulations, it is the Commission's goal to provide as much information as possible in order to ensure that consumers are protected and are able to see the benefits of a competitive electric market, which

includes a variety of products and offerings. In making these limits (or lack thereof) known in the disclosure statement provided to residential and small business customers, who in many cases are less sophisticated in their knowledge of energy markets and the fluctuations that may exist in these markets, we are ensuring that customers know whether their generation charges could possibly increase drastically, depending on any number of factors, over the life of a contract. As such, the Commission has amended § 54.5(c)(2)(ii) as outlined above.

3. *Addition of § 54.5(c)(2)(iii) Regarding the Provision of the First Billing Cycle's Pricing for Variable Rate Contracts*

While this Commission recognizes that variable-priced contracts will, in fact, vary, we believe it is essential to provide customers with the rate that will be charged for the first billing cycle upon the EGS's enrollment of that customer. We do not believe it is in the best interests of customers to allow an EGS to enroll a customer without that customer knowing the rate, per kilowatt-hour (kWh), he or she will be charged for the first billing cycle of service. As such, the following language has been added as 52 Pa. Code § 54.5(c)(2)(iii):

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

52 Pa. Code § 54.5(c)(2)(iii).

a. *Comments*

WGES notes that while it, like many other EGSs, does provide customers with the rate for the first billing cycle when it has a customer who initially contracts for service, "it is not clear that such a requirement is consistent with all variable pricing models." WGES Comments at 3. NRG supports this change. Specifically, NRG notes that "requiring that suppliers to include the first month's price provides customers a starting point to which future comparisons can be made." NRG Comments at 4. NRG continues that this regulation, as proposed, provides EGSs with needed flexibility to design variable product offerings to meet their needs and the needs of customers, "without restricting the types of product offers that EGSs can offer." NRG Comments at 4.

OCA notes that while this change "could have some benefit," the OCA is concerned that such a requirement is insufficient where introductory rates are often used. As a result, the OCA suggests that there should be specific language added to the regulation to make clear that a variable product's price will change in the second month and that if the price in the first month is "introductory," there be a clear statement added that the price is an introductory price, the length of the introductory period and the price for the first month after the introductory period ends. OCA Comments at 8.

b. *Resolution*

As indicated above, and throughout the Order, the goal of this Final-Omitted Rulemaking is to make changes to EGS disclosure practices that are in the public interest. While we note and applaud WGES's explanation that it provides the rate for the first billing month for customers who initially contract with them, the Commission is aware that not all EGSs operating in the Commonwealth operate in the same way. Accordingly, we believe that this change is needed and will be retained in the Final-Omitted Rulemaking.

In doing so, we also take note of OCA's concern that greater explanation is needed when introductory rates are involved. However, rather than include the language

suggested by the OCA in this regulation regarding the use of introductory rates, we think this type of information and explanation is better left for inclusion in the EGS Contract Summary that will be explained, *infra*. As indicated below, the EGS Contract Summary is a more fluid document, and may be refined with stakeholder input through OCMO.

4. *Amendment to § 54.5(c)(10) Regarding Explanation of Certain Contract Terms*

As previously discussed, this Commission believes it is in the best interest of those customers enrolled in variable-priced contracts to have EGSs provide them with sufficient information regarding variability. Because of the nuances and complexities of the electricity markets and because of the “legalese” often included in disclosure statements provided to customers, we believe it important to provide customers pertinent information in plain, easy-to-understand language that stands apart from the rest of the “fine print” of disclosure statements. As such, the Commission has made the following amendment to § 54.5(c)(10):

(10) 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.

52 Pa. Code § 54.5(c)(10).

5. *Addition of § 54.5(c)(14) Regarding Provision of Information for Variable Rate Contracts*

a. *Addition of § 54.5(c)(14)(i) and (c)(14)(ii) Regarding Provision of Historical Pricing Information*

Currently, when an EGS enrolls customers into a variable-priced contract, it must only provide information in the disclosure statement regarding the basis on which that pricing may vary, any applicable limits on pricing variability and an explanation of any applicable sign-up bonuses, add-ons, limited time offers, other sales promotions and exclusions. See 52 Pa. Code §§ 54.5(c)(2) and 54.5(c)(5). However, due to customer confusion surrounding changes in variable-priced products following the events of early 2014, the Commission believes that customers need more information on variable rate contracts upon enrollment.

Specifically, the Commission believes the provision of historical pricing for an EGS’s variable rate will be beneficial to customers, despite the fact that historical information is not necessarily an indicator of current or future market conditions. While not necessarily indicative of future performance, this information will allow customers to notice any trends (including the range of prices that have been charged) in variable-priced products. Specifically, we proposed the provision of 12 months of historical retail pricing which would allow customers to understand pricing changes that occur due to seasonal changes and fluctuations due to weather conditions and related temperatures. With this information, a customer may be able to determine appropriate times to reduce his or her electricity consumption or to recognize when it is their interest to shop around for alternative generation supply products.

Furthermore, the Commission believes that the provision of historical pricing is common, and perhaps expected, practice when providing variable rate products in other areas. For example, customers purchasing either individual stocks or mutual funds have access to historical prices, for the sake of determining any potential trends, to determine how prices were affected by certain

events (e.g. major weather events; global events; force majeure) or to generally see stock and plan performance over time. Similarly, there is no clear indication or guarantee that past performance can ever be an indicator of current or future pricing.

For these reasons, the Commission proposed the addition of section § 54.5(c)(14). This section stated the following:

(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 12 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 customer rate class and EDC service territory for 12 months, the EGS shall provide the average monthly billed prices for the months available to date.

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

52 Pa. Code § 54.5(c)(14).

i. *Comments*

Multiple parties request that this language be amended and/or clarified. OCA wants to ensure that this information is not misleading and believes a common approach should be utilized. Additionally, OCA believes the highest and lowest price per kWh charged for a rate class and EDC service territory should be provided. Lastly, OCA requests that instead of restricting information to only 12 months, information for between 36 and 60 months be provided, in order to “properly reflect energy pricing changes over a reasonable period of time.” OCA Comments at 9, 10. RESA believes the language should be clarified to make it easier for EGSs to provide information based on meter reads. RESA Comments at 4, 5.

NEM, NRG, IGS and WGES disagree with the provision of historical pricing information as it may be limited in value, confusing, costly, and may be competitively sensitive. NEM Comments at 5; NRG Comments at 5; IGS Comments at 6, 7; and WGES Comments at 4. WGES requests clarification regarding how the average will be calculated. WGES Comments at 4. Constellation requests clarification that EGSs would be providing 12 prices—the average for each month. Constellation Comments at 4.

OCA agrees with the Commission’s inclusion of a requirement that EGSs provide a statement to customers that historical pricing is not indicative of future pricing. OCA Comments at 10. Conversely, WGES believes the reasoning behind such a statement is why historical pricing should not be required. WGES Comments at 4.

ii. *Resolution*

The Commission disagrees with those parties who believe that the provision of historical pricing information is useless to customers. As previously discussed, while we recognize that this information is not indicative of future pricing, we believe customers may use historical pricing information to determine trends related to seasonal changes, global events, etc. Additionally, this information may help a customer determine optimal times to reduce his or her electricity consumption.

While we disagree with OCA that 36 to 60 months’ of historical pricing should be provided by EGSs, as we believe that a 3 to 5 year term is too long and too far removed from current and future conditions to provide

any practical value to customers, we agree that it may be beneficial to provide more than 12 months' information. We believe 24 months of historical information would be an appropriate amount as it allows customers to not only view one full year of seasonal changes, but two. In the Commission's opinion, this change meets OCA's desire that enough information is given to "properly reflect energy pricing changes over a reasonable period of time." As evident in the events earlier this year, one year's seasonal changes may be drastically different from the previous year. As such, a comparison between two separate years will aid customers in recognizing how their electric consumption changes over time and how prices are affected by various events. Therefore, we have revised at § 54.5(c)(14) to reflect that 24 months' of historical information shall be provided by the EGSs.

The Commission also recognizes that there are various types of retail electric price offerings throughout the Commonwealth, as well as a variety of offers from each EGS. Due to the variety of price offerings, a one-size-fits-all approach to calculating the average monthly billed price is neither practical nor useful. In addition, as the retail electric market offerings change and evolve, it is impractical to propose a calculation method that is applicable to all current and future rate designs. We agree with the various commenters that further information is needed regarding ways to provide such information in a consumer-friendly and useful format while maintaining competitive sensitivities. However, we do not believe it appropriate to include such details as to the interpretation and application of this requirement in regulations. As such, we will refer this issue to OCMO to review and provide recommendations to the Commission as to the best manner for providing historical pricing information to customers.

b. *Notifications Regarding Price Changes*

In the March 19, 2014 Secretarial Letter, there were two provisions included in the Annex regarding customer notifications. Specifically, the Commission sought input from stakeholders on the following two provisions in § 54.5(c)(14)(iii) and (iv):

(iii) Information regarding when the customer will be aware of each price change.

(iv) Notice to customers of a rate increase of more than 50% over the prior billing cycle as soon as the EGS becomes aware that such an increase will occur. For customers who have elected to receive electronic communications from the EGS, the notice of the rate increase will be transmitted in the manner chosen by the customer. For all other customers, notice will be provided by direct mail.

52 Pa. Code § 54.5(c)(14)(iii—iv).

i. *Comments*

OCA believes that customers on variable-priced contracts should be provided notification of price changes before being charged such prices. OCA submits that this information be provided at least at the beginning of each month. OCA Comments at 10. NRG and WGES believe that such a provision is burdensome. NRG Comments 6, 7; and WGES Comments at 5. UGIES states that this would require EGSs to provide forward price projections. UGIES Comments at 6.

Comments were also provided regarding the percentage of price increases over the previous billing cycle that should warrant notification to customers. Percentages ranging from 30% to 100% price increases were suggested

as a trigger for customer notification. Citizen Power Comments at 2 and Constellation Comments at 4, 5.

Other parties believe such a requirement, even at 50%, would be impractical and onerous. WGES Comments at 5 and UGIES Comments pg. 7. WGES specifically states that such a provision, if included in regulations would imply that the Commission sanctions a rate increase of a certain percentage as being "reasonable." WGES Comments at 5.

ii. *Resolution*

The Commission declines to include requirements in its regulations regarding the provision of notices surrounding variable pricing changes. While we agree with those parties that stated that EGSs should provide some indication of when customers will realize a price change, we disagree with the inclusion of such a requirement in our regulations at this time. Specifically, we believe this information is best included in the EGS Contract Summary provided to customers. EGSs should include, in the EGS Contract Summary, information regarding not only when a customer may realize a price change, but also when they can expect notification of a price change. For example, an EGS could state that a customer's variable rate may change monthly and the customer will receive notification of the price change during a certain time of the month, once the final monthly meter read is performed, or when the price takes effect (i.e. when the customer receives the bill with that price). The inclusion of this information on the EGS Contract Summary allows the Commission flexibility in amending the template to be more or less specific in its direction regarding the inclusion of such information. Additionally, it allows for other stakeholders to bring concerns to the Commission with a potential resolution completed in a timely fashion.

The Commission also declines to include in its regulations a requirement that EGSs notify customers of certain minimum percentage price increases. While we clearly understand customer confusion and potential frustration with increasing prices, as evident during the winter of 2014, we do not believe it appropriate to set a minimum percentage that would represent a "significant" increase. As accurately stated by WGES, this Commission should not be perceived as condoning certain levels of rate increases—especially those at 50% over the previous bill as reasonable. Instead, this Commission believes that EGSs should be in contact with its customers regularly regarding rates being charged. It is in an EGS's best interest to contact customers regarding potential rate increases in order to retain that person as a customer. We realize this expectation may not have been met during the events earlier this year; however, as recognized by the majority of parties, those events were unforeseeable. We are confident that all parties involved, including the EGSs, have learned from these events and we expect that they will act in good faith and in the best interest of customers going forward.

6. *Amendment to § 54.5(g) Regarding Customer Notices*

The Commission has made minor changes to 52 Pa. Code § 54.5(g) to conform with the requirement that EGSs send two notices to customers, an Initial and Options notice, which indicate a contract's impending expiration or change in service terms for a contract. Currently, the section contemplates that three notices would be sent—in each of the last three bills for supply services. While this language has been in regulations, it is unclear whether the intent could even be met, considering EDCs do most of the billing for EGSs and EDCs do

not allow EGSs to provide any inserts that accompany bills. To prevent confusion going forward and to provide clear direction to EGSs, the Commission has revised this language to indicate that two notices must be provided to customers when informing them of a contract's expiration or change in terms.

In addition, due to the importance of these notices, we have removed any possibility that these notices can be sent along with a customer's bill by instead requiring two separate written notifications for both the Initial and Options Notice. We believe that providing the notices to customers separately from bills allows these notices to stand out and also come directly from the EGS, thus encouraging and reinforcing an EGS-customer relationship. As such, Section 54.5(g) has been amended as follows:

(g) Disclosure statements must include the following customer notification: **"If you have a fixed term contract approaching the expiration date, or whenever we propose to change the terms of service in any type of contract, you will receive two separate written notifications that precede either the expiration date or the effective date of the proposed changes. These notifications will explain your options going forward."**

[(1) **"If you have a fixed term agreement with us and it is approaching the expiration date or whenever we propose to change our terms of service in any type of agreement, you will receive written notification from us in each of our last three bills for supply charges or in corresponding separate mailings that precede either the expiration date or the effective date of the proposed changes. We will explain your options to you in these three advance notifications."**]

52 Pa. Code § 54.5(g).

We had provided similar language in the March 19, 2014 Secretarial Letter in order to get stakeholders' feedback. Notably, though, we had included a provision that retained only notification to be done via "separate mailings" and other than removing the phrase "in each of our last three bills," did not indicate how many notices must be sent.

a. *Comments*

In comments, RESA recommends that this section be amended to allow for delivery of these two notifications "in the form and manner to which the customer agreed in forming the contract." RESA Comments at 5. OCA suggests that removing the requirement of three notifications is a mistake and recommended language to retain "three notifications" in separate mailings that precede either contract expiration or the effective date of a change in terms. OCA Comments at 12, 13.

b. *Resolution*

As indicated above, we have attempted, in part, to address RESA's concern that more flexibility be given to EGSs when providing notices to customers to have them "in a form and manner to which a customer agreed" when forming the contract. Accordingly, we have removed the requirement that the notices be sent "in separate mailings." Notably, however, and as explained in detail below, while we have amended Section 54.10 to allow for the Initial Notice to be sent via electronic communication to customers that consent to that type of delivery, we are still requiring that the Options Notice be sent by mail,

especially in light of the fact that we are retaining the requirement that the envelope containing the Options Notice include messaging to alert customers that "it contains important information regarding the expiration or changes in terms of the customer's electric supply contract."

In response to the OCA's comments that the change contained in § 54.5(g) is seen as going backward, for all the reasons articulated above, we disagree. Again, understanding that a majority of EGS bills are provided by EDCs and that EDCs do not allow EGSs any bill inserts, it is more than likely that EGSs have not been able to carry out their commitment to provide "written notification from us in each of our last three bills for supply changes or in corresponding separate mailings that precede either the expiration date or the effective date of the proposed changes" for some time. This reality, combined with the fact that the proposed regulations in this Final-Omitted Rulemaking that cover required notices before contract expiration or a change in terms only require two notices, further support the Commission's reasoning for only including two notices in this provision instead of the three as suggested by OCA.

Additionally, to maintain consistency throughout our regulations, we have amended this section to replace the word "agreement" with the word "contract."

7. *Addition of § 54.5(i) Creation of an EGS Contract Summary*

With the recent events surrounding the retail electric marketplace, this Commission supports the idea that EGS disclosure statements, as they currently exist, need a clear and concise summary for the benefit of consumers. In order to ensure customers are protected when participating in the competitive retail marketplace, we believe more education is needed regarding the terms of a contract. This idea has been evident in recent actions of the Commission, such as clarifying the presentation of information available on www.PaPowerSwitch.com and updating the definitions of both "variable" and "fixed price" contracts in the Commission's Final Order regarding Guidelines for Use of Fixed Price Labels for Products with a Pass-Through Clause.² In furtherance of this goal, the Commission has added a requirement, at 52 Pa. Code § 54.5(i) which states the following:

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

52 Pa. Code § 54.5(i).

We believe the provision of an EGS Contract Summary will provide, in an easy-to-read, one-page document, the most important terms of the disclosure statement. Many customers either do not read the "fine print" of their disclosure statements or are confused by the "legalese" included therein. The provision of a summary document provides pertinent contract terms in common language, consistent with much of the information provided on the Commission's PaPowerSwitch website, allowing for customers to more easily understand the contract into which they have enrolled. This information is also beneficial if a customer decides to review his or her current EGS terms and compare those terms with other EGS offers.

To aid the EGSs in fulfilling this new requirement, the Commission has created an EGS Contract Summary template separate from the regulations themselves, fol-

² See Guidelines for Use of Fixed Price Labels for Products with a Pass-Through Clause Final Order, at Docket No. M-2013-2362961, entered November 14, 2013.

lowing this Order as Attachment A. This template is meant to provide pertinent information in a clearly understandable “Schumer Box” style³ format for consumers to view, in addition to the disclosure statement they currently receive.⁴ The Commission’s template as proposed for the EGS Contract Summary includes the following headings, with an explanation of the type of information the Commission expects to see in each corresponding box:

- Electric Generation Supplier Information;
- Price Structure—fixed vs. variable; inclusion of an explanation of the limits on variability; information regarding notification of price changes;
- Generation/Supply Price;
- A Statement Regarding Savings—if applicable, a statement that the supply price may not always provide savings to the customer;
- Deposit Requirements;
- Incentives;
- Contract Start Date;
- Contract Term/Length;
- Cancellation/Early Termination Fees;
- Renewal Terms; and,
- EDC Information.

The Commission recognizes that many of the requirements in the EGS Contract Summary Template may not be applicable to certain types of contracts. For example, some EGS contracts guarantee a percentage of savings in relation to the EDC’s PTC. However, most contracts do not have such guarantees. As such, an EGS would explicitly state, in plain language, that it does not guarantee that a customer will be saving money every month/billing cycle under this contract.

Because some terms outlined in the EGS Contract Summary template provided herein may not be relevant to all contracts, EGSs are required to include those terms, as listed above, which are applicable to the contract being summarized. If a certain category of information is not applicable, the EGS may remove it from the template for that contract summary.

While we anticipate that the EGS Contract Summary will be incorporated into the EGS application going forward as an addendum to the disclosure statement template and have enumerated this fact in the regulations by stating EGSs “shall provide, with the disclosure statement, an EGS Contract Summary in a format provided by the Commission,” we also want to ensure that the EGS Contract Summary is useful and can be made available to consumers as soon as possible going forward. Accordingly, we direct OCMO to provide further direction to currently licensed EGSs serving residential and/or small business customers regarding the submission of EGS Contract Summaries to the Commission.

8. *Addition of § 54.10 Notice of Contract Expiration or Change of Terms for Residential and Small Business Customers*

The Commission believes that one of the primary ways in which to protect residential and small business con-

³ A Schumer Box is template used by the credit card industry to present certain terms and conditions. This template is named after Senator Charles Schumer (NY) who was responsible for the legislation associated with the requirements for outlining credit card terms.

⁴ Attachment A is an attachment to this Final-Omitted Rulemaking Order and is not an attachment to Annex A. As such, the EGS Contract Summary template provided herein is not included in the revised regulations.

sumers when participating in the competitive retail electric market is to ensure that these customers are educated on marketplace operations and on their options when moving around in the market (i.e. choosing different products with the same EGS; switching from one EGS to another; switching from default service to EGS service; or switching from EGS service to default service). As previously discussed, in 2010, after working with numerous stakeholders and reviewing comments, the Commission adopted Interim Guidelines that outlined requirements for the EGS provision of two notices to customers regarding the expiration of or change in terms of an electric supply contract. These notices are intended to provide customers with important information about their options prior to the expiration of or change in terms of their current contracts for generation supply. Because inaction will likely lead to placement on a variable rate, it is essential that customers enrolled in a fixed-rate contract be notified prior to that contract’s pending expiration or change in terms.

Prior to the expiration or change in terms of a fixed-rate contract (or any fixed-term contract for that matter), customers need to make a decision whether to remain with their current EGS, choose a new EGS, or return to default service. In order to aid customers in making such a decision, the Interim Guidelines required EGSs to provide an Initial Notice of the contract expiration, or to a change in contract terms, between 52 and 90 days before that contract expires. Additionally, the EGSs are required to provide an Options Notice, which outlines the actions a customer may take, no less than 45 days in advance of the contract expiration or change in terms. To codify these Interim Guidelines and in order to ensure EGS compliance with these requirements, we have added Section 54.10—Notice of Contract Renewal or Change in Terms, to our regulations. Due to the length of this addition, we will not reiterate the language here and, instead, refer readers to Annex A, which outlines all of the regulatory changes, including the addition of 52 Pa. Code § 54.10, resulting from this Order. However, in this section of the order, we would like to highlight certain provisions that differ from the Interim Guidelines.

a. Amendment to the Timing of the Initial and Options Notices

The Commission’s Interim Guidelines stated: (a) An Initial Notice shall be provided to each affected customer 52 to 90 days prior to the expiration date of the fixed term⁵ agreement or the effective date of the proposed change in terms; and (b) The Options Notice shall be provided to each affected customer at least 45 days prior to the expiration date of the fixed term agreement or the effective date of the proposed change in terms.

We believe that customers need to be notified prior to the expiration of their existing contract or prior to a change in the terms and conditions of that contract in a fashion that gives them both the information and time to act. Having an EGS provide an Initial Notice 90 days before the contract expires loses the implied urgency. Similarly, customers who receive their Options Notice 45 days before expiration may act immediately and incur an early cancellation fee because they left their existing EGS too soon. By requiring the EGSs to send the Initial and Options Notices closer to the expiration or change in terms of a contract, it will make customers more cognizant of the upcoming change and will likely force custom-

⁵ Fixed-term agreements are agreements that may offer a fixed-price or a variable-price over a specific period of time, such as 12 months, but is not intended to apply to a rolling month-to-month contract that has no set term length or expiration date.

ers to not delay in making an affirmative choice to either remain with their existing EGS, switch to alternative EGS or return to default service. As such, we have amended the language from the Interim Guidelines to direct that the Initial Notice be provided to the customer 45 to 60 days prior to the expiration of the contract and that the Options Notice be provided to the customer no less than 30 days prior to the expiration or change in terms of the contract.

b. Amendment to the Provision of the Initial and Options Notices

Currently, Section § 54.5(g) states: “If you have a fixed term agreement with us and it is approaching the expiration date or whenever we propose to change our terms of service in any type of agreement, you will receive written notification from us in each of our last three bills for supply charges or in corresponding separate mailings that precede either the expiration date or the effective date of the proposed changes. We will explain your options to you in these three advance notification.” See 52 Pa. Code § 54.5(g). In the 2010 Interim Guidelines, the Commission required the provision of an Initial Notice to customers between 52 and 90 days prior to the expiration or change in terms of a contract and the provision of an Options Notice to customers at least 45 prior to the expiration or change in terms of a contract. Due to the importance of the notices, the Interim Guidelines stated that the notices will be mailed to customers, separately from those customers’ electric bills.

i. Comments

Multiple parties believe that the EGSs should be allowed to use electronic means to transmit these notices, should a customer request such methodology. RESA Comments at 7; Constellation Comments at 5.

ii. Resolution

The Commission agrees that many customers may request notifications via email, text messaging or other electronic means. As such, we will allow EGSs to provide the Initial Notices to customer via electronic communication, using the format chosen by the customer. We would like to make it clear that this Commission does not believe that simply posting messaging on a website, such as the EGS’s homepage, would constitute notification. We expect the EGS to actively reach out to the customer via the electronic means (e.g., e-mail or text message) requested by that customer.

While the Commission will allow the Initial Notice to be communicated electronically, we still believe standard U.S. mail is an effective means of communicating important information to customers, especially in light of the fact that we are retaining the requirement that the envelope containing the Options Notice include messaging to alert a customer that it contains important information regarding that customer’s contract. Additionally, the potential utilization of electronic means for delivering the Initial Notice and requiring the Options Notice to be delivered via first class mail provides for multiple avenues through which to reach a customer. As such, we will require EGSs to provide the Options Notice via first class mail. We have amended the language in § 54.10(1).

c. Amendment to Cancellation Fee Information in the Initial Notice

The Commission proposed the addition of § 54.10(1)(vi) which stated:

(vi) A statement indicating whether the existing fixed term contract has a cancellation fee, and an explanation of the fee amount and how to avoid the fee, if possible.

52 Pa. Code § 54.10(1)(vi).

i. Comments

RESA requests that the language be amended to include the option for customers to select a different product from their existing EGS. RESA Comments at 7.

ii. Resolution

The Commission maintains its position that customers nearing the end of a fixed-term agreement need to be made aware that their existing contract has a cancellation fee. We agree with RESA that customers should be notified that they can choose a different product that is being offered by their existing EGS, as well as having the ability of choosing to purchase supply from an alternative EGS or return to default service. Therefore, we have amended the language at § 54.10(1)(vi) to state the following:

(vi) A statement indicating whether the existing fixed term 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, can choose an alternative EGS or can return to default service.

52 Pa. Code § 54.5(1)(vi).

d. Amendment to Information in Options Notice re: Customer’s Options

Currently, the Commission’s Interim Guidelines provide for: A statement advising the consumer of the specific changes being proposed by the EGS and informing the customer of its options, including the customer’s ability to select another EGS within a certain time period, accept the proposed changes, or return to default service. The Commission proposed the inclusion of this language in its regulations.

i. Comments

Constellation notes that customers should be encouraged to explore all of their options, including options for service from their existing EGS. Constellation Comments at 5, 6.

ii. Resolution

We agree with Constellation that the option for a customer to accept a new product from his or her existing EGS should be included and have revised the language to state the following:

(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.

52 Pa. Code § 54.10(2)(i)

e. Amendment to Provide Customers with First Billing Cycle’s Rate

As noted previously, this Commission recognizes that variable-priced contracts will, in fact, vary, but we believe it is essential to provide customers with the rate that will be charged for the first billing cycle of service. In the instances where a customer is enrolled in a fixed-term

contract that is nearing expiration or a change in terms, we believe that customer must know the first billing cycle's per kWh rate. Specifically, when EGSs provide the Options Notice at least 30 days in advance of the expiration or change in terms of the contract, that EGS should provide the new rate the customer will be charged the first billing cycle following the expiration or change in terms. As such, we proposed that customers who have not responded to the notices provided by EGSs and will be converted to a month-to-month or to another fixed-term contract be provided the first billing cycle's per kWh rate.

The Commission also proposed for those customers enrolled in fixed-term contracts who do not respond to the Initial or Options Notices and will be enrolled in a month-to-month variable-priced contract, that EGSs provide to customers 30 days' notice in advance of any subsequent price change.

i. Comments

Constellation requests that the first billing cycle's price be provided closer to when that rate will be charged. Specifically, Constellation proposes that EGSs provide the first billing cycle's rate to customers seven to 14 days in advance, instead of 30 days in advance via the Options Notice. Constellation states that the monthly rate for the upcoming month is typically established a few weeks in advance of the month. Constellation Comments at 6.

Multiple parties provided comments regarding the proposed notification of rate changes for those customers who are entered into a month-to-month contract upon expiration of their fixed-term contract. RESA, NEM and UGIES state that the providing notifications of rate changes as suggested 30 days in advance of the rate change would be costly, burdensome and may confuse customers, which could have a negative impact on both variable price products and retail choice. RESA Comments at 8; NEM Comments at 8, 9; UGIES Comments at. 11, 12.

While first suggesting that this requirement should not be maintained, RESA notes that, if the Commission would decide to make such a requirement, those notifications should be transmitted electronically if agreed upon by the customer. RESA Comments at 8. NRG also states that the requirement should not be imposed if the rate change benefits the customers or if an EGS already has limitations on the variability of its rate(s). NRG Comments at 8.

ii. Resolution

The Commission disagrees with Constellation that the provision of the first billing cycle's rate should be provided seven to 14 days in advance instead of 30 days in advance via the Options Notice. The purpose of the Options Notice is to provide a customer with information regarding their options in advance of the expiration of his or her fixed-term contract. The intent is to encourage a customer to take action, whether it be enrolling in a new product with his or her existing EGS, enrolling with an alternative EGS or returning to default service. As is the case when a customer initially shops, we believe the customer should be presented with, at a minimum, the first billing cycle's rate he or she will be charged. This information is most appropriate in the Options notice.

Upon review of stakeholders' comments, consumer complaints and feedback provided by a variety of parties, the Commission maintains its position that 30 days' notice of any pricing changes should be provided to those customers whose fixed-term contract has expired or has had a change in terms and are now enrolled in a variable-priced month to month contract. Because many of the customers

enrolled in fixed-term contracts have affirmatively chosen a fixed rate, these customers may need more information regarding the potential variability in rates they may experience upon contract expiration or when the terms of the contract are changed. Therefore, the following language has been included at § 54.10(2)(ii)(A)(I):

(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.

52 Pa. Code § 54.10(2)(ii)(A)(I).

However, we recognize the comments provided by the EGSs who indicated that providing notice only via first class mail to all such customers may be costly and burdensome. As such, customers who did not respond to either the Initial or Options Notices, whose fixed-term contract has been converted to a month to month contract and who have elected to receive electronic communications from the EGS will be able to receive price change notifications transmitted in the manner chosen by the customer. For all other applicable customers, the price change notices will be provided by first class mail. We would like to make it clear that the Commission does not believe that simply posting messaging on a website, such as the EGS's own website, would constitute compliance with this requirement. We expect EGSs to actively reach out to these customers and provide notice of price changes via the means requested by that customer. Accordingly, the following language has been included at § 54.10(2)(ii)(A)(II):

(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.

52 Pa. Code § 54.10(2)(ii)(A)(II):

f. Inclusion of Information on Options Notice Envelope

We recognize the fact that due to the cost, popularity and effectiveness of mail advertising for EGS products, customers tend to receive significant amounts of mail at any point in time and may disregard general notifications provided by any number of entities, including their EGS. As such, this Commission believes it is in the best interest of those customers on fixed-term contracts nearing expiration or a pending change in terms to be made clearly aware of this upcoming change. To do this, the Options Notice provided by EGSs to customers must be distinguishable from the other mailings a customer may receive. As such, we proposed that the front of the envelope used in the distribution of the Options Notice should include, language that the mailing contains important information regarding the expiration or changes in terms of a customer's electric supply contract.

i. Comments

Constellation encourages the Commission to review the New York Public Service Commission's proceeding related to similar issues and recommends that the Commission adopt the same universal statement as utilized in New York. Additionally, Constellation requests that EGSs be allowed the flexibility to provide the messaging through the clear window portion of a window envelope, if practical. Constellation Comments at 7, 8.

Citizen Power requests that the language indicate that the expiration or changes in terms of the contract may modify the rates paid by the customer. Citizen Power Comments at 2.

ii. *Resolution*

We maintain our position that language regarding the expiration or change in terms of a customer's fixed-term contracts should be clearly visible on the envelope distributing the Options Notice in order to make the notice more distinguishable from other items of mail. However, we do not intend a requirement that will be overly burdensome to EGSs to effectuate if they have similar processes that can achieve the same effect—such as providing messaging visible in the transparent window portion of the envelope, as Constellation suggests. To achieve this effect, we are requiring information that alerts the customer as to the importance and purpose of the mailing to be “clearly visible” on the front of envelope. This change will accommodate either messaging on the envelope as originally proposed or messaging in the transparent window as long as it is clearly visible on the front of the envelope.

Regarding the exact wording of the messaging that needs to be visible on the envelope, we decline to make any specific recommendations in this proceeding. Accordingly, EGSs are free to use language from other jurisdictions, as long as it fulfills the intent of the regulation—which is to make known that the Options Notice contains important information regarding the expiration or change in terms of a customer's electric supply contract. Accordingly, the Commission has included the following language in order to attain this objective:

(vi) 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.

52 Pa. Code § 54.10(2)(vi).

g. Inclusion of Information Regarding Actions to be Taken Should a Customer not Respond to EGS Notices

Lastly, as outlined in the Interim Guidelines, we believe direction is needed regarding actions to be taken when customers fail to respond to either of the two required EGS notices. Because the intent of the competitive market is to encourage customers to shop for their retail electricity supply, we do not believe it is appropriate for a customer to be reverted to default service should that customer fail to respond to either of the two EGS-provided notices. Instead, and as indicated in the Interim Guidelines, we believe that customers with a fixed-term contract who fail to respond to the EGS notices should be enrolled in one of two types of contracts. The first would be to convert that customer to a month-to-month contract with no cancellation fee. This month-to-month contract will remain in place until the customer affirmatively enters into a new contract with the existing EGS, a new EGS, or returns to the default service provider. The second option would be for the customer to be enrolled in a new fixed-term contract that includes a customer-initiated cancellation provision and does not include cancellation fees.

However, in allowing that EGS to retain these customers, the Commission believes certain customer protections should be in place, which is why cancellation fees may not be imposed on these customers, should they choose to switch suppliers or return to default service while enrolled in one of these two contracts. To memorialize this language from the Interim Guidelines and in order to ensure EGS compliance with these requirements, we have added Section 54.10(3) to our regulations. Due to the length of this addition, we will not reiterate the language here and, instead, will refer readers to Annex A, which

outlines all of the regulatory changes, including the addition of 52 Pa. Code § 54.10(3), resulting from this Order.

8. *Implementation*

EGSs shall implement these regulatory changes within 30 days of the publication in the *Pennsylvania Bulletin*.

Process and Justification for Promulgating Final-Omitted Regulations

Under the Public Utility Code, the Commission may promulgate regulations as may be necessary and proper in the exercise of its powers and performance of its duties. 66 Pa.C.S. § 501(b). In promulgating regulations, the Commission must adhere to the statutory requirements of the Regulatory Review Act, 71 P.S. §§ 745.1 et seq., the Commonwealth Documents Law, 45 P.S. §§ 1201 et seq., and the Commonwealth Attorneys Act, 71 P.S. § 732-204. A Commonwealth agency enjoys wide discretion in establishing rules, regulations, and standards; this discretion will not be overturned by a reviewing court absent proof of fraud, bad faith, or a blatant abuse of discretion. *Logsden v. Dept. of Educ.*, 671 A.2d 302, 305 (Pa. Cmwlth. 1996). In order for a regulation to have the force of law binding on the judiciary, the agency must: 1) act pursuant to the agency's governing statute, 2) adhere to proper procedure, and 3) issue a reasonable regulation. *Rohrbaugh v. Pa. Pub. Util. Comm'n*, 727 A.2d 1080, 1085 (Pa. 1999).

In proposing a new or modified regulation, an agency generally must provide notice to the public of its proposed rulemaking and an opportunity for the public to comment. 45 P.S. § 1201; *Naylor v. Com., Dept. of Public Welfare*, 54 A.3d 429, 434-6 (Pa. Cmwlth. 2012). The purpose behind this formal notice and comment rulemaking is to provide “affected parties a democratic process for participation in the formulation of standards which govern their conduct and increases the likelihood of administrative responsiveness to their needs and concerns.” *Dept. of Enviro. Resources v. Rushton Min. Co.*, 591 A.2d 1168, 1171 (Pa. Cmwlth. 1991). Furthermore, this formal process “enables the agency to obtain information relevant to the proposed rule and facilitates the consideration of alternatives, detrimental effects, criticism, and advice, thereby contributing to the soundness of the proposed regulation.” Id.

An agency may forgo those formal notice and comment procedures attendant to a proposed rulemaking by promulgating Final-Omitted Regulations. 45 P.S. § 1204. The Commonwealth Documents Law, Section 1204 of the Pennsylvania Statutes, 45 P.S. § 1204, in discussing scenarios that justify Final-Omitted Regulations, provides:

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

- (1) The administrative regulation or change therein relates to: (i) military affairs; (ii) agency organization, management or personnel; (iii) agency procedure or practice; (iv) Commonwealth property, loans, grants, benefits or contracts; or (v) the interpretation of a self-executing act of Assembly or administrative regulation; or
- (2) All persons subject to the administrative regulation or change therein are named therein and are either personally served with notice of the proposed promulgation, amendment, or repeal or otherwise have actual notice thereof in accordance with law; or

(3) The agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the order adopting the administrative regulation or change therein) that the procedures specified in §§ 201 and 202 are in the circumstances impracticable, unnecessary, or contrary to the public interest.

45 P. S. § 1204.

Pertinently, an agency may forgo traditional notice and comment procedures if the agency finds for good cause those procedures are “impracticable, unnecessary or contrary to the public interest.” 45 P. S. § 1204(3). To demonstrate good cause that the formal notice and comment rulemaking process is unnecessary, an agency must include a “finding and a brief statement of the reasons . . . in the order adopting the administrative regulation or change.” 1 Pa. Code § 7.4.

Here, the Commission has determined that Final-Omitted Regulations revising our customer information regulations, 52 Pa. Code § 54.5, and adding 52 Pa. Code § 54.10 regarding customer notices, are necessary to serve and protect the public interest. Based upon the circumstances of this situation, specifically, the unusually high electric supply bills recently incurred by customers resulting from variable-priced contracts and fluctuations in wholesale energy markets, the exception at § 1204(3) is, in our opinion, applicable.

Good Cause Supports Commission Promulgation of Final-Omitted Regulations

The Commission finds good cause that undergoing the traditional notice and comment procedures for these regulations is impracticable, unnecessary, and contrary to the public interest. See 45 P. S. § 1204(3). Importantly, pursuant to Section 1204(2) all EGSs affected by these regulations will be served and provided with actual notice. See 45 P. S. § 1204(2).

Formal notice and comment procedures are impracticable and contrary to the public interest because customers are being affected now with extraordinarily high bills and may be affected again as early as this summer due to peak demand periods and potential fluctuations in the wholesale energy market. The Commission seeks to amend its regulations as soon as practicable to ensure customers are being provided with the necessary information to make informed decisions when shopping in Pennsylvania’s competitive retail electricity market. Specifically, these Final-Omitted Regulations will provide increased protection to customers and more adequately inform customers about the scope and limits of rate variability, the terms and conditions of an EGS contract, and the customer’s options prior to and after the expiration of their current contract for generation supply. Any delay in requiring EGSs to enhance disclosure statements provided to customers, such as a change in contract terms and notice of contract renewal, is contrary to public interest.

Formal notice and comment procedures are unnecessary because there have been and continue to be substantial channels for formal and informal public notice and comment. The public has voiced their comments and concerns through the filing of nearly 500 formal complaints with the Commission’s Secretary’s Bureau between January 1, 2014 and March 25, 2014, and the filing of over 5,600 informal complaints with the Commission’s Bureau of Consumer Services (BCS) regarding EGSs. In addition, BCS has answered more than 9,000 inquiries on the subject. Moreover, the media has raised this issue

throughout the Commonwealth. Additionally, the Commission has received a number of inquiries and comments from the Legislature regarding these events. As such, the public is indeed on high notice and constituents have reached out to their legislators, who are discussing legislative amendments to achieve clear and more expansive disclosure of contract terms. Throughout February and March of this year, the Commission has held numerous conference calls and meetings with interested parties, including the Office of Attorney General, the Office of Consumer Advocate, customers, suppliers, utilities, legislative committees, and the media.

As discussed, the Commission has already accepted and reviewed formal comments on advance notification by an EGS of impending changes affecting customer service via a previous Commission order. See September 2010 Interim Guidelines, Docket Nos. M-2010-2195286 and M-0001437. In the September 2010 Interim Guidelines, 12 parties filed comments, including the OCA, OSBA, Pennsylvania Utility Law Project (PULP), PPL Electric Utilities Corporation (PPL), PECO Energy Company (PECO), National Energy Marketers Association (NEMA), Pennsylvania Energy Marketers Association (PEMC), Washington Gas & Electric Services, Inc. (WGES), BlueStar Energy Solutions (BlueStar), Dominion Retail, Inc. (Dominion), FirstEnergy Solutions Corporation (FES), and Direct Energy Services, LLC (Direct Energy).

These regulations are, for the most part, simply codifying notice guidelines that have been in operation since 2010. We have over three years of experience with suppliers operating under these guidelines; and that experience for the most part has been positive with few compliance problems. However, our guidelines are sometimes overlooked by suppliers since guidelines do not have the force of law like regulations. Therefore, it is now appropriate to promulgate these regulations, which will be more visible and enforceable. While additional comments obtained through a proposed rulemaking have the potential to provide more insight and analysis (especially on generally-related issues of electric supply competition), additional comments for the limited purposes of this rulemaking—protecting customers by requiring EGSs to provide enhanced disclosure statements—are unnecessary. Both governmental and other stakeholder resources will be saved by forgoing the extensive formal notice and comment rulemaking process. Accordingly, the public interest is better served through administrative streamlining in this Final-Omitted Rulemaking pursuant to the Commonwealth Documents Law, 45 P. S. § 1204.

In an effort to obtain comments on proposed changes to our Disclosure Regulations, on March 19, 2014, the Commission issued a Secretarial Letter alerting affected parties of the 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. 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, (Secretarial Letter served Mar. 19, 2014) (Secretarial Letter). This Secretarial Letter noted that while some amendments would codify, with modifications, existing contract renewal/change in terms notice requirements, other changes raise new issues that had not previously been considered. As a result, the Commis-

sion requested comments on its proposed regulations in order to give an opportunity for those entities most affected to provide feedback.

The Commission received comments related to these and other issues regarding the effect the proposed amendments would have on the Commission's existing regulations and EGS operations. Comments were filed by the following parties: Representatives Godshall and Daley, OCA, OSBA, Citizen Power, UGIES, WGES, Constellation, IGS, RESA, NRG, Alphabuyer, NEM and FES.

The Commission also received a letter, dated March 18, 2014, from Senators Tomlinson and Boscola suggesting that our regulations regarding disclosure statements be revised immediately. The letter also stated that customers should be provided with more information regarding the prices to be paid and the variability that may occur if enrolled in a variable-price contract.

In addition, two residential customers e-mailed either the Commission's website or www.PaPowerSwitch.com with comments regarding the Commission's proposed regulatory changes to EGS disclosure statements, as well as changes to customer notices regarding "contract renewals" and "changes in terms."

One customer, Mr. David Tranquillo, was supportive of changes to contract terms and conditions, including rebates and incentives, being explained "in bold print in a size larger than the rest of the offer." Another customer, Mr. Ron Brenize, was supportive of changes that would require suppliers to notify customers of rate increases via mail, e-mail, or on the bill. He added "this would give the consumer time to review and make changes if they desire."

WGES, OSBA, OCA, Representative Godshall and Representative Daley expressed concern with the Commission's decision to move forward with drafting this regulation using the Final-Omitted Rulemaking process. WGES Comments at 2, 7, OSBA Comments at 1, 2, and OCA Comments at 1-3. Conversely, UGIES, Alphabuyer, Constellation, Senator Tomlinson, and Senator Boscola commended the Commission for immediately moving forward with revising the disclosure regulations.

We agree with the comments of UGIES, Alphabuyer, Constellation and Senators Tomlinson and Boscola that it is in the public interest to proceed with this rulemaking using the Final-Omitted Rulemaking process. Senators Tomlinson and Boscola requested that the Commission, "Immediately begin revising the regulations addressing the notification electric suppliers must provide to customers regarding variable rates and the end of fixed rate offerings." Tomlinson/Boscola letter at pg. 1. As the Commission discussed previously in this Final-Omitted Rulemaking, the Commission finds good cause that undergoing the traditional notice and comment procedures for these regulations is impracticable, unnecessary, and contrary to the public interest. In light of the recent high number of informal and formal complaints filed before the Commission, the possible damage these complaints will have on the ongoing success and operation of the competitive retail electric market in the Commonwealth and the more important need for residential and small commercial customers to enter into contracts which they fully understand, the Commission believes it is essential to the public interest to act promptly and expeditiously to amend these regulations using the Final-Omitted process.

Additionally, as previously mentioned, the Commission has undertaken many recent immediate measures to ensure that customers are better educated about their

options when participating in the competitive retail electric market. We have provided enhanced information to explain price fluctuations in variable rates and the differences between fixed versus variable rates on the Commission's website and PaPowerSwitch.com. We have also provided information and guidance via press releases and other media outlets to educate customers with their options when presented with a high billing complaint. However, while the Commission believes those initial steps were informative, as discussed, we believe the public interest is even better served by the promulgation of these Final-Omitted regulations included herein.

Through its Retail Markets Investigation and OCMO, the Commission has created a "democratic process for participation" in the formulation of standards governing retail electricity shopping at 52 Pa. Code §§ 54.1—54.9 "to increase [] the likelihood of administrative responsiveness" to the needs and concerns of stakeholders and interested parties. See *Rushton Min. Co.*, 591 A.2d at 1171. Therefore, this Final-Omitted Rulemaking still meets the intent of a de novo rulemaking with formal notice and comment without risking promulgation of an agency regulation not in the public interest.

Statutory Safeguards Prevent Promulgation of an Agency Regulation not in Public Interest

Importantly, Final-Omitted Regulations are subjected to the same review before IRRC as review of final-form regulations. See 71 P.S. §§ 745.5a—745.6. IRRC, the legislative committees, and the Attorney General may still comment on the final-form regulation. 71 P.S. § 745.5a(c). IRRC or a committee may disapprove the Final-Omitted Regulation. See 71 P.S. §§ 745.5a—745.7. IRRC may also request and receive public comments up to 48 hours prior to IRRC's public meeting where the final-form regulation will be ruled upon. 71 P.S. § 745.5a(j). If IRRC does not disapprove the Final-Omitted Regulation within its statutory time frame, the Final-Omitted Regulation will be deemed approved. 71 P.S. § 745.5a(e). An agency may accept revisions to the Final-Omitted Regulations, as recommended by IRRC or a committee. 71 P.S. § 745.5a(g). An agency may also toll the time for review in order to provide the agency with sufficient time to make recommended changes suggested by IRRC or the committees. See *id.* An agency may also withdraw a Final-Omitted Regulation. Upon receiving a report from the agency regarding revisions to the Final-Omitted Regulations, IRRC will deliver an approval or disapproval order to the committees for consideration by the General Assembly and the Governor, both of which retain powers to prevent promulgation of the agency's Final-Omitted Regulation. See 71 P.S. § 745.7(c.1)—(d). Therefore, statutory safeguards are in place to prevent promulgation of an unreasonable agency regulation not in the public interest.

Regulatory Review

Under section 5.1(c) of the Regulatory Review Act (71 P.S. § 745.5a(c)), on April 8, 2014, the Commission submitted a copy of the final-omitted rulemaking and a copy of a Regulatory Analysis Form to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House Consumer Affairs Committee and the Senate Consumer Protection and Professional Licensure Committee. On the same date, the regulations were submitted to the Office of Attorney General for review and approval under the Commonwealth Attorneys Act (71 P.S. §§ 732-101—732-506).

Under section 5.1(j.2) of the Regulatory Review Act, on May 21, 2014, the final-omitted rulemaking was deemed

approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on May 22, 2014, and approved the final-omitted rule-making.

Conclusion

The revisions made to the Disclosure Statement Regulations, including the addition of the EGS Contract Summary and Section 54.10, Notice of Contract Expiration or Change in Terms, are intended to increase consumer protection and better inform customers about the scope and limits of rate variability, the terms and conditions of an EGS contract, and a customer's options prior to and after the expiration of their current contract for generation supply. The regulations, as now revised after consideration of comments from affected parties, provide for enhanced information from EGSs to customers who enter into variable-priced contracts and for the inclusion of information about what will happen to a customer's current supply contract if the customer does not respond to either the Initial or Options Notices. This information will 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. We have recently seen first-hand the frustrations of customers enrolled in variable-priced contracts who are not sufficiently aware of potentially significant price increases due to fluctuating wholesale market conditions. By updating these regulations to provide customers with accurate, timely pricing information and history 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.

The Commission believes that this Final-Omitted Rule-making is prudent and is essential to the public interest. For the previous reasons, the exceptions to the notice of proposed rulemaking requirements enunciated in § 1204(3) are applicable in the instant case. Accordingly, under sections 501 and 1501 of the Public Utility Code (66 Pa.C.S. §§ 501 and 1501); the Commonwealth Documents Law (45 P. S. § 1204); the Regulatory Review Act (71 P. S. §§ 745.1 et seq.); the Commonwealth Attorneys Act (71 P. S. § 732-204); and the regulations promulgated at 1 Pa. Code § 7.4, the Commission adopts the regulations at 52 Pa. Code §§ 54.5 and 54.10, as set forth in Annex A; *Therefore,*

It Is Ordered That:

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

2. The Secretary shall submit this order, Attachment A and Annex A to the Attorney General for review and approval and to the Governor's Budget Office for fiscal review.

3. The Secretary shall submit this order, Attachment A and Annex A to the legislative standing committees and to the Independent Regulatory Review Commission for review and approval.

4. The Secretary shall duly certify this order, Attachment A and Annex A and deposit them with the Legislative Reference Bureau for final publication upon approval by the Independent Regulatory Review Commission.

5. The final regulations become effective upon publication in the *Pennsylvania Bulletin*.

6. The Commission's Office of Competitive Market Oversight provide further direction to currently licensed EGSs serving residential and/or small business customers regarding the submission of EGS Contract Summaries to the Commission.

7. This order, Attachment A and Annex A, revising the regulations appearing in Title 52 of the *Pennsylvania Code* Chapter 54 relating to Electricity Generation Customer Choice, be served on all licensed Electric Generation Suppliers, the Bureau of Investigation and Enforcement, the Office of Consumer Advocate, the Office of Small Business Advocate, and those parties who submitted comments at Docket Nos. L-2014-2409385 and M-2010-2195286.

8. The Office of Competitive Market Oversight shall electronically send a copy of this final-omitted rulemaking order, Attachment A and Annex A to all persons on the contact list for the Committee Handling Activities for Retail Growth in Electricity, and to all persons on the contact list for the Investigation of Pennsylvania's Retail Electricity Market, order entered April 29, 2011 at Docket No. I-2011-2237952.

9. A copy of this final-omitted rulemaking order, Attachment A and Annex A shall be posted on the Commission's web site at the Office of Competitive Market Oversight web page and on the web page for the Investigation of Pennsylvania's Retail Electricity Market.

10. The contact persons for this matter are Matthew Hrivnak in Bureau of Consumer Services (717) 783-1678 and Patricia Wiedt in the Law Bureau (717) 787-5755.

ROSEMARY CHIAVETTA,
Secretary

(Editor's Note: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 44 Pa.B. 3470 (June 7, 2014).)

Fiscal Note: 57-305. No fiscal impact; (8) recommends adoption.

**Attachment A
Electric Generation Supplier Contract Summary**

<i>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>Generation / Supply Price</i>	\$/kWh or ¢/kWh. If variable rate, the first billing cycle's rate. Any introductory rate with length of term.
<i>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>	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 Term / 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>Renewal Terms</i>	Treatment of customer at end of contract. Timing of notices. No cancellation/early termination fees. In plain language.
<i>Electric Distribution Company Information</i>	Name, telephone number, website, etc. Plain language statement that EDC is responsible for distribution charges, as well as any emergencies/outages/etc.

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

§ 54.5. 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) Generation charges shall be disclosed according to the actual prices.

(2) The variable pricing statement must include:

(i) Conditions of variability (state on what basis prices will vary).

(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.

(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.

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

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

(4) The length of the agreement, which includes:

- (i) The starting date.
- (ii) The expiration date, if applicable.

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

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

(7) The cancellation provisions, if applicable.

(8) The renewal provisions, if applicable.

(9) The name and telephone number of the default service provider.

(10) 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.

(11) Customer contact information that includes the name of the EDC and EGS, and the EGS's address, telephone number, Commission license number and Internet address, if available. The EGS's information must appear first and be prominent.

(12) A statement that directs a customer to the Commission if the customer is not satisfied after discussing the terms of service with the EGS.

(13) The name and telephone number for universal service program information.

(14) For contracts with variable pricing, the EGS must 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.

(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 and shall be defined in accordance with the "Common Electric Competition Terms." Definitions for each of the nonbasic services, if applicable, are required. The definition section of the bill 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 notification: "If you have a fixed term contract approaching the expiration date, or whenever we propose to change the terms of service in any type of contract, you will receive two separate written notifications that precede either the expiration date or the effective date of the proposed changes. These notifications will explain your options going forward."

(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.

§ 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 term 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 term 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 term 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 term contract.

(vi) A statement indicating whether the existing fixed term 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.

(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 term 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 term 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.

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

(i) A fixed term 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 term contract, as long as the new contract includes a customer-initiated cancellation provi-

sion 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.

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PENNSYLVANIA PUBLIC UTILITY COMMISSION

[52 PA. CODE CH. 57]

[L-2014-2409383]

Standards for Changing a Customer’s Electricity Generation Supplier

The Pennsylvania Public Utility Commission (Commission), on April 3, 2014, adopted a final-omitted rule-making order amending regulations regarding standards for changing a customer’s electricity generation supplier.

Executive Summary

The Commission has issued a Final-Omitted Rule-making Order to amend and add regulations at 52 Pa. Code §§ 57.171—57.178 that address the process for transferring a customer’s account from a default service provider to a competitive electric supplier (EGS or supplier) and from one supplier to another supplier. The regulations are intended to facilitate this process while preserving safeguards to prevent the unauthorized switching of a customer’s account, also known as “slamming.” Due to changes in the competitive retail electric market and the advent of new technologies since the adoption of these regulations, the Commission has reviewed these regulations, previous relevant orders, and comments from the public and interested parties seeking to accelerate the switching process. These revised regulations facilitate accelerated switching without endangering safeguards against unauthorized switching.

Public Meeting held
April 3, 2014

Commissioners Present: Robert F. Powelson, Chairperson; John F. Coleman, Jr., Vice Chairperson; James H. Cawley; Pamela A. Witmer; Gladys M. Brown

Rulemaking to Amend the Provisions of 52 Pa. Code, Chapter 57 Regulations Regarding Standards for Changing a Customer’s Electricity Generation Supplier; L-2014-2409383

Final-Omitted Rulemaking Order

By the Commission:

The Commission adopts this Final-Omitted Rulemaking Order to amend and add to our regulations at 52 Pa. Code §§ 57.171—57.179 that address the process for transferring a customer’s account from a default service provider to a competitive electric generation supplier (EGS or supplier), from one supplier to another supplier and from a supplier to default service. The regulations are intended to facilitate this process while preserving safeguards to prevent the unauthorized switching of a customer’s account, also known as “slamming.” These regulations were adopted on May 21, 1998 and became

effective November 21, 1998.¹ Due to changes in the competitive retail electric market and the advent of new technologies since the adoption of these regulations, the Commission has reviewed these regulations, previous relevant orders, and comments from the public and interested parties regarding an accelerated switching process. With this Order, the Commission revises its regulations to facilitate accelerated switching without endangering safeguards to protect customers against unauthorized switching.

In adopting the Interim Guidelines Regarding Standards for Changing a Customer’s Electricity Generation Supplier, the Commission has already considered and implemented a temporary mechanism to shorten the switching process. Final Order, Docket No. M-2011-2270442 (entered Oct. 25, 2012) (hereinafter October 2012 Interim Guidelines). In those October 2012 Interim Guidelines, the Commission waived Sections 57.173 and 57.174 of the Commission’s regulations at Title 52 of the *Pennsylvania Code* and reduced the confirmation waiting period from ten days to five days.² Id. Additionally, the Commission directed staff to consider permanent changes to the switching regulations. As of June 2013, all of the major electric distribution companies (EDCs) have instituted the shorter confirmation period.³ Through its Office of Competitive Market Oversight (OCMO), the Commission has deliberated over its switching regulations by holding stakeholder initiatives and issuing orders in the past few years. On March 18, 2014 the Commission issued a Secretarial Letter, served on all jurisdictional EDCs, seeking comments on proposed regulations before issuing this Final-Omitted Rulemaking Order. See Proposed Rulemaking: Standards For Changing a Customer’s Electricity Generation Supplier, Docket No. L-2014-2409383. In light of this deliberation and the recent wave of complaints filed with the Commission concerning energy price increases in the winter of 2014, the Commission believes acting promptly and expeditiously to amend its regulations serves the public interest.

For reasons more fully explained herein, the Commission finds good cause that undergoing the traditional notice and comment procedures for these regulations is impracticable, unnecessary, and contrary to the public interest. See 45 P. S. § 1204(3). Upon finding good cause, we issue this Final-Omitted Rulemaking Order to amend and add to our regulations at 52 Pa. Code §§ 57.172—57.179 in order to ensure that consumers may easily and quickly switch electric suppliers in an effort to mitigate potential adverse price impacts related to variable contracts and fluctuations in the wholesale and retail energy markets.

Background

The Commission’s statutory authority for the existing switching regulations arises from Section 2807(d)(1) of the Public Utility Code, 66 Pa.C.S. § 2807(d)(1). This Section requires the Commission to:

Establish regulations to ensure that an electric distribution company does not change a customer’s electricity supplier without direct oral confirmation from

¹ See Revised Final Rulemaking Order re: Rulemaking Order Establishing Standards for Changing a Customer’s Electric Supplier, Docket L-00970121 (entered July 7, 1998); see also 28 Pa.B. 5770.

² The October 2012 Interim Guidelines also waived the analogous gas-industry regulations found at 52 Pa. Code §§ 59.93 & 59.94. These gas-industry regulations may be addressed in a separate proceeding. See Investigation of Pennsylvania’s Retail Natural Gas Supply Market, Order at Docket No. I-2013-2381742 (entered Sep. 12, 2013).

³ See Recap of the August 2013 CHARGE conference call, available at http://www.puc.pa.gov/utility_industry/electricity/electric_competitive_market_oversight.aspx (discussing EDC implementation of the 5-day confirmation period).

the customer of record or written evidence of the customer's consent to a change of supplier.

66 Pa.C.S. § 2807(d)(1).

Following this statutory directive, the Commission promulgated regulations in 1998 to address the supplier switching process and to guard against "slamming." These regulations are found at 52 Pa. Code §§ 57.171—57.179 (relating to standards for changing a customer's EGS) and set forth the following timeframes for the switching process:

- Section 57.173(1) requires the EGS to notify the EDC of the customer's selection "by the end of the next business day following the customer contact." However, the Commission has waived this provision for instances where the customer's service is not to start until some distant, future date. See Petition of PP&L Energy Plus Co., Docket No. P-00991673, 1999 WL 641179 (Order entered June 29, 1999).

- Section 57.173(2) requires the EDC to mail a 10-day confirmation letter to the customer "by the end of the next business day following the receipt of the notification of the customer's selection of an EGS." This regulation also states that "[t]he 10-day waiting period shall begin on the day the letter is mailed." *Id.* This 10-day waiting period is intended to give the customer time to contact the EDC to cancel the switch of supplier in cases where the customer did not authorize the switch of supplier. Notably, this 10-day waiting period is made available to cancel switches in instances of slamming and not intended to act as a contract rescission period. See *Re: Nor Am Energy Management, Inc.*, Docket No. P-00981625, 1999 WL 632769 (Order entered Feb. 12, 1999). As explained above, this 10-day waiting period was reduced to 5-days by the Commission through the Final Order in the October 2012 Interim Guidelines, Docket M-2011-2270442.

- Section 57.174 requires the EDC to make the change at the beginning of the first feasible billing period following the 10-day waiting period.

Customer information regulations at 52 Pa. Code §§ 54.1—54.9 (relating to customer information) also include timeframes that affect the switching process for residential and small commercial customers:

- Section 54.5(d) requires that customers be provided "a 3-day rescission period following receipt of the disclosure statement."

- Sections 54.5(d)(1) and (2) state that the 3-day rescission period is "3 business days" and "begins when the customer receives the written disclosure."

History of the Commission's Review of Its Switching Regulations

Based on customer complaints and supplier concerns and at the request of the Commission, in 2011 OCMO started exploring options to shorten the timeframe for switching a customer to another supplier. At that time, a change in supplier could take from 16 to 45 days. This switching timeframe was the result of a variety of Commission regulations as noted above, as well as EGS and EDC procedures that were established in large part to guard against slamming. The delay in transferring a customer's account has been perceived by consumers to be a lost "savings opportunity" that results in customer frustration, disappointment, and a less than favorable opinion of the competitive retail market. Because customer satisfaction is key to the success of any retail market, OCMO became concerned that the length of the

switching timeframes had become an impediment to achieving an effective competitive retail electric supply market in Pennsylvania.

To understand the mechanics behind the current switching process, OCMO had informal discussions with a number of EDCs. OCMO also consulted with regulators from Texas and Maryland to learn about their enrollment timeframes and any steps they have taken to accelerate the switching process. Finally, OCMO presented this topic to the CHARGE⁴ working group on March 24, 2011, in order to obtain the perspectives of the EGSs, OCA, and other interested parties. With the initiation of the Retail Markets Investigation (RMI) in 2011, it was decided to bring this issue to that forum as well and to give RMI participants an opportunity to present their perspectives and concerns.⁵ OCMO's working group met 19 times between March 24, 2011 and February 7, 2013 to discuss the issue of Accelerated Supplier Switching Timeframes.⁶

OCMO examined EDC procedures, some of which were adopted to comply with the above-cited regulations but also impact the time needed for a customer to switch suppliers. Supplier switches are executed based on meter read dates according to the customer's regular meter-reading schedule for billing purposes. Before the above mentioned October 2012 Interim Guidelines went into effect, EDCs had what was commonly referred to as the "16-day rule," which included the 10-day confirmation period required by 52 Pa. Code § 57.173(2), plus additional days for the EDC to process the customer account transfer. PJM Interconnection, LLC (PJM) rules related to capacity and transmission obligations also require a minimum of two days' notice prior to the transfer of customer accounts.

Under the foregoing procedures, an EDC has to be informed of the customer's supplier selection at least 16-days prior to the customer's next meter read for the switch to occur at the next meter read. If the EDC does not receive at least 16-days' notice, a supplier switch has to wait until the following meter read. This means that under previous rules, a supplier switch could be performed in as little as 16 days, or as long as 45 days.

The possibility of using mid-cycle, off-cycle, or estimated meter reads was considered as a means to shorten the switching timeframe. This solution would be dependent on the current metering capabilities of the EDCs. The capabilities of metering systems currently used by EDCs vary significantly. Some EDCs have advanced metering systems,⁷ while others still utilize traditional basic meters that require field visits and manual readings to obtain metering information. In fact, some EDCs only read customer meters on a bi-monthly basis and issue estimated bills during the non-read months. This range in metering capabilities and practices complicates any attempt at moving immediately to a mid-cycle read protocol.

The implementation of smart meter technology may offer the answer as smart meters may be able to support mid-cycle reads and short-period bills. The Commission discussed the use of advanced metering in the context of supplier switching in the Final Order in the Commission's

⁴ CHARGE participants include EDCs, EGSs, industry trade organizations, consumers, the Office of Consumer Advocate (OCA), and the Office of Small Business Advocate (OSBA).

⁵ RMI participants include EDCs, EGSs, residential, small business and industrial consumer representatives and other interested parties. For more information on the Commission's RMI, see the Commission's web page at http://www.puc.pa.gov/utility_industry/electricity/retail_markets_investigation.aspx.

⁶ See Master List of CHARGE Agenda Items. Pa. Public Utility Commission, OCMO, at 16. Available at http://www.puc.pa.gov/electric/pdf/OCMO/CHARGE_Issues-Master_List.pdf.

⁷ Note that these advanced meters are generally not classified as "smart meter technology" as defined at 66 Pa.C.S. § 2807(g) (relating to duties of electric distribution companies), but have a capability to be read remotely.

Investigation of Pennsylvania's Electricity Market: End State of Default Service. Docket No. I-2011-2237952 (Order entered Feb. 15, 2013). (End State Final Order). On page 73 of the End State Final Order, the Commission noted that:

To date, most of the discussion on the use of advanced metering has centered on their use in billing and load management. However, we believe that this discussion has to be expanded to also consider their role in the supplier switching process.

While we acknowledge that it may be several years before all the large EDCs have completed their deployment of advanced metering, this does not prevent us from now considering their role in the switching process. Ideally, we would like to have regulations in place so that these new metering capabilities can be used to their best advantage soon after their deployment.

Current EGS procedures were also examined by OCMO to determine if changes could be made to shorten the switching timeframe. Some supplier practices may adversely affect the switching process timeframes. For example, the practice of batching enrollments before sending them to the EDC instead of sending enrollments to the utility one at a time may unnecessarily delay account transfers. As noted above, the Commission has waived the provision of 52 Pa. Code § 57.173 that requires the EGS to notify the EDC of the customer's selection "by the end of the next business day following the customer contact" in instances where the customer's service is not to start until some distant, future date. See October 2012 Interim Guidelines, Docket No. M-2011-2270442. However, under the color of that waiver, EGSs may be holding enrollments for reasons other than future service dates. Additionally, some EGSs hold enrollments and do not submit them to the EDC until the last day of the 3-day right of rescission period provided for in 52 Pa. Code § 54.5(d).

OCMO's exploration of these issues culminated in a November 10, 2011 Tentative Order, which proposed several options to accelerate switching timeframes. Interim Guidelines Regarding Standards For Changing a Customer's Electricity Generation Supplier, Docket M-2011-2270442 (Order entered Nov. 14, 2011). In the Tentative Order we declared that changing the 3-business day rescission period at 52 Pa. Code § 54.5 is not feasible because it reflects existing Pennsylvania consumer contract law. Id. at 9; see Unfair Trade Practices and Consumer Protection Law, 73 P.S. §§ 201-1—201-9.3. Federal law also requires a 3-business day "cooling off period" for door-to-door transactions. Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations, 16 CFR Part 429. Further, we saw no point in changing the "first feasible billing period" language in 52 Pa. Code § 57.174 unless we first changed all of the other timeframes and requirements that necessitate the current switching timeline.

Instead, we focused on the confirmation waiting period during which the EDC holds the enrollment request in order to give the customer an opportunity to respond to the confirmation letter. In our November 10, 2011 Tentative Order, we proposed to eliminate the 10-day waiting period. We also raised the possibility of off-cycle meter readings to effectuate switching.

Seventeen parties filed comments in response to the Tentative Order. October 2012 Interim Guidelines, at 2. Those parties were AARP/Pennsylvania Utility Law Project/Community Legal Services Inc. (AARP/PULP/CLS); Columbia Gas of Pennsylvania (Columbia Gas); DTE Energy Supply Inc. (DTE Energy); Duquesne Light

Company (Duquesne); Energy Association of Pennsylvania (EAP); FirstEnergy Solutions Corp. (FE Solutions); Industrial Customer Groups; Metropolitan Edison, Pennsylvania Electric Company, Pennsylvania Power Company, West Penn Power (collectively FirstEnergy); National Energy Marketers Association (NEMA); Office of Consumer Advocate (OCA); PA Energy Marketers Coalition (PEMC); PECO Energy Company (PECO); Philadelphia Gas Works (PGW); PPL Electric Utilities (PPL); Retail Energy Supply Association (RESA); Verde Energy USA (Verde Energy); and Washington Gas Energy Services, Inc. (WGES).

In the comments to the October 2012 Interim Guidelines, the parties generally supported reducing customer wait time for switching suppliers. EAP, PECO, PPL, and AARP/PULP/CLS commented that enacting those changes would be better facilitated through the rulemaking process, as we are doing here, instead of through guidelines issued via Commission order. See Docket No. M-2011-2270442, at 12. RESA observed that shortening the switching timeframe is important because the current switching process is "grossly out of line with standards for service in other industries." Id. at 13 (citing RESA Comments at 1-2). NEMA supported the proposed guidelines as a reasonable step to achieving customer switching on a timelier basis, recognizing current metering technology. Id. (citing NEMA Comments at 2). Similarly, PEMC observed that the proposed guidelines would achieve the delicate balance between strengthening the competitive energy market while ensuring strong consumer protections. Id. (citing PEMC Comments at 2). FE Solutions believed that the 16- to 45-day time period for switching is too long and supported the proposed guidelines. Id. (citing FE Solutions Comments at 1-2).

After careful review and consideration of the comments, we decided that instead of the complete elimination of the 10-day confirmation period at 52 Pa. Code § 57.17, we would retain the confirmation period but shorten it to five days. We would then gauge the impact of this change before considering the elimination of the confirmation period altogether. In light of other Commission priorities and projects we had recently imposed on the EDCs, we decided not to require the use of off-cycle readings at that time. As such, we issued a Final Order that provided interim guidelines to shorten the confirmation waiting period from 10 to 5 days. Id. at 12-14. We believed that a 5-day period provided sufficient notice for customers while also shortening supplier switching timeframes. At the same time, we reserved taking more substantial actions until after we observed the impact of the change from 10 to 5 days.

In an Order adopted at its February 20, 2014 Public Meeting, the Commission opened a proceeding to examine current rules, policies and consumer education measures regarding variable rate retail electric products. Review of Rules, Policies and Consumer Education Measures Regarding Variable Rate Retail Electric Products, Docket No. M-2014-2406134, (Order entered Mar. 4, 2014) (Variable Rate Order) at 4-5, citing 66 Pa.C.S. § 2807(d). In the Variable Rate Order, the Commission expressed particular concern for customers receiving their electric supply service from an EGS under a contract with a monthly adjusted variable rate. Id. at 4. Therefore, the Commission sought to learn about and facilitate mid-cycle supplier switching so that customers can respond more rapidly to retail market price offers and mitigate potential price increases associated with variable-priced contracts. Id.

The March 18, 2014 Secretarial Letter Seeking Public Comments

In an effort to obtain more feedback from stakeholders on proposed changes to the standards for changing a customer's electric generation supplier included in this Final-Omitted Rulemaking Order, the Commission issued a Secretarial Letter on March 18, 2014, alerting affected parties of the Commission's intent to promulgate a Final-Omitted Rulemaking that would amend the existing regulations at 52 Pa. Code, Chapter 57. On March 18, 2014, the Commission served the Secretarial Letter on all jurisdictional EDCs, OCA, OSBA, and EAP, seeking comments on proposed regulations, within seven business days to allow the Commission to carefully review the comments and further deliberate before issuing this Final-Omitted Rulemaking Order. In an Annex attached to the Secretarial Letter, the Commission included proposed language changes to 52 Pa. Code §§ 57.172—57.179.

On March 18, 2014, the Commission received a letter addressed to Chairman Robert F. Powelson from Senators Robert M. Tomlinson and Lisa M. Boscola of the Senate Consumer Protection and Professional Licensure Committee, asking the Commission to begin revising its regulations to accelerate the supplier switching process.

In a March 25, 2014 letter addressed to the Commissioners, Pennsylvania Governor Tom Corbett commended the PUC for advancing this rulemaking to accelerate the timeframe for effectuating a switch in a customer's choice of electric supplier. The Governor observed that while Pennsylvania has been recognized as having the second-most competitive retail electricity market in North America, there are still ample opportunities to enhance competitive markets and provide more consumer benefits.

On March 25, 2014, the Commission also received a letter from Representatives Robert W. Godshall and Peter J. Daley of the House Consumer Affairs Committee, applauding the Commission for moving forward to revise its switching regulations, but urging caution as to expediting the rulemaking due to the intent of their committee to address those same issues legislatively.⁸

Comments to the March 18, 2014 Secretarial Letter were filed by the Office of Small Business Advocate (OSBA); NEMA; the Industrial Customer Groups; the Public Utility Law Project (PULP); UGI Utilities, Inc.—Electric Division (UGI Electric); NRG Retail Northeast (NRG); RESA; EAP; PPL; OCA; the Electronic Data Exchange Working Group (EDEWG); WGES; Citizens' Electric Company of Lewisburg, PA and Wellsboro Electric Company (Citizens and Wellsboro); FE Solutions; FirstEnergy; PECO; UGI Energy Services, LLC (UGI Energy); Pike County Light & Power Co. (Pike County); Duquesne; and Anna Perederina.

The Customer Experience

Before moving forward with any regulatory changes, we must first carefully scrutinize the current customer experience with switching suppliers and the impact of the change from a 10-day to a 5-day confirmation period. Mindful that the primary objective of these regulations is to effectuate efficient switching of suppliers while protecting consumers from unauthorized switching, we will first examine "slamming" in the current marketplace.

One of the mechanisms available to gauge the level of slamming in the marketplace is the number of informal complaints filed with the Commission's Bureau of Consumer Services (BCS) that allege slamming. Since 2010,

there have been just over 1,100 such complaints, representing less than 20 percent of all informal complaints against EGSs. In the majority of these cases, after reviewing a customer's complaint and the EGS's supporting documentation, BCS determined that the slamming allegation was unfounded. Many of the allegations are merely manifestations of customer confusion, such as a customer misunderstanding the distinctions between the EGS and utility or a customer unaware that a spouse authorized the switch.

In addition, there have been instances of alleged slamming that have necessitated Commission action beyond the informal level.⁹ While the Commission is extremely concerned with and takes seriously any allegation of slamming, we believe that slamming incidents are relatively rare, when considering that over two million Pennsylvania consumers have been shopping for some time. Regardless, we again reiterate our long-standing "zero-tolerance" policy on slamming that we first enunciated in May 1998:

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

Statement of Chairman Quain, Vice Chairman Bloom, Commissioner Hanger, Commissioner Rolka and Commissioner Brownell in Pennsylvania Electric Association Petition for Reconsideration of Rulemaking Order Establishing Standards for Changing Electric Suppliers, Docket Number L-00970121 (Public Meeting of May 21, 1998). In that same statement, the Commission continued:

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

Id.

Additionally, Commission staff has been monitoring the impact of the October 2012 Interim Guidelines that reduced the confirmation period from ten days to five days. OCMO's discussions with the EDCs and its review of informal complaints filed during 2013 have revealed no significant problems resulting from the shortened confirmation period. However, we continue to receive numerous complaints, legislative inquiries, and media reports that highly criticize the existing switching procedures and regulations.¹⁰ This strongly demonstrates that our reduction in the confirmation period from ten to five days has not provided sufficient relief to adequately protect the public interest.

The mounting number of complaints¹¹ and recent wave of media attention responding to the increase in wholesale electric prices in January 2014 has magnified the need for urgency to respond thoroughly and expeditiously.

⁹ See *Pa. Public Utility Commission, Bureau of Investigation & Enforcement v. Energy Services Providers, Inc.* Docket No. M-2013-2325122 (Feb. 6, 2014); *Pa. Public Utility Commission, Bureau of Investigation & Enforcement v. Public Power, LLC*, Docket No. M-2012-2257858 (Dec. 19, 2013); *Pa. Public Utility Commission Law Bureau Prosecutory Staff v. Mxenergy Electric Inc.* Docket Number M-2012-2201861 (Dec. 5, 2013); see also *Pa. Public Utility Commission Bureau of Investigation & Enforcement v. IDT Energy Inc.* M-2013-2314312 (Oct. 17, 2013); and *Pa. Public Utility Commission Bureau of Investigation & Enforcement v. AP Gas & Electric (PA), LLC, d/b/a APG&E*, Docket M-2013-2311811 (Oct. 17, 2013).

¹⁰ See, e.g., Associated Press, "Many Pa. electric customers feeling rate shock as temperatures plummet, variable rates rise." *PennLive* (Mar. 9, 2014). Available at http://www.pennlive.com/midstate/index.ssf/2014/03/many_pa_electric_customers_fee.html.

⁸ House Bill No. 2104 was referred to the Committee on Consumer Affairs on March 17, 2014.

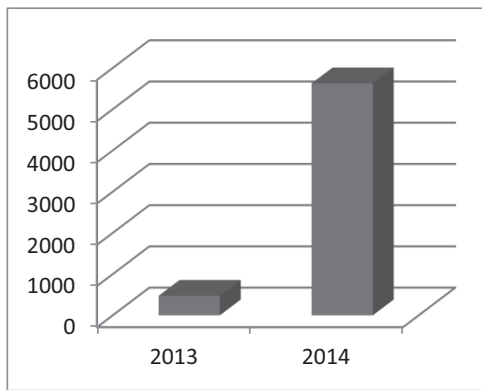
Due to extraordinary demand in the PJM¹² market caused by extreme cold weather, average wholesale day-ahead LMP¹³ prices for Pennsylvania in January 2014 were estimated at \$148/MWh, vs. \$44/MWh in December 2013. Estimated energy uplift charges, which are energy-related charges billed to suppliers in addition to LMP costs, also increased substantially in January 2014.¹⁴

As a result of these high PJM energy wholesale market prices, many EGSs serving Pennsylvania customers with variable-priced retail supply contracts needed to increase their retail prices to customers in order to recover the higher wholesale electric energy costs they incurred in January 2014. Some variable retail prices rose to a high of 28 cents per kWh. These dramatic and sudden price increases, coupled with higher than normal usage caused by the cold weather, especially at times of historic peak winter demand, resulted in a number of retail electric customers realizing very high electric bills in amounts two to three times (and even higher) than what they would normally be billed during this time of year.

This Commission has received a record number of inquiries and informal complaints related to EGS high bills over the last several weeks. It appears that most of the affected customers are participating in the competitive retail market and receiving electric supply service from an EGS under a contract with a variable rate that is adjusted monthly. The following chart and graph displays the number of informal complaints received by the Commission in the months of February and March 2014 compared to February and March 2013—the vast majority of these being related to billing and prices:

Number of Informal Complaints Filed Against EGSs in February-March 2013 and February-March 2014 compared:

2013:	473
2014:	5626
Difference:	5153
Percent Change:	+ 1089%



¹¹ Between January 1, 2014 and March 28, 2014, 500 formal complaints were filed with the Commission's Secretary's Bureau. The Commission's Bureau of Consumer Services (BCS) received 5,626 informal complaints between February 1, 2014 and March 28, 2014.

¹² PJM Interconnection is a regional transmission organization that oversees and manages the electricity grid for fifty million consumers in thirteen states and the District of Columbia. *New Jersey Bd. of Public Utilities v. FERC*, —F.3d—, 2014 WL 642943 at *3 (3d Cir. 2014).

¹³ Under LMP (Locational Marginal Price), "the price any given buyer pays for electricity reflects a collection of costs attendant to moving a megawatt of electricity through the system to a buyer's specific location on the grid." Id. at *4 (citing *Black Oak Energy v. FERC*, 725 F.3d 230, 233-4 (D.C. Circuit 2013)).

¹⁴ For more information about PJM wholesale prices, see historical pricing information posted on PJM's website at: <http://www.pjm.com/markets-and-operations/energy/real-time/monthlylmp.aspx>. For general information about PJM and the wholesale market, see PJM's "Learning Center" website at: <http://www.pjm.com/about-pjm/learning-center.aspx>.

At least 25 residential customers emailed comments to the March 18, 2014 Secretarial Letter on accelerated switching to the Commission's website or www.PAPowerSwitch.com. These customers, many whom identified themselves as variable-rate customers hit hard by price spikes this past winter, were unanimous in their support to significantly reduce the time to switch to a competitive supplier or return to default service. The majority of commenters expressed frustration with having to wait an additional billing cycle in order to switch out of their current contract, exposing them to greater market volatility and higher prices (from their current supplier) for up to 30 additional days. Some customers indicated that delays produced by current switching time frames seemed needless and cost them several hundred dollars while they waited to exercise their ability to switch suppliers.

Discussion

While the events in the wholesale electricity market in January 2014 were unprecedented, we believe that the re-occurrence of similar events is a clear possibility. In fact, the January 2014 price-spikes were rare in that they occurred in the winter, as electric price spikes are typically much more common in the summer. Furthermore, fluctuations and volatility in the wholesale interstate energy market could again contribute to unforeseen and unexpected surges in retail energy prices. As such, similar circumstances could potentially reoccur as early as this summer. It is also possible that the increasingly rapid shift in the electric generation market to gas-fired generation has produced increased uncertainty in electric wholesale markets. We simply do not have the experience with large-scale gas generation to predict with substantial certainty the implications in this rapidly changing market. While the movement to and greater reliance on natural gas certainly has its benefits (e.g., an abundant source of fuel coming from Pennsylvania) the impacts of this shift on wholesale and retail markets are not yet fully apparent or understood.¹⁵

Large fluctuations in wholesale and retail electricity prices again magnified and illuminated the sheer length of time it takes a customer to switch suppliers. A customer's ability to escape from a high-price product with a supplier is often frustrated by the switching timeframes currently in place, as a customer is often exposed to at least one more entire billing cycle beyond the billing cycle in which the customer requested to switch suppliers. This lag when switching is unacceptable. We routinely advise consumers impacted by high electric prices to "select a lower-cost supplier." However, for this to be an effective, meaningful course of action, switching must be easier and faster. We can no longer tolerate a scenario in which a customer is held captive for another entire billing cycle. This situation not only imposes unacceptable financial burdens on consumers, but also chills current consumer confidence in the competitive retail electric market and discourages potential shoppers from entering the market.

While the potential cost-savings benefits to consumers from accelerating the switching timeframes are readily apparent, we believe there are other benefits as well. For example, speeding up switching will help minimize impacts due to slamming and protect consumers when it does occur. With the current switching timeframes, a customer has to remain captive to the supplier that slammed them for an entire billing period, sometimes

¹⁵ For more information on current and future electric generation sources in Pennsylvania, see the Commission's "Electric Power Outlook for Pennsylvania 2012-17 Report," available at http://www.puc.state.pa.us/General/publications_reports/pdf/EPO_2013.pdf.

longer. This is unacceptable. If a customer can quickly escape a supplier that has “slammed” them, the customer’s exposure to financial harm will be significantly reduced. Furthermore, when a customer can quickly escape a “slammer” there will be less incentive for a supplier to slam a customer in the first place.

Furthermore, via a March 19, 2014 Secretarial Letter, the Commission initiated amendments to the regulations regarding disclosure statements for residential and small business customers through a concurrent Final-Omitted Rulemaking Order. See 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, at Docket No. L-2014-2409385. The intent of that proceeding is to increase consumer protections and better inform customers about the scope and limits of rate variability, the terms and conditions of an EGS contract, and a customer’s options prior to and after the expiration of their current contract for generation supply. The Commission believes that these enhanced disclosures will ensure that customers have the information they need when considering the various options for purchasing future electric generation supply. The Commission also believes that the additional disclosure requirements will further reduce the occurrence of slamming since customers will have more information about the options available to them.

Revisions to 52 Pa. Code §§ 57.171—57.179

Given the urgency, we think it is essential to revise our regulations as promptly and expeditiously as possible so that it takes no more than three days for customers to switch electric suppliers. Upon careful review and consideration of the aforementioned proceedings, stakeholder processes, and comments to the March 18, 2014 Secretarial Letter, and upon Commission review and deliberation, we find that the following changes and additions to 52 Pa. Code §§ 57.171—57.179 are essential and in the public interest.

§ 57.171. Definitions.

For clarification purposes only, we proposed new definitions in the March 18, 2014 Secretarial Letter for the following terms: Default service provider, Current EGS Product, and Selected EGS Product.

Comments

In response to our proposed new definitions, NRG recommends that the rules be revised to create two separate processes—one to switch suppliers and one to switch products. NRG believes that a separate process is needed for switch of product because the EDC, while involved in a switch of supplier, is not involved in a switch of product. NRG Comments at 2-3. RESA thinks that the switch in a supplier’s product should first be addressed in a stakeholder process and not in the current proceeding. RESA Comments at 2. FE Solutions likewise objects to including the switching of supplier products because it adds complexity and costs. FE Solutions Comments at 2-4. NEMA also expressed concern that applying the switching regulations to changes in products would be overly burdensome and contrary to the intent of the Commission’s regulations. NEMA Comments at 4. WGES finds the inclusion of “products” in these regulations is confusing. WGES Comments at 2. RESA recommends new definitions of “Customer Account Transfer Notice” for the notice an EGS must provide an EDC and “Customer Notice of Account Transfer” to refer to the notice that the

EDC provides to the customer. RESA Comments, Attachment A at 1. FirstEnergy, PPL, OCA and PECO ask that the term “default service provider” be used consistently and correctly. See, e.g., PPL Comments at 8.

Resolution

In addition to the switching of suppliers, we considered also including the switching of products in these regulations. However, after careful consideration, we agree with the above commenters that the focus of these regulation changes should be on the change of supplier and not a supplier’s products.

We think the two new definitions suggested by RESA are not necessary. We are unaware of any problems resulting from the absence of these definitions. For clarification purposes only, we add definitions for the following terms: Default service provider, Current EGS, and Selected EGS. We distinguish between a customer’s Current EGS and a customer’s Selected EGS to avoid potential confusion. We agree that default service provider should be used consistently in our regulations, as well as the Public Utility Code, by incorporating the statutory definition at 66 Pa.C.S. § 2803.

§ 57.172. Customer contacts with the EDC.

Comments

PPL believes that, with the exception of responding to slamming complaints, the EDC should avoid placing itself between the customer and the customer’s current EGS. PPL Comments at 8-9. PECO thinks the last sentence in paragraph (1) should specify the “standard offer program” instead of the proposed language which they believe is overly-broad. PECO Comments at 10-11.

OCA strongly supports allowing customers to contact the EDC to return to default service in order to address the situation where a customer is unable to reach anyone at the EGS. For clarity, OCA recommends using the terms “cancellation fee” or “early termination fee” instead of “financial penalty.” OCA Comments at 5-6. PULP thinks that the reference to a person authorized to act on a customer’s behalf is unnecessary, as this phrase is already included in the definition of customer. PULP Comments at 4. RESA suggests using the term “cancelling service” instead of “terminate” as to avoid confusion with the physical disconnection of service. RESA Comments at 3-4.

Resolution

We agree with the comments that suggest that this regulation needs to be revised by adding language providing for exceptions in the case of Commission-approved programs, such as the standard-offer programs that all of the major EDCs are currently operating. Accordingly, we will add the following sentence: “This notification requirement may not apply when a Commission-approved program requires the EDC to initiate a change in EGS service.” We disagree with PECO’s suggestion and decline to identify specific programs in regulations because this would deprive us of flexibility to accommodate future programs without necessitating a regulation change.

We agree with OCA’s comments regarding the allowance of a customer to contact an EDC in order to effectuate a switch and will include a provision allowing the customer to return to default service by contacting the EDC. We also agree with OCA and RESA and have used the term “cancellation” instead of “termination.” We agree with PULP that a reference to “person authorized to act on a customer’s behalf” is unnecessary and redundant, and therefore have removed this phrase.

§ 57.173. *Customer contacts with EGSs.*

Comments

PPL notes that while its metering will support accelerated switching times, their current billing system will not. PPL Comments at 4. PPL has initially determined that supporting 3-day switching and off-cycle switching will require significant modifications to the logic of their billing system, substantial capital investment, and an in-depth analysis to determine the most efficient means to implement the proposed changes. As an interim measure, PPL proposes to reduce the current minimum 11-day rule to 3-business days, meaning that PPL would need a 3-business day notice before the next meter read to switch the service. PPL reports that they could implement this in six to eight weeks. PPL also reports that while their current billing system cannot support multiple off-cycle switches, it could support a single mid-cycle switch. PPL could implement this over a 9-12 month period at a cost of approximately \$ 1.5 million (including the 3-business day notice rule). *Id.* at 4-7.

PECO and PPL suggest that the 3 days be 3 business days to accommodate PJM requirements. See e.g., *id.* PECO suggests customers be limited to one off-cycle switch. PECO Comments at 2.

Citizens and Wellsboro likewise want customers limited to one switch per month. Citizens and Wellsboro Comments at 5. These companies also note that they are in the process of becoming EDI-compliant, but they will not have mid-cycle functionality until the second quarter of 2015. *Id.* at 2-4. UGI Electric also asks the Commission to limit the number of switches per a defined time period. UGI Electric Comments at 5.

PPL and PECO object to the elimination of the confirmation period due to perceived increased risks of slamming and all the subsequent remedial action, including re-billings. See PECO Comments at 7 and PPL Comments at 11. During 2014, PECO has experienced between 100 and 150 customer requests per week to stop a switch. *Id.* PPL contends that it is not feasible to have EDCs send confirmation notices in instances where a customer is only changing a product with an EGS. PPL Comments at 11.

FE Solutions believes that EGSs should notify the EDC by the end of the next business day and that any delay introduces unneeded complexity and expense, especially since the “vast majority” of customers do not exercise their rights to rescind. FE Solutions Comments at 4-5. NEMA supports the elimination of the confirmation period, citing their belief that the current confirmation period only delays the customer switching process. NEMA Comments at 2. However, NEMA has concerns with the proposal to allow switching based on estimated readings because misestimates could yield problems and complaints. *Id.* at 3. WGES asks that any change in the timeframes in this section be carefully considered and that EGSs should have at least 90 days to implement any changes. WGES Comments at 3-4. RESA fully supports the elimination of the 10-day waiting period. To address possible slamming, RESA recommends a new expedited procedure for resolving customer complaints involving switching. RESA also asks the Commission to clarify when a supplier can consider a disclosure statement as being “received” by the customer. RESA Comments at 4-5. NRG believes speeding the switching process to five days or less will yield greater customer satisfaction in the marketplace and positively impact how EGSs behave in the market. NRG Comments at 2. If an EGS knows a

customer can quickly leave the EGS, an EGS will have a strong incentive to work even harder to meet their customers’ needs and offer better products and services. *Id.*

OCA objects to removing the provision requiring authorization before proceeding with the switch of service. OCA Comments at 7. OCA and PULP also want three additional days to be added to the process in order to accommodate the 3-day right of rescission at 52 Pa. Code § 54.5. See PULP Comments at 3-7. OCA, along with PULP, wants to retain the 5-day confirmation period as an anti-slammng mechanism. See OCA Comments at 8-9. The Industrial Customer Groups are also concerned that a 3-day switching timeframe may not allow sufficient time for a customer to catch an unauthorized change of supplier. Industrial Customer Groups Comments at 2-3. PULP asks that EGSs be required to notify customers of their 3-day right of rescission. PULP Comments at 5.

Resolution

This section will require extensive revisions to make faster switching a reality. First, we will incorporate exceptions into paragraph (1) that provide for the 3-day rescission period in 52 Pa. Code 54.5(d). This will allow an EGS, if it prefers and with the consent of the customer, to send the customer’s enrollment the day after the customer contact. If, however, the customer does not give consent, the EGS must wait until the end of the 3-day rescission period. This delay is at the choice of the customer. The existing regulations do not require the holding of the notification for these 3-days; in fact, the existing regulation requires notifying the EDC “by the end of the next business day.” See 52 Pa. Code 57.173(1). Requiring EGSs to “hold” the selection for 3 days would prolong the switching timeframes and run counter to what we are trying to accomplish. We disagree with the OCA that this impermissibly permits a customer to “waive” their 3-day rescission right. A customer retains their 3-day rescission right regardless of when the EGS notifies the EDC of their selection. If the EGS notifies the EDC immediately, regardless of whether the EGS has customer consent, the EGS assumes the risk that the customer could cancel the agreement and that the EGS would then be obligated to do what they have to do to cancel the enrollment.

We will also include an exception for those instances when, again with the consent of the customer, the customer’s enrollment is deliberately held until some future, distant date. This will accommodate those suppliers and customers who may want to enter into service at a future date, possibly to avoid early termination of a contract that would result in additional charges such as early termination fees.

We will revise Section 57.173(2) to omit any waiting period. While we will still require the EDC to send a confirmation letter—there will be no waiting period. As discussed above, with faster switching, we believe that a waiting period is unnecessary. If a customer, upon the receipt of the confirmation letter, believes that he or she was “slammed,” the customer can be quickly returned to their supplier of choice with minimal harm to them. By allowing faster switching, a “slammer” will not be able to hold onto the victim, thereby minimizing the incentive to “slam.” Additionally, the dispute procedures below in § 57.177 will assist the customer in avoiding liability for even the minimal charges that may have accrued.

We agree with NRG that faster switching would result in better EGS behavior and better products and services.

By allowing customers to more freely and quickly switch suppliers, EGSs will have to offer better services and products to hold onto their customers. EGSs will no longer be able to count on the extra month or two of revenue from a departing customer. We find that the cumulative benefits attendant to faster switching outweigh the risk of a few isolated cases of slamming that a lengthy confirmation period would otherwise protect.

We agree with PECO and PPL that, given PJM requirements, as well as holidays and weekends, we should refer to “business days” and not “calendar days.” In response to OCA’s concern with the removal of the phrase “upon receiving direct oral confirmation or written authorization from the customer to change the EGS,” we note that we are removing this language only because it is redundant and found in § 57.174. See 52 Pa. Code § 57.174.

§ 57.174. *Time frame requirement.*

Comments

FirstEnergy notes that “significant” time for research, development, and implementation will be needed to meet the proposed timeframes. FirstEnergy Comments at 5. FirstEnergy reports that current business processes require them to calculate each EGS’s capacity and transmission obligation 3 business days prior to the market day and report results to PJM the following morning by noon in order to meet PJM reporting deadlines. PJM market rules require each day’s posting from FirstEnergy to reflect each supplier’s obligations 2 days into the future. Since there is no process at PJM to reconcile or correct the NSPL and PLC obligations, FirstEnergy is concerned that using estimates could lead to widespread inaccuracies in the reported obligations. *Id.* at 5-8.

PPL likewise notes considerable amount of time and resources will be needed. PPL Comments at 12. PECO asks that customers who are not metered (lighting service) be excluded from off-cycle switching due to the complexity of their formulaic billing. PECO Comments at 8-9. PPL likewise asks for street lighting to wait until a future “second phase.” PPL Comments at 14.

NEMA is concerned with the proposal that would permit a switch of supply based on an estimated meter reading. Concerned that a gross misestimate could significantly harm either or both the customer and the supplier, NEMA recommends only allowing actual meter readings. NEMA Comments at 3. WGES also opposes the use of estimated meter readings. WGES is not convinced that a 3-day switching timeframe is possible given PJM, EDI and EDC protocols—in light of the lack of the utility billing infrastructure. WGES Comments at 4.

RESA applauds the proposal for off-cycle switches and does not believe full smart meter deployment is necessary to allow off-cycle switching since the EDC can pro-rate the usage for billing and PJM settlement purposes. RESA Comments at 7. NRG also supports this proposal and suggests that EDCs report to the Commission annually the percentage of actual and estimated meter readings used for switching purposes. NRG Comments at 5-7. NRG also suggests that the EDC be required to “look back” when they get a switching request and if there has been a meter reading obtained within the past 3 days, then the switch should be dated to that meter read. *Id.*

Concerned about the use of estimated meter reads, OCA believes the matter should be considered further. OCA Comments at 12-13. EDEWG asks the Commission to confirm that mid-cycle switching would be available for all customer classes and seeks clarification as to whether the 3-day timeframe applies only to mid-cycle switching

or all switching. EDEWG also notes that new “stacking rules” will need to be established in order to handle multiple pending enrollment and rescission requests to determine which switch will be honored and in what order. EDEWG Comments at 3-4.

Resolution

To achieve our objective of accelerating switching, we will need to extensively revise this section to specify the new timeframes and how those timeframes should be achieved. Since the existing language “first feasible billing period” is vague and permissive, we reject OCA’s suggestion that we retain this phrase, which would simply perpetuate the unacceptable status quo of the current 11–40 day switching period.

While we acknowledge PJM capacity assignment requirements necessitate a few days, we still believe a switch can be performed within three business days. As smart meter technology is deployed, EDCs can more easily obtain accurate meter readings at any time without sending personnel into the field to read meters. Utilities with automated metering (AMRs) can do likewise. With all the money and effort currently being spent on deploying smart meter technology in the Commonwealth, it is unacceptable not to use the technology and information as available to directly benefit customers.

We agree with RESA that EDCs that do not have advanced or AMR metering can use either estimated or customer-provided meter reads for the purpose of switching EGSs. This section will be revised by adding language directing utilities to use either a meter reading obtained by an advanced or AMR meter. When these options are not available, an estimated or customer-provided reading shall be used, subject to revision and correction upon an actual meter read. This will allow these EDCs to avoid costly field visits to implement these regulations since personnel will not have to be dispatched to read the meter. We decline to put in place a reporting requirement like that proposed by NRG, but we could revisit this suggestion in the future if we become aware of problems with the estimated readings. We also decline NRG’s suggestion to “look back” and base the switch on a past meter reading. We are concerned that this could have serious billing impacts and PJM complications.

In response to the requests of Duquesne, EDEWG, PECO, and PPL that we address the applicability of these timeframes to all rate classes, we decline to provide a blanket exemption to specific rate classes in these regulations. The EDCs that provided comments failed to identify a particular technical barrier to off-cycle switching for customer accounts that are not metered. An EDC can seek a waiver for off-cycle switching for non-metered accounts by demonstrating the need for such a waiver in its request. We note that the second paragraph only applies to metered accounts. We acknowledge that multiple switches could occur within a single billing period. This may even be necessary in some instances—such as returning to a customer to the appropriate supplier to reverse a “slam.” We also decline to specify the “stacking rules” mentioned by EDEWG in these regulations, but acknowledge that this will have to be addressed in the future.

§ 57.179. *Record maintenance.*

Comments

Citizens and Wellsboro believe that the EDC record-keeping needed to comply with this section could be burdensome since EDI-related transactions are easily maintained but other records are not. Citizens and

Wellsboro Comments at 5-6. PPL notes that they currently only retain customer recordings for 120 days (or 1 year in the case of a dispute). Expanding this to 3 years will require additional resources. PPL Comments at 16.

If EDCs have a role in switching consumers, WGES agrees that EDCs should maintain appropriate records. WGES thinks it is inevitable that Commission staff would need these records to resolve disputes as to what information was discussed and what representations were made in those customer contacts. WGES Comments at 5-6.

OCA recommends removal of the provision directed to default service providers as to avoid conflict with other record retention requirements. OCA Comments at 14.

Resolution

Since we are now allowing EDCs to switch customers to the default service provider (see § 56.172), we agree with WGES that the EDC should have a record-keeping requirement similar to the EGSs. In response to concerns that this is burdensome, we emphasize that the record-keeping requirement only pertains to disputes and not all switching.

Implementation and Cost Recovery

In the March 18, 2014 Secretarial Letter we proposed a six-month implementation timeframe for the EDCs, allowing for cost recovery in an EDC's next base rate proceeding.

Comments

Commenters expressed concern over the implementation timeframe, but also expressed a willingness to work within the Commission's timeframe. See e.g., PECO Comments at 3 (stating that PECO "is fully committed to complying with the proposed regulations within the [six-month] timeframe stated in the [March 18, 2014] Secretarial Letter"); cf. Pike County Comments at 3 (implementation would take at least one year due to complexities of its billing system).

EAP thinks that the failure to allow timely cost recovery is problematic, contending that the steps necessary to comply with stringent switching deadlines will likely entail greater implementation costs than previously considered. EAP Comments at 3-5. UGI Electric requests that, given their small customer base and that variable pricing issues have not been a problem in their market, that they be exempt from any new switching rules until it implements its next default service plan. See UGI Electric Comments at 2, 5. FirstEnergy claims that initial costs will be \$1.5—2 million and that these costs must be recoverable on a full and current basis through a reconcilable rider mechanism. FirstEnergy Comments at 2-3. PECO likewise asks for full and current cost recovery under an appropriate rate adjustment mechanism. PECO Comments at 5-6. Duquesne estimates implementation costs at \$10 million. Duquesne Comments at 10. PPL is concerned that in submitting these costs in a base rate case, a party could propose disallowance of some or all of these costs. PPL believes this is unfair because they are simply complying with the Commission's regulations, and that the Commission should declare that EDCs will be permitted to fully recover all reasonable costs. PPL Comments at 16-17.

FE Solutions believes that these changes are for the overall promotion of retail customer choice which will benefit all customers, and as such, cost recovery should be addressed in EDC base rate filing. FE Solutions Comments at 6. RESA also supports the use of base rate filings to recover costs. RESA Comments at 8.

Resolution

EDCs and EGSs shall implement the revised regulations within 6 months of the date these revised regulations become effective. Any EGS or EDC unable to comply within this timeframe must file a petition with the Commission to explain their inability to comply and to propose alternatives, including the estimated timeframe for implementation. We understand the concerns of the smaller electric utilities. See UGI Electric Comments at 2, 5; Pike County Comments at 3-4; and Citizens and Wellsboro Comments at 2-3.

We also acknowledge that there will be costs incurred by the EDCs in adapting EDC metering and billing systems to accommodate off-cycle meter readings. We expect EDCs to implement these new requirements in the most cost-effective manner possible. EDCs should seek recovery of reasonable costs in a future base-rate filing, which will receive the usual full scrutiny of review by the Commission and interested parties.

We also note PECO's suggestion that, as an alternative to cost recovery through an adjustment clause exercisable at the EDC's option, the Commission could provide that EDCs may request approval for a deferral of implementation and ongoing costs resulting from this rulemaking, establish a regulatory asset for such costs and seek recovery in a future base rate case. PECO Comments at 6. PECO's suggestion of deferral, with the establishment of a regulatory asset with recovery in a future base rate proceeding is consistent with our intent regarding cost recovery. We agree that EDCs may seek approval of a deferral of costs and the establishment of a regulatory asset for recovery in a future base rate proceeding. However, we caution that any such requests will be governed by the applicable standards set forth in Petition of Duquesne Light Company, Docket No. P-2012-2333760, at 6 (Order entered April 17, 2013).

Accordingly, we will add Section 57.180 to our regulations to require EDCs and EGSs to implement the provisions of Sections 57.172, 57.173, 57.174, and 57.179 within 6 months of the effective date of these regulations.

Process and Justification for Promulgating Final-Omitted Regulations

Under the Public Utility Code, the Commission may promulgate regulations as may be necessary and proper in the exercise of its powers and performance of its duties. 66 Pa.C.S. § 501(b). In promulgating regulations, the Commission must adhere to the statutory requirements of the Regulatory Review Act, 71 P. S. §§ 745.1 et seq., the Commonwealth Documents Law, 45 P. S. §§ 1201 et seq., and the Commonwealth Attorneys Act, 71 P. S. § 732-204. A Commonwealth agency enjoys wide discretion in establishing rules, regulations, and standards; this discretion will not be overturned by a reviewing court absent proof of fraud, bad faith, or a blatant abuse of discretion. *Logsdon v. Dept. of Educ.*, 671 A.2d 302, 305 (Pa. Cmwlth. 1996). In order for a regulation to have the force of law binding on the judiciary, the agency must 1) act pursuant to the agency's governing statute, 2) adhere to proper procedure, and 3) issue a reasonable regulation. *Rohrbaugh v. Pa. Pub. Util. Comm'n*, 727 A.2d 1080, 1085 (Pa. 1999).

In proposing a new or modified regulation, an agency generally must provide notice to the public of its proposed rulemaking and an opportunity for the public to comment. 45 P. S. § 1201; *Naylor v. Com., Dept. of Public Welfare*, 54 A.3d 429, 434-6 (Pa. Cmwlth. 2012). The purpose behind this formal notice and comment rule-

making is to provide “affected parties a democratic process for participation in the formulation of standards which govern their conduct and increases the likelihood of administrative responsiveness to their needs and concerns.” *Dept. of Enviro. Resources v. Rushton Min. Co.*, 591 A.2d 1168, 1171 (Pa. Cmwlth. 1991). Furthermore, this formal process “enables the agency to obtain information relevant to the proposed rule and facilitates the consideration of alternatives, detrimental effects, criticism, and advice, thereby contributing to the soundness of the proposed regulation.” *Id.*

When necessary for the public interest an agency may forgo those formal notice and comment procedures attendant to a proposed rulemaking by promulgating final-omitted regulations. 45 P. S. § 1204. The Commonwealth Documents Law, Section 1204 of the Pennsylvania Statutes, 45 P. S. § 1204, in discussing scenarios that justify final-omitted regulations, provides:

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

- (1) The administrative regulation or change therein relates to: (i) military affairs; (ii) agency organization, management or personnel; (iii) agency procedure or practice; (iv) Commonwealth property, loans, grants, benefits or contracts; or (v) the interpretation of a self-executing act of Assembly or administrative regulation; or
- (2) All persons subject to the administrative regulation or change therein are named therein and are either personally served with notice of the proposed promulgation, amendment, or repeal or otherwise have actual notice thereof in accordance with law; or
- (3) The agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the order adopting the administrative regulation or change therein) that the procedures specified in §§ 201 and 202 are in the circumstances impracticable, unnecessary, or contrary to the public interest.

45 P. S. § 1204.

Pertinently, an agency may forgo traditional notice and comment procedures if the agency finds for good cause those procedures are “impracticable, unnecessary or contrary to the public interest.” 45 P. S. § 1204(3). To demonstrate good cause that the formal notice and comment rulemaking process is unnecessary, an agency must include a “finding and a brief statement of the reasons . . . in the order adopting the administrative regulation or change.” 1 Pa. Code § 7.4.

Here, the Commission has determined that final-omitted regulations revising and adding to our standards for changing a customer’s electricity generation supplier, 52 Pa. Code §§ 57.171—57.179, are necessary to serve and protect the public interest. Based upon the circumstances of this situation, specifically, the unusually high electric supply bills recently incurred by customers resulting from variable pricing contracts and fluctuations in wholesale and retail energy markets, the exception at § 1204(3) is, in our opinion, applicable.

Good Cause Supports Commission Promulgation of Final-Omitted Regulations

The Commission finds good cause that undergoing the traditional notice and comment procedures for these regulations is impracticable, unnecessary, and contrary to the public interest. See 45 P. S. § 1204(3). Additionally,

pursuant Section 1204(2) all of the EDCs that will be obligated to alter their switching procedures will be served and provided with actual notice of these final-omitted regulations. See 45 P. S. § 1204(2).

Traditional notice and comment procedures are impracticable and contrary to the public interest because customers are being affected now with extraordinarily high bills and may be affected again as early as this summer due to peak demand periods and potential fluctuations in the wholesale energy market. The Commission seeks to amend its regulations as soon as practicable in order to allow customers to more quickly and easily switch electric suppliers, which will allow customers to more fully realize the benefits of a fully functioning retail market through quicker and easier access to a more favorable retail rate. These changes will also allow customers to avoid being trapped on unfavorable and volatile rate plans as many were this past winter. Furthermore, these changes will advance competition in the retail market as EGSs will need to respond more quickly to customer concerns or risk losing them to more agile competitors.

Traditional notice and comment procedures are unnecessary because there have been and continue to be substantial channels for formal and informal public notice and comment. The public has voiced their comments and concerns through the filing of a record-breaking 500 complaints concerning variable rates with the Commission’s Secretary’s Bureau between January 1, 2014 and March 28, 2014, and the filing of over 5,600 informal complaints with the Commission’s Bureau of Consumer Services regarding EGSs. Moreover, the media has raised this issue throughout the Commonwealth. The public is indeed on high notice and constituents have reached out to their legislators, who are proposing legislative amendments to accelerate the switching process. Throughout February and March of this year, the Commission has held numerous conference calls and meetings with interested parties, including customers, suppliers, utilities, legislative committees, and the media.

As discussed, the Commission has already accepted and reviewed formal comments on its switching regulations via a previous Commission order. See October 2012 Interim Guidelines, Docket No. M-2011-2270442. In the October 2012 Interim Guidelines order, seventeen parties filed comments in response to the November 14, 2011 Tentative Order, including AARP/PULP/CLS; Columbia Gas; DTE Energy; Duquesne; EAP; FE Solutions; Industrial Customer Groups; FirstEnergy; NEMA; OCA; PEMC; PECO; PGW; PPL; RESA; Verde Energy; and WGES.

In the comments to the October 2012 Interim Guidelines, the parties generally supported reducing customer wait time for switching suppliers. EAP, PECO, PPL, and AARP/PULP/CLS commented that enacting those changes would be better facilitated through the rulemaking process, as we are doing here, instead of through guidelines issued via Commission order. See Docket No. M-2011-2270442, at 12. RESA observed that shortening the switching timeframe is important because the current switching process is “grossly out of line with standards for service in other industries.” *Id.* at 13 (citing RESA Comments at 1-2). NEMA supported the proposed guidelines as a reasonable step to achieving customer switching on a timelier basis, recognizing current metering technology. *Id.* (citing NEMA Comments at 2). Similarly, PEMC observed that the proposed guidelines would achieve the delicate balance between strengthening the competitive energy market while ensuring strong con-

sumer protections. *Id.* at 13 (citing PEMC comments at 2). FE Solutions believed that the 16- to 45-day time period for switching is too long and supported the proposed guidelines. *Id.* (citing FE Solutions Comments at 1-2).

The March 18, 2014 Secretarial Letter

On March 18, 2014 the Commission issued a Secretarial Letter, served on all jurisdictional EDCs, OCA, OSBA, and EAP, seeking comments on proposed regulations, and invite and promote public participation in the rulemaking process and to allow the Commission to further deliberate before issuing this Final-Omitted Rulemaking Order. On March 18, 2014 the Commission received a letter from Senators Robert M. Tomlinson and Lisa M. Boscola of the Senate Consumer Protection and Professional Licensure Committee, asking the Commission to begin revising its regulations to accelerate the supplier switching process. In a March 25, 2014 letter addressed to the Commissioners, Governor Corbett commended the PUC for advancing this rulemaking to accelerate the timeframe for effectuating a switch in a customer's choice of electric supplier. Also, on March 25, 2014, the Commission received a letter from Representatives Robert W. Godshall and Peter J. Daley of the House Consumer Affairs Committee, applauding the Commission for moving forward to revise its switching regulations, but urging caution as to expediting the rulemaking due to the intent of their committee to address those same issues legislatively.

Comments to the March 18, 2014 Secretarial Letter were filed by OSBA; NEMA; the Industrial Customer Groups; PULP; UGI Electric; NRG; RESA; EAP; PPL; OCA; EDEWG; WGES; Citizens and Wellsboro; FE Solutions; FirstEnergy; PECO; UGI Energy; Pike County; Duquesne; and Anna Perederina. Many residential customers emailed comments to the March 18, 2014 Secretarial Letter on accelerated switching to the Commission's website or www.PAPowerSwitch.com. These customers, many who identified themselves as variable-rate customers hit hard by price spikes this past winter, were unanimous in their support to significantly reduce the time to switch to a competitive supplier or return to default service.

The Commission has reviewed the comments to the Secretarial Letter. We have incorporated beneficial suggestions and clarifications to the language we proposed to 52 Pa. Code §§ 57.171—57.180 in the attached Annex to the March 18, 2014 Secretarial Letter.

Some commenters expressed concern over the Commission's decision to embark on this expedited final-omitted rulemaking process. See OSBA Comments at 1; PULP Comments at 2; UGI Electric Comments at 1-5; EAP Comments at 6-7; PPL at 3-4, 17; OCA Comments at 2-4; EDEWG Comments at 2; WGES Comments at 1; FE Solutions Comments at 2, 6-7; and FirstEnergy Comments at 2-3, 9-10. Some commenters contended that the seven-day comment period provided for in the March 18, 2014 Secretarial Letter was insufficient to flush out the issues and properly estimate the implementation costs from a practical, technical, and financial standpoint. See *id.* See also EAP Comments at 4 and Pike County Comments at 3-4. However, most EDCs did provide numerical implementation cost estimates. See PPL Comments at 6; Duquesne Comments at 10-11; FirstEnergy Comments at 2-3; PECO Comments at 5, fn. 3; and Pike County Comments at 3. Some commenters requested a longer stakeholder process or working group to evaluate

regulations and share information regarding accelerated switching. See e.g., OCA Comments at 4.

The Commission appreciates the above concerns regarding the Commission's decision to embark on a faster, streamlined rulemaking through the Final-Omitted process.

As PULP emphasized, the purpose of the Commonwealth Documents Law is to invite and promote public participation in the promulgation of a regulation. See PULP Comments at 2. The Commission believes it has invited and promoted sufficient public participation over the past few years through OCMO, the Retail Markets Investigation, and the October 2012 Interim Guidelines. OCMO's working group met 19 times between March 24, 2011 and February 7, 2013 to discuss the narrowed issue here: Accelerated Supplier Switching Timeframes. Furthermore, the Commission went above and beyond the procedures required by a Final-Omitted Rulemaking by issuing its March 18, 2014 Secretarial Letter to invite public comment on specific, proposed regulatory language. As a result, the Commission received 22 sets of comments, including letters from the General Assembly and a letter of endorsement from the Governor.

While additional comments obtained through a more extended proposed rulemaking have the potential to provide more insight and analysis, the Commission believes it has received sufficient information and comments from the diverse and represented perspectives of the stakeholders in this matter. The Commission has considered these comments and incorporated the Commission's deliberation of those comments in this Order. Indeed, the Commission has created a "democratic process for participation" in the formulation of Standards for Changing a Customer's Electricity Generation Supplier at 52 Pa. Code §§ 57.171—57.179 "to increase [] the likelihood of administrative responsiveness" to the needs and concerns of stakeholders and interested parties. See *Rushton Min. Co.*, 591 A.2d at 1171. Governmental and other stakeholder resources will be saved by forgoing the extensive proposed notice and comment rulemaking process to achieve this urgent public interest objective of accelerated switching. Therefore, this final-omitted rulemaking still meets the intent of a *de novo* rulemaking with formal notice and comment procedures without risking promulgation of an agency regulation not in the public interest. See 45 P. S. § 1204.

A few commenters have advised the Commission to wait or delay this rulemaking because the General Assembly may enact legislation that conflicts with or is redundant to the Commission's regulations promulgated in this Final-Omitted Rulemaking. See, e.g., UGI Electric Comments at 3 and PPL Comments at 2-3; see also March 25, 2014 Letter from the House Consumer Affairs Committee. The Commission appreciates these concerns. However, the Commission is under a duty to act pursuant to its existing governing statutes that have already been enacted in the Public Utility Code; the Commission believes that it is imprudent to wait on legislation that may not be enacted for months or never enacted. While the House Consumer Affairs Committee has urged caution, the Senate Consumer Protection and Professional Licensure Committee and the Governor have implicitly directed and endorsed the Commission's advanced rulemaking. We note that should legislation effecting these regulations be enacted, the Commission is obligated to revise its existing regulations to conform with the law.

Statutory Safeguards Prevent Promulgation of Agency Regulation not in the Public Interest

Importantly, final-omitted regulations are subjected to the same review before IRRC as review of final-form regulations. See 71 P. S. §§ 745.5a—745.6. IRRC, the legislative committees, and the Attorney General may still comment on the final-form regulation. 71 P. S. § 745.5a(c). IRRC or a committee may disapprove the final-omitted regulation. See 71 P. S. §§ 745.5a—745.7. IRRC may also request and receive public comments up to 48 hours prior to IRRC's public meeting where the final-form regulation will be ruled upon. 71 P. S. § 745.5a(j). If IRRC does not disapprove the final-omitted regulation within its statutory time frame, the final-omitted regulation will be deemed approved. 71 P. S. § 745.5a(e). An agency may accept revisions to the final-omitted regulations, as recommended by IRRC or a committee. 71 P. S. § 745.5a(g). An agency may also toll the time for review in order to provide the agency with sufficient time to make recommended changes suggested by IRRC or the committees. See *id.* An agency may also withdraw a final-omitted regulation. Upon receiving a report from the agency regarding revisions to the final-omitted regulations, IRRC will deliver an approval or disapproval order to the committees for consideration by the General Assembly and the Governor, both of which retain powers to prevent promulgation of the agency's final-omitted regulation. See 71 P. S. § 745.7(c.1)—(d). Therefore, statutory safeguards are in place to prevent promulgation of an unreasonable agency regulation not in the public interest.

Regulatory Review

Under section 5.1(c) of the Regulatory Review Act (71 P. S. § 745.5a(c)), on April 8, 2014, the Commission submitted a copy of the final-omitted rulemaking and a copy of a Regulatory Analysis Form to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House Consumer Affairs Committee and the Senate Consumer Protection and Professional Licensure Committee. On the same date, the regulations were submitted to the Office of Attorney General for review and approval under the Commonwealth Attorneys Act (71 P. S. §§ 732-101—732-506).

Under section 5.1(j.2) of the Regulatory Review Act, on May 21, 2014, the final-omitted rulemaking was deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on May 22, 2014, and approved the final-omitted rulemaking.

Conclusion

The Commission has deliberated on its switching regulations in the past few years and received numerous comments on these regulations in various channels, including formal comments to the Commission's Final Order for the October 2012 Interim Guidelines, which have been in effect for approximately thirteen months, and formal comments to the March 18, 2014 Secretarial Letter. See Docket Nos. M-2011-2270442 and L-2014-2409383. We believe our switching regulations should be updated in the context of today's marketplace and the available metering technology. Throughout this order and the attached Annex, we discuss various issues and carefully craft new rules to accelerate the supplier switching process for retail electric customers in Pennsylvania. Importantly, we revise our regulations to facilitate accelerated switching without endangering safeguards to protect customers against slamming or unauthorized switching.

The Commission believes that this final-omitted rulemaking is prudent and in the public interest. For the previous reasons, the exceptions to the notice of proposed rulemaking requirements enunciated in section 1204(3) of the Commonwealth Documents Law justify promulgation of these final-omitted regulations. Accordingly, under sections 501, 1501 and 2807 of the Public Utility Code (66 Pa.C.S. §§ 501, 1501 and 2807); the Commonwealth Documents Law (45 P. S. § 1204); the Regulatory Review Act (71 P. S. §§ 745.1 et seq.); the Commonwealth Attorneys Act (71 P. S. § 732-204); and the regulations promulgated at 1 Pa. Code § 7.4, the Commission adopts the regulations at 52 Pa. Code §§ 57.171—57.180, as set forth in Annex A; *Therefore,*

It Is Ordered That:

1. The regulations of the Commission, 52 Pa. Code Chapter 54, are amended by adding § 57.180 and amending §§ 57.171—57.174 and 57.179 to read as set forth in Annex A.

2. The Secretary shall submit this order and Annex A to the Attorney General for review and approval and to the Governor's Budget Office for fiscal review.

3. The Secretary shall submit this order and Annex A to the legislative standing committees and to the Independent Regulatory Review Commission for review and approval.

4. The Secretary shall duly certify this order and Annex A and deposit them with the Legislative Reference Bureau for final publication upon approval by the Independent Regulatory Review Commission.

5. The final regulations become effective upon publication in the *Pennsylvania Bulletin*.

6. This order and Annex A revising the regulations appearing in Title 52 of the *Pennsylvania Code* Chapter 57 relating to Standards for Changing a Customer's Electricity Generation Supplier, be served on all jurisdictional electric utilities, all licensed Electric Generation Suppliers, the Bureau of Investigation and Enforcement, the Office of Consumer Advocate, the Office of Small Business Advocate, and those parties who submitted comments at Docket No. L-2014-2409383.

7. The Office of Competitive Market Oversight shall electronically send a copy of this final-omitted rulemaking order and Annex A to all persons on the contact list for the Committee Handling Activities for Retail Growth in Electricity; to all persons on the contact list for the Investigation of Pennsylvania's Retail Electricity Market, order entered April 29, 2011, at Docket No. I-2011-2237952; and to all persons on the contact list for Stakeholders Exploring Avenues to Remove Competitive Hurdles.

8. A copy of this order and Annex A shall be posted on the Commission's web site at the Office of Competitive Market Oversight web page and on the web page for the Investigation of Pennsylvania's Retail Electricity Market.

9. The contact persons for this matter are Daniel Mumford in the Bureau of Consumer Services (717) 783-1957 and Ken Stark in the Law Bureau (717) 787-5558.

ROSEMARY CHIAVETTA,
Secretary

(Editor's Note: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 44 Pa.B. 3470 (June 7, 2014).)

Fiscal Note: 57-306. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 52. PUBLIC UTILITIES

PART I. PUBLIC UTILITY COMMISSION

Subpart C. FIXED SERVICE UTILITIES

CHAPTER 57. ELECTRIC SERVICE

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

§ 57.171. Definitions.

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

Act—66 Pa.C.S. §§ 2801—2815 (relating to Electricity Generation Customer Choice and Competition Act).

Current EGS—The EGS at the time of the customer contact.

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

Default service provider—The term as defined in section 2803 of the act (relating to definitions).

EDC—*Electric distribution company*—The term as defined in section 2803 of the act.

EGS—*Electric generation supplier*—The term as defined in section 2803 of the act.

Selected EGS—The EGS from which the customer seeks new electric generation supply service.

§ 57.172. Customer contacts the EDC.

(a) When a customer or a person authorized to act on the customer's behalf contacts the EDC to request a change from the current EGS or default service provider to a selected EGS, the EDC shall notify the customer that the selected EGS shall be contacted directly by the customer to initiate the change. This notification requirement does not apply when a Commission-approved program requires the EDC to initiate a change in EGS service.

(b) When a customer contacts the default service provider to request a change from the current EGS to default service, the default service provider shall notify the customer that there may be a cancellation penalty to cancel service with the current EGS. Subsequent to this notice and upon express or written consent from the customer, the default service provider shall enroll the customer in default service.

§ 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.

(2) Upon receipt of this notification, or notification that the customer has authorized a switch to default service, the EDC shall send the customer a confirmation letter noting the proposed change of EGS or change to default service. The notice must include the date service with the new selected EGS or default service provider will begin. The letter shall be mailed by the end of the next business day following the receipt of the notification of the customer's selection of an EGS or default service provider.

§ 57.174. Time frame requirement.

(a) When a customer has provided the selected EGS or current EGS with oral confirmation or written authorization to select the new EGS or default service provider, consistent with electric data transfer and exchange standards, the EDC shall make the change within 3 business days of the receipt by the EDC of the electronic enrollment transaction.

(b) The EDC shall obtain a meter read to effectuate the switch of service within the time period provided for in subsection (a). In instances when the EDC does not have advanced or automated metering capability, the EDC shall obtain an actual meter read, use an estimated meter read or use a customer-provided meter read. When an estimated meter read is used, the estimated meter read shall be updated when an actual meter read is obtained.

§ 57.179. Record maintenance.

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

§ 57.180. Implementation.

Each EDC and EGS shall implement §§ 57.172—57.174 and 57.179 by December 15, 2014.

[Pa.B. Doc. No. 14-1247. Filed for public inspection June 13, 2014, 9:00 a.m.]

PENNSYLVANIA PUBLIC UTILITY COMMISSION

[52 PA. CODE CH. 62]

[L-2011-2266832]

Licensing Requirements for Natural Gas Suppliers

The Pennsylvania Public Utility Commission (Commission), on August 15, 2013, adopted a final rulemaking order which reviews the Commission's existing regulations outlining the licensing requirements for natural gas suppliers (NGS), specifically whether the exemption from NGS licensing of marketing services consultants and nontraditional marketers should be discontinued and whether all natural gas aggregators, marketers and brokers should be required to be licensed as NGSs to offer natural gas supply services to retail customers.

Executive Summary

By order entered January 13, 2012, the Pennsylvania Public Utility Commission (Commission) initiated a proposed rulemaking to review the exemption from licensing for "marketing services consultants" and "non-traditional marketers" in its natural gas supply (NGS) licensing regulations at 52 Pa. Code § 62.102 (relating to scope of

licensure). The Commission's existing regulations hold a licensed NGS responsible for violations of the law, or for any fraudulent, deceptive or other unlawful marketing or billing acts committed by the marketing services consultant or nontraditional marketer that the NGS hires or with whom it partners.

Following the receipt of comments to its Proposed Rulemaking Order, the Commission suggested further amendments to the NGS licensing regulations in an Advance Notice of Final Rulemaking Order, entered February 28, 2013. The Commission recommended adding the terms "aggregator," "broker," and "nonselling marketer," and incorporated a revised definition of "nontraditional marketer." Ultimately, for purposes of its final rulemaking, the Commission decided to advance proffered definitions of these terms while choosing to eliminate the "marketing services consultant" designation. Additionally, the Commission clarified the definition of "marketing," and modified the exemption from licensing requirements set forth in its existing regulations at Section 62.102(a).

By order entered August 15, 2013, the Commission set forth final-form regulations regarding NGS licensing requirements. Pursuant to its Final Rulemaking Order, the Commission determined that (1) all "aggregators" and "brokers" must be licensed for their involvement in the sale or arrangement of the sale of natural gas to retail customers; (2) "nonselling marketers" under contract to a single NGS in Pennsylvania are exempt from licensure; (3) "nonselling marketers" under contract to two or more NGS firms in Pennsylvania are required to be licensed; and (4) the licensing exemption continues for "nontraditional marketers."

Public Meeting held
August 15, 2013

Commissioners Present: Robert F. Powelson, Chairperson; John F. Coleman, Jr., Vice Chairperson; Wayne E. Gardner; James H. Cawley; Pamela A. Witmer, statement follows

*Licensing Requirements for Natural Gas Suppliers
Regulations at 52 Pa. Code § 62.101—§ 62.102;
L-2011-2266832*

Final Rulemaking Order

By the Commission:

By Order entered February 28, 2013, the Pennsylvania Public Commission (Commission) issued an Advanced Notice of Final Rulemaking (ANOFR) to amend our natural gas supplier (NGS or supplier) licensing regulations at 52 Pa. Code § 62.101 (relating to definitions) and § 62.102 (relating to scope of licensure). Specifically, this rulemaking was initiated to address whether or not to maintain the exemptions from the licensing requirement for marketing services consultants and nontraditional marketers. Comments were filed by various interested parties. The Commission has reviewed those comments, as well as all comments filed to its Proposed Rulemaking Order entered January 13, 2012, and issues this Final Rulemaking.

Background

On June 22, 1999, Governor Thomas J. Ridge signed into law the Natural Gas Choice and Competition Act, effective July 1, 1999, 66 Pa.C.S. §§ 2201—2212 (Act). Pursuant to the Act, beginning on November 1, 1999,

retail customers were given the ability to choose an NGS to provide them with natural gas supply services.¹

Section 2208(a) of the Act requires that no entity can engage in the business of an NGS unless it holds a license issued by the Commission. 66 Pa.C.S. § 2208(a). The term NGS is defined, in part, as:

An entity other than a natural gas distribution company, but including natural gas distribution company marketing affiliates, which provides natural gas supply services to retail gas customers utilizing the jurisdictional facilities of a natural gas distribution company.

66 Pa.C.S. § 2202. Further, the term "natural gas supply services" is defined, in part, as "the sale or arrangement of the sale of natural gas to retail gas customers," 66 Pa.C.S. § 2202.

On June 24, 1999, following the passage of the Act, the Commission issued a Tentative Order establishing a draft licensing application for the interim licensing of NGSs. On July 15, 1999, the Commission issued a Final Order at Docket No. M-00991248F0002 that adopted the interim licensing procedures and license application for NGSs. The Final Order required all suppliers of retail natural gas supply services to obtain an NGS license, other than natural gas local distribution companies providing service within their certificated service territories and municipal utilities providing service within their corporate or municipal limits.

Subsequently, in 2000, the Commission adopted a Proposed Rulemaking Order that revised its interim licensing procedures and promulgated proposed regulations governing the licensing requirements for NGSs. See 52 Pa. Code §§ 62.101—62.114. See Licensing Requirement for Natural Gas Suppliers, Proposed Rulemaking Order, Docket No. L-00000150, 30 Pa.B. 3073 (June 17, 2000). The Commission stated that its initial interpretation of the Act had been that every entity that engages in an activity listed as that undertaken by a natural gas supplier must be licensed. However, the Commission's proposed rulemaking acknowledged that some activities may be undertaken by entities that will not have any direct physical or financial responsibility for the procurement of the customer's natural gas. Accordingly, in the proposed regulations the Commission decided to exempt from licensing two types of entities that worked as brokers or agents for NGSs and retail customers. The proposed regulation used the terms "marketing services consultant" and "nontraditional marketer" for these agents and brokers.

In the final NGS licensing regulations, the Commission defined the term "marketing services consultant" as follows:

A commercial entity, such as a telemarketing firm or auction-type website, or energy consultant, that under contract to a licensee² or a retail customer, may act as an agent to market natural gas supply services to retail gas customers for the licensee or may act as an agent to recommend the acceptance of offers to provide service to retail customers. A marketing services consultant:

¹ Section 2202 of the Act, 66 Pa.C.S. § 2202, defines natural "gas supply services" as including (1) the sale or arrangement of the sale of natural gas to retail customers; and (2) services that may be unbundled by the Commission under section 2203(3) of the Act (relating to standards for restructuring of the natural gas utility industry) and excluding distribution service.

² "Licensee" is defined as "a person or entity that has obtained a license to provide natural gas supply services to retail customers." See also 52 Pa. Code § 62.101 (relating to definitions).

- (i) does not collect natural gas supply costs directly from retail customers;
- (ii) is not responsible for the scheduling of natural gas supplies;
- (iii) is not responsible for the payment of the costs of the natural gas to suppliers, producers, or NGDCs.

52 Pa. Code § 62.101 (footnote added).

Additionally, in the regulations the Commission defined “nontraditional marketer” as follows:

A community-based organization, civic, fraternal or business association, or common interest group that works with a licensed supplier as an agent to market natural gas supply services to its members or constituents. A nontraditional marketer: (i) conducts its transactions through a licensed NGS; (ii) does not collect revenue directly from retail customers; (iii) does not require its members or constituents to obtain its natural gas service through the nontraditional marketer or a specific licensed NGS; (iv) is not responsible for the scheduling of natural gas supplies; [and] (v) is not responsible for the payment of the costs of the natural gas to its suppliers or producers.”

52 Pa. Code § 62.101.

In Section 62.102 of the regulations, relating to scope of licensure, the Commission created licensing exemptions for marketing services consultants and nontraditional marketers.

(d) A nontraditional marketer is not required to obtain a license. The licensed NGS shall be responsible for violations of 66 Pa.C.S. (relating to the Public Utility Code), and applicable regulations of this title, orders and directives committed by the nontraditional marketer and fraudulent, deceptive or other unlawful marketing or billing acts committed by the nontraditional marketer.

(e) A marketing services consultant is not required to obtain a license. The licensed NGS shall be responsible for violations of 66 Pa.C.S. and applicable regulations of this title, orders and directives committed by the marketing services consultant and fraudulent, deceptive or other unlawful marketing or billing acts committed by the marketing services consultant.

52 Pa. Code § 62.102(d)—(e).

The Commission recommended these two exemptions in its June 2000 Proposed Rulemaking Order. Some commenters supported the exemptions and others, including the Independent Regulatory Review Commission (IRRC), opposed them. In the final rulemaking the Commission determined that marketing services consultants and nontraditional marketers were not engaged in the sale or arranging of natural gas supply services to retail consumers. Thus, they fell outside of the definition of an NGS set forth in Section 2202 of the Act. Furthermore, rather than require these entities to obtain a license themselves, the regulations emphasized that the licensed NGSs were responsible for any violations of the statute, regulations or orders or for any fraudulent, deceptive or other unlawful marketing or billing acts committed by the marketing services consultant or nontraditional marketer. See 52 Pa. Code § 62.102 (relating to scope of licensure). See also 52 Pa. Code § 62.110(a)(3) (NGSs must identify nontraditional marketers and marketing services consultants who are currently or will be acting as agents for the licensee in the upcoming year).

The proposed regulations were finalized by the Commission in July 2001 in Licensing Requirements for Natural Gas Suppliers, Final Rulemaking Order, Docket No. L-00000150, 31 Pa.B. 3943 (July 21, 2001).

On September 28, 2010, Alphabuyer LLC (Alphabuyer) filed a license application to operate as a broker/marketer engaged in the business of supplying natural gas services in the service territory of various NGDCs within the Commonwealth of Pennsylvania. The term broker/marketer is synonymous with marketing services consultant. The application was filed pursuant to section 2208 of the Natural Gas Choice and Competition Act (Act) and Title 52 of the Pennsylvania Code, Chapter 62, Subchapter D. In conjunction with the approval of that application, the Commission noted that during the past ten years, a number of entities similar to Alphabuyer,³ despite the existence of an exemption from the requirement to obtain a license, nonetheless applied for an NGS license in order to supply natural gas services to retail customers.⁴

Due to the non-compulsory nature of licensing entities like Alphabuyer and the amount of direct interaction these entities have with retail customers, the Commission determined it was time to conduct a review of its regulations outlining the licensing requirements for natural gas suppliers. Therefore, on January 13, 2012, the Commission initiated the instant rulemaking proceeding to determine (1) if its current NGS licensing regulations conform with the plain language of the Natural Gas Choice and Competition Act⁵ and reflect the current business plans of NGSs appearing before it; and (2) whether continuing these licensing exemptions is in the public interest. Furthermore, the Commission requested comments on whether it was appropriate to remove responsibility from a licensed NGS for violations of the Public Utility Code, and applicable Commission regulations, orders and directives and for fraudulent, deceptive or other unlawful marketing or billing acts committed by a marketing service consultant or a nontraditional marketer.

Accordingly, in its Proposed Rulemaking Order, the Commission suggested the following revisions to its NGS licensing regulations at 52 Pa. Code §§ 62.101—62.110: (1) deletion of the “marketing service consultant” and “nontraditional marketer” definitions; (2) the deletion of the exemptions set forth in Subsections 62.102(d) and (e) of the regulations and (3) the deletion of Subsection 62.110 (a)(3) that requires a licensee to report the names and addresses of nontraditional marketers and marketing services consultants who are acting or will be acting as agents for the licensee in the upcoming year.

The Commission received comments to its proposed revisions.⁶ Based upon these comments, the Commission suggested further amendments to the NGS licensing regulations to add the definitions aggregator, broker, and nonselling marketer and to incorporate a revised definition of nontraditional marketer. It also modified the exemption from licensing requirements set forth in the

³ Under this model, the entity falls within the definition of “marketing services consultant” if it: (1) does not collect natural gas supply costs directly from retail customers; (2) is not responsible for the scheduling of natural gas supplies; and (3) will not be responsible for the payment of costs to NGSs, producers or NGDCs.

⁴ The Commission’s practice has been to issue NGS licenses to such entities upon demonstration that they meet the financial and technical requirements of NGS licensure and also comply with, and be governed by, the applicable provisions of the Public Utility Code and Commission regulations.

⁵ Natural Gas Choice and Competition Act, effective July 1, 1999, 66 Pa.C.S. §§ 2201—2212 (Act).

⁶ Comments to the proposed rulemaking were filed by the IRRC, National Energy Marketers Association (NEMA), Washington Gas Energy Services, Inc. (WGES), Spark Energy Gas, LP, Retail Energy Supply Association (RESA) and the Pennsylvania Energy Marketers Coalition (PEMC).

existing regulations and added clarifying language at Section 62.102(a) and to the definition of marketing. The Commission issued its further revisions to the proposed regulations as an Advanced Notice of Final Rulemaking (ANOFR), entered February 28, 2013, and invited additional comments.

Comments to the ANOFR were filed by the Retail Energy Supply Association (RESA), National Energy Marketers Association (NEMA), the Pennsylvania Independent Oil and Gas Association (PIOGA), the Office of Consumer Advocate (OCA), and the Pennsylvania Energy Marketers Coalition (PEMC).

Comments to the Proposed Rulemaking Order

IRRC's Comments

In its comments, IRRC stated that the Commission did not provide convincing supporting information as to the need to amend the regulations regarding licensing of NGSs. IRRC Comments at 2. IRRC commented that the Commission's Regulatory Analysis Form (RAF) did not provide substantive information to estimate the direct and indirect costs to the Commonwealth, to its political subdivisions and to the private sector, and did not identify the types of persons, businesses and organizations which would be affected by the regulation. IRRC further stated that the Commission should explain its interpretation of its statutory authority in deciding which entities must be licensed, which entities do not need to be licensed and provide an explanation of how the final-form regulation meets the requirement of the Act. *Id.* IRRC recommended that the Commission withdraw this proposed regulation and conduct an investigation with stakeholders to determine who is using the current exemption, what the cost impact is to them and how to best regulate the competitive marketplace. *Id.* In the alternative, IRRC recommended that the Commission publish an advanced notice of final rulemaking that allows interested parties the opportunity to review the revised regulatory language before submittal of a final-form regulation. *Id.*

NEMA's Comments

NEMA stated that a wholesale deletion of the "marketing services consultant" definition and its exemption from licensing is not necessary for those consultants that only make sales to consumers on behalf of licensed suppliers. NEMA Comments at 7. NEMA stated, however, that "energy consultants," who purport to hold themselves out as either agents of or representatives of consumers and which have been included as a subset within the definition of "marketing services consultants" by the Commission, may not have sufficient safeguards in place within the current regulations to protect consumers and the public interest. NEMA Comments at 9-12.

NEMA stated that there has been a proliferation of "energy consultants" in the competitive marketplace that interject themselves between the consumer and the NGS in order to "arrange for the sale of natural gas" for the consumer. *Id.* NEMA explained that these energy consultants may have a direct contract with the consumer to perform this service on the consumer's behalf. In the alternative, the energy consultant may not have a contract with the consumer, but will gather bids from multiple suppliers for the consumer and receive its compensation through the NGS's bill. In this latter scenario, the energy consultant has an agreement in place with the winning NGS for the NGS to act as its billing service provider and the NGS is under a contractual obligation to remit compensation or commission directly to the energy consultant.

NEMA stated that an NGS should not be responsible for the energy consultant's conduct because it is operating as the agent of the consumer and not the supplier. NEMA Comments at 12. NEMA stated that the Commission should look to whom the entity owes its fidelity or whether they are acting for their own account rather than a specific supplier or a purchaser or group of purchasers. NEMA asserted that in the absence of a contractual relationship with the NGS, the NGS should not be responsible for the entity's conduct. *Id.*

NEMA stated that it supports the exemption from licensing of entities operating exclusively for a supplier in a utility service territory and the licensing of brokers who are not beholden to anyone unless they have an exclusive contract with one supplier. NEMA Comments at 15. NEMA asserted that refining the current exemption by excluding "energy consultants" from the "marketing services consultant" definition may be a good first step in an ongoing process of monitoring the performance of entities in the natural gas market. Conversely, NEMA stated that the Commission should retain the exemption from the licensing requirements for nontraditional marketers. NEMA asserted that the nontraditional marketer is not involved in the financial transaction between the licensed supplier and the customer and is not holding itself out as representing the NGS, it is merely communicating to its members that there is an offer that they may avail themselves of from the NGS.

Furthermore, NEMA stated that prior to the Commission making a determination as to whether gas aggregators, brokers or marketers need to be licensed, that the Commission should engage in a rulemaking process to develop definitions and a common understanding of these terms as they apply to the retail gas market. *Id.* NEMA noted that legislature did not set forth definitions for the terms "aggregator," "broker," and "marketer" in the Act or any corresponding licensing requirement for any such specifically identified entities. NEMA asserted that the licensing requirement in the Act mentions only "natural gas suppliers."

WGES's Comments

In its comments, WGES stated that it agreed with NEMA that the Commission should consider refining the expansive definition of "marketing services consultant" to exclude "energy consultants" that "arrange for the sale of natural gas for a consumer." WGES Comments at 1. WGES explained that under this scenario, the main contractual relationship exists between the energy consultant and the customer.

WGES further stated that NGSs generally do not exercise any control over the actions of energy consultants. WGES Comments at 2. Nevertheless, despite this lack of control or contractual relationship, under the current regulations, NGSs may be held responsible for the actions of the energy consultant. WGES stated that the Commission should revise its regulations to assign appropriate responsibility to energy consultants for their actions, rather than assigning responsibility to NGSs. WGES Comments at 3.

Spark Energy's Comments

Spark Energy stated that NGS firms and marketing entities should not be grouped together when identifying licensing requirements. Spark Energy Comments at 2. Rather, Spark Energy stated that the Commission should implement a less-stringent certification procedure for marketing entities. *Id.* Spark Energy explained that the newly-implemented certification process will allow the

Commission to focus on whether the marketing entity possesses appropriate core marketing proficiencies. Additionally, Spark Energy stated that certification should enhance, but not replace, oversight of the entity by the licensed NGS for fraudulent, deceptive or unlawful practices. Spark Energy Comments at 3. Lastly, Spark Energy stated that if the definitions for “marketers” and “brokers” were adopted for gas purposes, it would be difficult to distinguish them from the existing marketing services consultant and nontraditional marketers operating today in the competitive retail market. Accordingly, Spark Energy stated that the Commission should refrain from adopting the more generic “marketer” and “broker” terms. Spark Energy Comments at 5-6.

RESA's Comments

RESA stated the Commission should retain the current “marketing services consultant” and “nontraditional marketer” definitions in the regulations. RESA Comments at 2. However, RESA also stated that the Commission should incorporate the “aggregator,” “broker” and “marketer” definitions so there is symmetry and continuity between the treatment of licensed entities on the electric side with the entities subject to the natural gas licensure regime. RESA Comments at 3-4. RESA stated that the exemption from licensure should continue for those marketing services consultants and nontraditional marketers that are compensated and conducting marketing and sales activities on behalf of a single licensed NGS. RESA Comments at 4. To the extent that the marketing services consultant or nontraditional marketer works solely for a single NGS, it would be deemed an “agent” of the NGS and, therefore, would not be required to be separately licensed with the Commission. RESA Comments at 4-5.

RESA further stated that those marketing services consultants or nontraditional marketers who function as aggregators or a broker/marketer by providing or arranging for natural gas service to be supplied to an end-user, including but not limited to collection of payment, schedule of natural gas supplies, or payment of natural gas supplies should be required to be licensed with the Commission. RESA Comments at 5. RESA stated that while these entities are not “agents” of an NGS, they directly arrange for a customer’s natural gas supply services; therefore, these natural gas aggregators and broker/marketers should go through the licensing process and have their marketing activities directly regulated by the Commission. *Id.*

However, RESA asserted that it is in favor of less burdensome licensing requirements for these entities in the form of reduced bonding or security requirements. *Id.* Furthermore, RESA asserted that these entities should not be required to submit annual reports given that NGSs already have an obligation to submit annual reports and are parties that are best positioned to provide the required data to the Commission due to their familiarity with the process for confidential filings. RESA Comments at 6.

PEMC's Comments

PEMC stated that there does not appear to be a discernible or identifiable reason for the Commission to revise the current regulations. PEMC Comments at 4. Additionally, PEMC stated that as an unintended consequence, the Commission’s proposed revisions would dramatically expand the number of license applications it must review and suppliers it must monitor. *Id.* Accordingly, PEMC stated that it opposes the elimination of the exemption from licensing requirements for marketing services consultants and nontraditional marketers.

PEMC offered two alternatives to the Commission. First, PEMC stated that when agents who are legitimate representatives of a single supplier are found to be in violation of Commission regulations, the NGS should be held accountable as if the agent was its own employee. PEMC Comments at 5. Secondly, PEMC stated that to address accountability issues that can arise when an agent simultaneously represents more than one NGS, the Commission could choose to define such agents as “natural gas supply brokers.” *Id.* PEMC further stated that the Commission could then either require entities that meet this definition to apply for a standard NGS license or establish a new, separate natural gas broker license tantamount to the “broker” definition under the EGS licensing regulations. *Id.*

Discussion of comments to the Proposed Rulemaking Order

In response to IRRC’s comments that the Commission did not provide convincing supporting information as to the need to amend its existing regulations regarding licensure of NGSs, the Commission published an advanced notice of final rulemaking to allow the public and standing committees the opportunity to review the revised regulatory language before submittal of a final form regulation. The Commission’s statutory authority to decide which entities must be licensed comes from 66 Pa.C.S. § 2202 (regarding definitions for the terms “Natural Gas Supplier” and “natural gas supply services”); and § 2208(a) (stating that no entity shall engage in the business of a natural gas supplier unless it holds a license issued by the commission). Also, the Commission acknowledges IRRC’s comments regarding the deficiencies of its RAF submitted with the Proposed Rulemaking. The Commission will supplement its RAF to address the direct and indirect costs that will result from changes to our regulation and will identify the various types of persons, businesses and organizations that may be affected.

In establishing the original NGS licensing regulations, the Commission adopted definitions for both “marketing services consultant” and “nontraditional marketer” as a means to distinguish certain activities that would fall outside of the definition of “natural gas supply services” set forth in Section 2202 of the Act. Thus, when the Commission defined these two entities, it clearly determined that there was a distinction between the rendering and sale of the physical natural gas commodity versus the provision of marketing and sales support activities. The Commission supported the exemptions because “those [marketing] entities . . . act[ed], not on behalf of licensees, but on behalf of retail customers as energy consultants.” April 19, 2001 Order at 10.

However, upon its subsequent experience of monitoring the activities and interactions of entities acting or operating as “marketing services consultants” in the gas retail market, the Commission believes these entities appear to provide functions that are the same or similar to those performed by “aggregators” and “brokers” operating on the electric competition side, whom are required to be obtain a license. Therefore, the Commission determined that it was appropriate to revisit the definitions of those entities operating within the competitive retail gas market.

We acknowledged that the Act did not create subcategories of natural gas suppliers as were created for electric generation suppliers in the Electric Competition Customer Choice and Competition Act. See 66 Pa.C.S. § 2803 (definitions of aggregator, market aggregator, broker, mar-

meter and electric generation supplier). However, we determined that entities that act as aggregators and brokers do fall under the definition of NGS as they are engaged in the “arrangement of the sale of natural gas to retail gas customers.” 66 Pa.C.S. § 2202. The fact that these entities may take no title to the natural gas is irrelevant in this determination.

Therefore, the Commission deleted the term “marketing services consultant” set forth in the initial licensing regulations as its definition was ambiguous and the activities of these entities had become synonymous with the activities of “aggregators” and “brokers” on the electric competition side. The Commission determined that the activities of “aggregators” and “brokers” on the natural gas side should be regulated under the Natural Gas Choice and Competition Act. In response to IRRC’s comment about the Commission’s authority to decide which entities must be licensed, the Commission added definitions for “aggregators” and “brokers” involved in the sale, arrangement and purchase of natural gas to retail customers to the final-form regulation. See 66 Pa.C.S. § 2202. Additionally, the Commission amended its definition of a “nontraditional marketer” to ensure these entities engage only in the marketing of an NGS’s natural gas service to its members or constituents. However, the Commission also decided to add the term “nonselling marketer” to identify entities engaged only in marketing natural gas services to retail customers on behalf of a NGS. These “nonselling marketers” are not required to obtain a license unless they are under contract to more than one NGS. The Commission believes this provides sufficient consumer protection, but will not infringe on the competitive market.

Thus, for the purpose of the amendments to our regulation at 52 Pa. Code §§ 62.101–62.102, the definitions of “aggregators” and “brokers” in this final-form rulemaking refer to entities engaged in “the sale or arrangement of the sale of natural gas to retail gas customers” under 66 Pa.C.S. § 2202. Entities engaged solely in the marketing of natural gas to retail customers do not provide natural gas supply services as defined in Section 2202 of the Public Utility Code.

In response to IRRC’s comment about proving a threat to the public interest, comments received from the regulated community are instructive. The natural gas marketplace has seen a proliferation of “energy consultants” that interject themselves between the consumers and NGSs. These consultants currently operate as “marketing services consultants” and are outside the scope of our licensing requirements. However, “energy consultants” arrange for the sale of natural gas for the consumer and act as either agents or representatives of consumers. Presently, “energy consultants” may have a direct contract with the consumers, but they also may gather bids from multiple suppliers for the consumer and receive compensation through the NGS’s bill. Thus, safeguards need to be in place to protect consumers and to ensure that “energy consultants” disclose their fees and are accountable for their analysis of a customer’s natural gas needs. “Energy consultant” activities fall within the definition of “broker.” Therefore, entities that provide energy consultation services for customers should be required to obtain a license from the Commission regardless of whether or not they take title to the natural gas.

Further, the Commission noted RESA’s comments stating that there should be some form of symmetry and continuity between our governance of the licensed entities performing electric supply services on the electric side

with entities operating within the natural gas licensure regime, especially when they appear to be undertaking the same or similar functions. Accordingly, we revised Section 62.101 of our regulations by deleting the definition of “marketing services consultant” and incorporating the definitions for “aggregator” and “broker” set forth in the our EGS licensing regulations at 52 Pa. Code § 54.31.

PEMC commented that the Commission’s proposed revision to eliminate the current exemptions would dramatically expand the number of applicants the Commission must review and suppliers it must monitor. Additionally, Spark Energy commented that the existing definitions of marketing service consultant and nontraditional marketer were useful in describing which marketing entities would be subject to the Commission licensing requirements. Moreover, Spark Energy asserted that licensed NGSs and entities that perform only marketing duties should not be grouped together when identifying licensing requirements.

In its ANOFR, the Commission identified the primary focus of this rulemaking as whether entities essentially acting as aggregators, brokers or entities solely providing marketing services in the natural gas retail marketplace should be licensed under the Act. In order to bring clarity to the natural gas retail marketplace regarding the entities that must be licensed, as we stated above, we proposed the deletion of the current “marketing services consultant” definition and incorporated the terms “aggregator,” “broker” and “nonselling marketer” into the final-form regulation.

Our rationale for the licensure of natural gas “aggregators” and natural gas “brokers” has been fully discussed above. A “nonselling marketer” is an entity whose activities are limited to providing only marketing support services on behalf of one or more NGS firms. We noted the comments of RESA and NEMA that a “marketer” that operates under an exclusive contract with a single licensed NGS supplier to conduct natural gas-related marketing activities in its service territory should not be required to be separately licensed by the Commission. We agreed with the commenters that the line of accountability back to a single NGS is clear where there is a direct relationship and the NGS will be directly responsible for the marketer’s activities and for reporting requirements under Section 62.110. Accordingly, we incorporated this concept into the ANOFR by stating that a “nonselling marketer” under contract to a single NGS will not be required to obtain a license. Conversely, a nonselling marketer that interacts directly with an end-user customer or simultaneously represents more than one licensed NGS should be required to obtain a license so that if an action is brought by a customer or the Commission for violations of the Code, applicable regulations, Commission orders or other consumer protection safeguards, the appropriate party is clearly identifiable.

As to “nontraditional marketers,” we reinstated a modified definition for this term and exempted these entities from a licensing requirement. Nontraditional marketers are community-based organizations, civic, fraternal or other groups with a common interest that work with a licensed NGS to endorse that NGS’ natural gas supply service to its members. The members are not required to purchase the services from the endorsed NGS and, if the offer is accepted, the contract is between the member and the NGS. Under these circumstances, we believed it reasonable to not require a license for this type of activity.

Based upon our further consideration of these issues, the Commission proposed that an exemption from licens-

ing for entities providing “marketing” support services either (a) on behalf of the members of a civic or other community-based organization or (b) on behalf of a single NGS should remain intact. Thus, in contradiction to PEMC’s assertion, the Commission has retained some form of the previous exemption from licensing set forth in the existing regulations in the revised final-form regulation.

Spark Energy was also concerned that entities that perform only marketing duties but fall outside of the licensing exemption category, should not have to pay a license application fee. However, we noted that marketers/brokers and aggregators providing electric generation supply services have been required to pay a de minimus application fee that we are now requiring marketing entities on the natural gas side to pay. Such a de minimus fee has not had a negative impact, or chilling effect, on entities seeking to provide electric generation supply services and, therefore, is not expected to have a negative effect on entities seeking to participate in the natural gas retail market in order to conduct marketing support services.

Comments to the Advanced Notice of Final Rulemaking Order

RESA’s Comments

In general, RESA supports the revisions recommended in the Commission’s ANOFR. As an example, RESA agrees with the Commission that the licensing exemption for nontraditional marketers should be retained. However, RESA contends that the licensing exemption applicable to nonselling marketers who work for a single NGS should be clarified to state that the exemption attaches to marketers who work for no more than a single NGS in a given service territory. RESA suggests that a nonselling marketer who works for a single NGS that is licensed to provide service in a specific service territory should be permitted to work for another NGS that is licensed to provide service in a completely separate service territory without first obtaining a license. RESA believes that its proposed revision provides for necessary consumer protections while also supporting and promoting natural gas competition in Pennsylvania.

NEMA’s Comments

NEMA, like RESA above, supports the exemption from licensing of nonselling marketers operating exclusively for one NGS in a single utility service territory. NEMA states that an NGS should be responsible for the actions of third parties with whom they have entered into contractual relationships and who act exclusively in the NGS’s interest in a single utility service territory. NEMA identifies that the Commission’s suggested language in its ANOFR at Section 62.102(f) state that, “a nonselling marketer under contract to only one licensed NGS *may* not be required to obtain a license.” (Emphasis added). However, the text of the Commission’s ANOFR order concluded that a nonselling marketer *will not* be required to obtain a license. (Emphasis added). NEMA requests that the language in Section 62.102(f) be modified to reflect the Commission’s finding in the ANOFR order.

NEMA also recommends that licensing or registration requirements placed on aggregators, brokers and non-exclusive, nonselling marketers be imposed only after a showing of demonstrable need to safeguard the public has been made. In its comments, NEMA contends that if the Commission advances a uniform licensing requirement for aggregators, brokers and non-exclusive, nonselling marketers, then the licensure process for different entities in

the retail marketplace should be tailored to the activities they perform and the relative financial fitness and technical expertise that are required to perform their different roles. For example, NEMA suggests that license or registration applications for nonselling marketers might require information relevant to the entity’s ability to perform sales and marketing support services as opposed to the retail sale of the natural gas commodity, which is how the current licensing application is framed. Moreover, NEMA recommends information the Commission might consider collecting from these different entities including: (1) a list of officers and key management personnel; (2) contact information including the entity’s principal place of business as well as a local service agent; (3) an entity’s express agreement to abide by relevant Commission rules and regulations; (4) the demonstration of the requisite technical and operational experience to conduct its business; and (5) a listing of other states in which the entity currently does business.

Additionally, NEMA shares concern that the Commission should consider a form of minimal registration of individuals engaged in sales and marketing activities to residential consumers, other than NGS employees, exclusive agents, brokers and Multi-Level Marketing representatives. NEMA states that this could be as straightforward as requiring these individuals to file their names and contact information with the Commission to produce an identification number that would be presented to residential consumers during direct sales or marketing activities.

NEMA recommends that the Commission’s suggested definition of the term “broker” that was added in its ANOFR be revised to reflect common industry usage by clarifying that the broker is acting “on behalf of” NGSs when it is performing its service. Also, NEMA once again suggests a definition for “energy consultants” that act on behalf of consumers in the marketplace because these consultants may have direct contact with the consumer to arrange for the sale of natural gas on the consumer’s behalf. One particular concern raised by NEMA to the treatment of “energy consultants” is the disclosure of their fee to consumers.

Furthermore, NEMA contends that the title “nonselling marketer” may not correctly identify the types of activities that such entities undertake and could be better expressed in a manner more consistent with industry usage and understanding. NEMA suggests that these entities instead be denominated as “marketing services providers” or “sales channel partners.” Finally, NEMA supports the exemption from licensing of nontraditional marketers.

PIOGA’s Comments

In its comments, PIOGA echoes the general thrust of the comments of NEMA. Specifically, PIOGA supports (1) NEMA’s suggested definition of “energy consultant;” (2) NEMA’s suggested change of the term “nonselling marketer” to “marketing services provider;” (3) NEMA’s suggested revision to the term “broker;” and (4) the correction of the language in proposed Section 62.102(f) to implement the Commission’s finding in the ANOFR that nonselling marketers operating exclusively for one NGS need not be licensed. However, in contrast to NEMA’s recommendations, PIOGA suggests that nonselling marketers with an exclusive marketing relationship to an NGS that operates in more than one utility service area should be licensed. PIOGA contends that this situation is present in western PA where gas utility service territories overlap.

OCA's Comments

The OCA submitted comments in support of the Commission's proposed modifications to its licensing requirements for NGSs. The OCA cited the significance of the proposed changes as "broker/marketers" have taken up an increasingly significant role in the retail gas market. Also, the OCA supported the Commission's determination to not require a license for nontraditional marketers because the members of these groups are not required to purchase the services from any partnering NGS.

PEMC's Comments

PEMC, in its comments, supports the Commission's decision to incorporate the definitions of "broker" and "aggregator" from the electric supplier licensing regulations into the natural gas regulations. Additionally, PEMC favors the Commission's decision to leave intact the licensing exemption for "nonselling marketers" that provide marketing and sales support services on behalf of only one NGS because the alternative would result in significant costs for NGSs who rely on services from a range of partner firms to sell and deliver natural gas to retail consumers. PEMC recognizes that requiring licensing for nonselling marketers that work with multiple NGSs ensures a single entity can be held responsible for any violations of consumer protection or sales and marketing rules. Finally, PEMC supports the Commission's choice to continue the licensing exemption for nontraditional marketers which work on behalf of the members of a civic or other community-based organization.

Discussion of the comments to the Advanced Notice of Final Rulemaking

As stated in the Commission's ANOFR, entered February 28, 2013, at Docket No. L-2011-2266832, the focus of this rulemaking is to review: (1) whether the exemption from licensing for marketing services consultants and nontraditional marketers should be discontinued; and (2) whether all natural gas aggregators, marketers and brokers should be required to be licensed as NGSs in order to offer natural gas supply services to retail consumers.

RESA and NEMA, in their respective comments, request that the licensing exemption applicable to nonselling marketers working for a single NGS and set forth in the Commission's ANOFR should be clarified to state that the exemption applies to nonselling marketers who work for only one NGS in a single utility service territory. In part, this request was in response to the Commission's ANOFR wherein we noted comments that a "marketer" operating under an exclusive contract with a single licensed NGS to conduct natural gas-related marketing and sales activities *in its service territory* should not be required to be separately licensed by the Commission. (Emphasis added.) See ANOFR p. 15. The Commission agreed with commenters that when a nonselling marketer's line of accountability back to a single NGS is clear, meaning that a direct relationship exists and the NGS is directly responsible for the marketer's activities and for its reporting requirements under Section 62.110, a nonselling marketer under contract to a single NGS will not be required to obtain a license.

However, the Commission will not expand its licensing exemption at this time. First, the Commission recognizes that there are places in the Commonwealth, especially in western PA, where gas utility service territories overlap. To the extent that the proposals by RESA and NEMA would expand the licensing exemption for a "nonselling marketer" with an exclusive marketing relationship with only one NGS to an exemption that applies to a "nonsel-

ling marketer" that contracts with an NGS that operates in more than one utility service territory, no direct relationship or responsibility may be inferred in the event of abuse. Secondly, in forwarding administrative and regulatory efficiency, the rule proffered in the Commission's ANOFR is enforceable as both NGDCs and NGSs continue to expand the territories they service as natural gas competition continues to grow. Finally, the Commission believes that consumer protections are further enhanced by requiring "nonselling marketers" working for more than one NGS to be licensed, even when the NGSs operate in separate service territories.

The Commission will grant NEMA's request to have the language in the proffered revision of 62.102(f) modified to reflect the Commission's finding in its ANOFR. Thus, the language will state that a nonselling marketer is not required to obtain a license unless it is under contract to more than one licensed NGS.

In response to NEMA's recommendation that licensing or registration requirements be imposed on aggregators, brokers and non-exclusive, nonselling marketers only after a showing of demonstrable need to safeguard the public has been made, the Commission declines to delay in regulating these entities. First, the Act mandates that aggregators and brokers, because they are involved in the sale or the arrangement of the sale of natural gas to retail customers, must be licensed. We believe that entities interacting with retail consumers should have the appropriate regulatory oversight in the first instance, not after a violation or harm to the public has already occurred. Secondly, with respect to non-exclusive, nonselling marketers, we have determined it is the relationships with multiple NGSs that require these entities to obtain a license. The Commission seeks to ensure that a party against whom an action may be brought is clearly identifiable where waste, fraud and abuse occurs. Neither a delay in regulating these entities nor a light-handed approach to licensing or registration adequately safeguards the public.

NEMA also comments that if the Commission moves forward with its proposal to uniformly license aggregators, brokers and non-exclusive, nonselling marketers, then the licensure process should be tailored to the activities these entities perform and the relative financial fitness and technical expertise required in completing their different tasks. We agree with this suggestion in part. We note that pursuant Section 2208 of the Act and Section 62.111 of our regulations, which identify the licensing requirements for entities that sell or arrange for the sale of natural gas to retail gas customers, potential licensees have to pay an application fee and furnish a bond or other security. Based upon the activities that nonselling marketers perform, we will not establish a bonding requirement for non-selling marketers, as they do not provide natural gas supply service as defined in section 2202 of the Act. We do not believe that it is necessary for entities that provide only marketing services in the natural gas retail marketplace to furnish a bond in order to obtain a license from the Commission. The only cost that would potentially apply to nonselling marketers is the de minimus license application fee.

In its comments, NEMA requests that the Commission consider a form of minimal registration of individuals engaged in marketing activities to residential consumers. The Commission's suggested definition of a nonselling marketer currently refers only to a commercial entity, but makes no mention of an individual engaged in similar activities. Therefore, the Commission will take this oppor-

tunity to expand its definition of nonselling marketers to include individuals engaged in marketing activities to residential consumers. If these individuals are under contract to more than one NGS, like their commercial entity counterparts, they will be required to obtain a license. While it is true that licensing these individuals will entail some cost for the license application fee, we note that the amounts are de minimus and are not expected to have a negative impact on the natural gas supply market. Moreover, in the Commission's judgment, the cost associated with obtaining a license are outweighed by the benefit to the public of ensuring that these marketing activities are performed by credible and responsible entities.

Additionally, for the purpose of clarification, the Commission will further amend its definition of "nonselling marketer" to state that an individual or commercial entity must be under contract to a licensed NGS to provide marketing services to retail customers for natural gas supply services. Moreover, in its ANOFR, the Commission added language to Section 62.102(e) stating "or which has a contract with an end-user retail natural gas customer." This clause will not be retained in the Commission's Final Rulemaking because there is no foreseeable circumstance in which a marketer would work on behalf of a retail consumer rather than an NGS.

Finally, NEMA comments that the title "nonselling marketer" may not correctly identify the types of activities that such entities undertake. Instead, NEMA suggests these entities be called either "marketing services providers" or "sales channel partners." The Commission chooses not to adopt either of these titles which NEMA believes will better reflect industry usage and understanding. Neither suggestion properly encompasses that the key to an individual or commercial entity receiving the licensing exemption is that a marketer solely offers marketing services on behalf of the NGS and does not offer to "arrange for the sale of" natural gas supply services to retail consumers. While marketers may hand-out and introduce an NGS's services to the consumer, the consumer must contact the NGS directly to be provided with service or enter into a separate contractual relationship with a broker or an aggregator. Therefore, the Commission believes that the term "nonselling marketer" most accurately describes and covers the intent of the definition.

The Commission will also retain its amended definition of the term "nontraditional marketer" as proffered in its ANOFR and the exemption from licensing for these entities. The comments received to the Commission's ANOFR supported the continuation of this exemption.

Additionally, with respect to the Commission's regulation at 52 Pa. Code § 62.110(a)(3) (regarding reporting requirements and requiring a licensed NGS to file the names and addresses of nontraditional marketers and marketing services consultants acting as agents for the licensee), our Proposed Rulemaking Order suggested the deletion of this requirement. Logically, removing this requirement followed our recommendation, at the time, to delete the definitions of "nontraditional marketers" and "marketing services consultants" and to eliminate licensing exemptions entirely. However, as our ANOFR and now our Final Rulemaking Order reflect, a revised definition of "nontraditional marketers" and a new designation, "nonselling marketers," make certain marketing entities exempt from licensing. Thus, our Final Rulemaking Order will reinstate an amended Section 62.110(a)(3) to account for these entities and that will require licensed NGSs to

file the names and addresses of their agents as part of their annual reports to the Commission.

Both NEMA and PIOGA commented that a separate definition of "energy consultant" should be included in the Commission's revised regulations to complement the advanced definition of "broker." These "energy consultants" work on behalf of consumers as intermediaries between the consumer and an NGS for the sale and purchase of natural gas. While we acknowledge the latitude that is available to the Commission to separately delineate a definition of "energy consultant," entities that provide energy consultation services for consumers under our final form regulations will already be required to obtain a license from the Commission because their activities fall within the definition of "broker." Implicit in our definition of the term "broker" is the understanding that an entity acting as an agent or intermediary in the sale and purchase of natural gas, whether working on behalf of the retail consumer or the NGS, must be licensed. As Section 62.102(a) of our regulations state, in pertinent part, "an NGS, including an aggregator or a broker, may not . . . offer to provide, or provide natural gas supply services to retail consumers until it is granted a license by the Commission." Therefore, we decline to construct a separate definition for "brokers" working on behalf of consumers and reaffirm that all entities that act as agents or intermediaries in the sale and purchase of natural gas must be licensed.

In reaching the conclusion directly above, the Commission also rejects NEMA's recommendation to revise the suggested definition of the term "broker." In its comments, NEMA requests that the definition of "broker" read as follows:

Broker—An entity, licensed by the Commission, that acts **on behalf of more than one NGS** as an agent or intermediary in the sale and purchase of natural gas but does not take title to natural gas supply. (Additions in bold.)

This proffered addition would provide an exemption for licensure for entities providing brokering services for only one NGS and does not truly delineate the Commission's intent regarding the licensing of brokers. Currently, our regulations require that an NGS obtain a license before offering to provide or before providing natural gas supply services to retail consumers. See 52 Pa. Code § 62.102(a). This steadfast rule has been applied to all entities that provide natural gas supply services irrespective of whether the entity acts on behalf of more than one NGS. If an entity is not solely engaged in marketing services to retail consumers on behalf of a licensed NGS, but also in the provision of natural gas supply services, that entity must obtain a license.

Conclusion

This order sets forth final-form regulations concerning NGS licensing that eliminate the definition of marketing service consultants and modify the exemption from licensing requirements set forth in the current regulations. Consistent with our authority and obligations under the Act, particularly, Chapter 22 of the Public Utility Code (66 Pa.C.S. §§ 2201—2212), the Commission is establishing rules and regulations that will bring the benefits of natural gas competition and customer choice to retail consumers. The purpose of the regulations is to eliminate barriers to supplier entry and participation in the marketplace. 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) (45 P.S. §§ 1201 and 1202) and the regulations promulgated thereunder, 1 Pa. Code §§ 7.1, 7.2 and 7.5; section 204(b) of the Commonwealth Attorneys Act (71 P.S. § 732.204(b)); section 745.5 of the Regulatory Review Act (71 P.S. § 745.5); and section 612 of The Administrative Code of 1929 (71 P.S. § 232), and the regulations promulgated thereunder at 4 Pa. Code §§ 7.231—7.235, we find that the regulations for establishing a licensing requirements for NGSs as set forth in Annex A should be approved; *Therefore,*

It Is Ordered That:

1. The Secretary shall serve a copy of this order and Annex A on all jurisdictional natural gas distribution companies, natural gas suppliers, the Office of Consumer Advocate, the Office of Small Business Advocate and all other parties that filed comments at Docket No. L-2008-2069114, Natural Gas Distribution Companies and the Promotion of Competitive Retail Markets.

2. The Secretary shall certify this order and Annex A and deposit them with the Legislative Bureau for publication in the *Pennsylvania Bulletin*.

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

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

5. The Secretary shall submit this order and Annex A for review by the designated standing committees of both houses of the General Assembly, and for review and approval by the Independent Regulatory Review Commission.

6. The final regulations become effective upon publication in the *Pennsylvania Bulletin*.

7. The Office of Competitive Market Oversight shall electronically send a copy of this Order and Annex A on all persons on the contact list for the Stakeholders Exploring Avenues to Remove Competitive Hurdles (SEARCH).

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

9. The contact persons for this Final Rulemaking are David E. Screven, Assistant Counsel, (717) 787-2126 (legal), Colin W. Scott, Assistant Counsel, (717) 783-5949 (legal) and Brent Killian, Bureau of Technical Utility Services, (717) 783-0350 (technical). Alternate formats of this document are available to persons with disabilities and may be obtained by contacting Sherri DelBiondo, Regulatory Review Assistant, Law Bureau, (717) 772-4597.

Statement of Commissioner Pamela A. Witmer

Before the Commission today is the Final Rulemaking Order concerning revisions to the Commission's requirements for Natural Gas Supplier (NGS) licensing that, among other things, removes the exemption for marketing services consultants, establishes new definitions and clarifies the NGS licensing requirements for "aggregators" and "brokers." These changes better reflect the statute as well as current business standards and practices. Importantly, these changes also provide better symmetry and continuity between the treatment of licensed entities on the electric side with entities subject to our NGS licensing requirements, both of which are providing the same service to the competitive market.

As I stated in October 2011 when the Commission first initiated this rulemaking process, "I believe it is necessary for the Commission to periodically review both the Public Utility Code and our regulations to ensure that their purpose is being properly effectuated." I continue to believe that it is appropriate to periodically review statutory requirements, regulations, and policy statements to ensure that all are in synch, are being properly effectuated and reflect current standards.

I want to commend the good work of staff as well as the thoughtful comments received that resulted in today's Final Rulemaking Order. This rulemaking recognizes the important role aggregators and brokers have come to play in the natural gas competitive retail market and provides more clarity to the natural gas industry and more transparency to consumers regarding what is expected of these entities. Furthermore, using similar terminology across the electric and natural gas industries will reduce customer confusion and will allow companies that supply or sell both commodities to more easily market their products across the Commonwealth.

I remain steadfast in my belief that a functioning natural gas competitive retail market represents an economic opportunity and that this Commission should continue to actively explore ways to remove barriers to retail natural gas competition. I look forward to working with all interested parties going forward to further strengthen the state of natural gas competition in Pennsylvania.

PAMELA A. WITMER,
Commissioner

Public Meeting held
November 14, 2013

Commissioners Present: Robert F. Powelson, Chairperson; John F. Coleman, Jr., Vice Chairperson; James H. Cawley; Pamela A. Witmer; Gladys M. Brown

Petition for Reconsideration of the Commission's Rulemaking regarding Licensing Requirements for Natural Gas Suppliers Regulations at 52 Pa. Code § 62.101—§ 62.102; L-2011-2266832

Order

By the Commission:

Before the Commission for consideration and disposition is a Petition for Clarification and/or Reconsideration (Petition) filed by Washington Gas Energy Services (Washington Gas) on August 30, 2013, in the above-captioned proceeding. The Petition refers to the Commission's Final Rulemaking Order that was issued on August 15, 2013 (August 15th Final Rulemaking Order), which set forth final form regulations regarding the scope of the licensure of Natural Gas Suppliers. No Response to the Petition has been filed. For the reasons set forth herein, we will grant the Petition and will modify the August 15th Final Rulemaking Order by revising the definition of nontraditional marketers set forth in our final regulations.

Background

On June 22, 1999, Governor Thomas J. Ridge signed into law the Natural Gas Choice and Competition Act, effective July 1, 1999, 66 Pa.C.S. §§ 2201—2212 (Act). Pursuant to the Act, beginning on November 1, 1999, retail customers were given the ability to choose a Natural Gas Supplier (NGS) to provide them with natural gas supply services.

Section 2208(a) of the Act requires that no entity can engage in the business of an NGS unless it holds a license issued by the Commission. 66 Pa.C.S. § 2208(a). The term NGS is defined, in part, as:

An entity other than a natural gas distribution company, but including natural gas distribution company marketing affiliates, which provides natural gas supply services to retail gas customers utilizing the jurisdictional facilities of a natural gas distribution company.

66 Pa.C.S. § 2202. Further, the term “natural gas supply services” is defined, in part, as “the sale or arrangement of the sale of natural gas to retail gas customers,” 66 Pa.C.S. § 2202.⁷

On June 24, 1999, following the passage of the Act, the Commission issued a Tentative Order establishing a draft licensing application for the interim licensing of NGSs. On July 15, 1999, the Commission issued a Final Order, at Docket No. M-00991248F0002, that adopted the interim licensing procedures and license application for NGSs. The Final Order required all suppliers of retail natural gas supply services to obtain an NGS license except those natural gas local distribution companies providing service within their certificated service territories and municipal utilities providing service within their corporate or municipal limits.

Subsequently, in 2000, the Commission adopted a Proposed Rulemaking Order that revised its interim licensing procedures and promulgated proposed regulations governing the licensing requirements for NGSs. See 52 Pa. Code §§ 62.101—62.114. See Licensing Requirement for Natural Gas Suppliers, Proposed Rulemaking Order, Docket No. L-00000150, 30 Pa.B. 3073 (June 17, 2000). The Commission stated that its initial interpretation of the Act had been that every entity that engages in an activity listed as that undertaken by a natural gas supplier must be licensed. However, the Commission’s proposed rulemaking acknowledged that some activities may be undertaken by entities that will not have any direct physical or financial responsibility on the procurement of the customer’s natural gas. Accordingly, in the proposed regulations, the Commission decided to exempt from licensing two types of entities that worked as brokers or agents for NGSs and retail customers: marketing services consultant and nontraditional marketer. The proposed regulation set forth definitions of the terms “marketing services consultant” and “nontraditional marketer” and established an exemption from licensing for these entities. See 52 Pa. Code §§ 62.101, 62.102(d) and (e).

The Commission issued its June 2000 Proposed Rulemaking Order and corresponding proposed regulations for public comment. Some commenters supported the exemptions and others, including the Independent Regulatory Review Commission (IRRC), opposed them. In the subsequent Final Rulemaking Order, the Commission determined that marketing services consultants and nontraditional marketers were not engaged in the sale or arranging of natural gas supply services to retail consumers. Thus, the Commission concluded that these two entities fell outside of the definition of an NGS set forth in Section 2202 of the Act.

Furthermore, rather than require these entities to obtain a license themselves, the regulations emphasized

that the licensed NGSs would be responsible for any violations of the statute, regulations or orders or for any fraudulent, deceptive or other unlawful marketing or billing acts committed by a marketing services consultant or nontraditional marketer. See 52 Pa. Code § 62.102 (relating to scope of licensure). See also 52 Pa. Code § 62.110(a)(3) (NGSs must identify nontraditional marketers and marketing services consultants who are currently or will be acting as agents for the licensee in the upcoming year).

The regulations were finalized by the Commission in July 2001 in Licensing Requirements for Natural Gas Suppliers, Final Rulemaking Order, Docket No. L-00000150, 31 Pa.B. 3943 (July 21, 2001).

By Order entered January 13, 2012, the Commission initiated a rulemaking to review the scope of the NGS licensing regulations at 52 Pa. Code § 62.101 (relating to definitions) and § 62.102 (relating to scope of licensure). The Commission initiated the instant rulemaking proceeding to determine (1) if its current NGS licensing regulations conform with the plain language of the Act and reflect the current business plans of NGSs appearing before it; and (2) whether continuing certain licensing exemptions was in the public interest.

Specifically, the rulemaking was initiated to address whether or not to maintain the exemptions from the licensing requirement for marketing services consultants and nontraditional marketers. Furthermore, the Commission requested comments on whether it was appropriate to remove responsibility from a licensed NGS for violations of the Public Utility Code, and applicable Commission regulations, orders and directives and for fraudulent, deceptive or other unlawful marketing or billing acts committed by a marketing service consultant or a nontraditional marketer.

In the Proposed Rulemaking Order, the Commission suggested the following revisions to its NGS licensing regulations at 52 Pa. Code §§ 62.101—62.110: (1) deletion of the “marketing service consultant” and “nontraditional marketer” definitions; (2) the deletion of the exemptions set forth in Subsections 62.102(d) and (e) of the regulations and (3) the deletion of Subsection 62.110(a)(3) that requires a licensee to report the names and addresses of nontraditional marketers and marketing services consultants who are acting or will be acting as agents for the licensee in the upcoming year.

Comments to the proposed revisions were filed by Washington Gas, IRRC, National Energy Marketers Association (NEMA), Spark Energy Gas, LP, Retail Energy Supply Association (RESA) and the Pennsylvania Energy Marketers Coalition (PEMC). Based upon these comments, the Commission suggested further amendments to the NGS licensing regulations to add the definitions “aggregator,” “broker,” and “nonselling marketer” and to incorporate a revised definition of “nontraditional marketer.” The Commission issued its further revisions to the proposed regulations as an Advanced Notice of Final Rulemaking (ANOFr), entered February 28, 2013, and invited additional comments.

Specifically, the ANOFr proposed to continue the exemption from licensure for nontraditional marketers, but proposed the following new definition of nontraditional marketers:

Nontraditional marketer—A community-based organization, civic, fraternal or business association, or common interest group that works with a licensed NGS as an agent to market natural gas service to its

⁷ Specifically, Section 2202 of the Act, 66 Pa.C.S. § 2202, defines natural “gas supply services” as including (1) the sale or arrangement of the sale of natural gas to retail customers; and (2) services that may be unbundled by the Commission under section 2203(3) of the Act (relating to standards for restructuring of the natural gas utility industry) and excluding distribution service.

members or constituents. The nontraditional marketer may not require its members or constituents to obtain its natural gas service through a specific licensed NGS and *may not be compensated by the licensed NGS if members or constituents enroll with the licensed NGS.* (Emphasis added).

Comments to the ANOFR were filed by the RESA, NEMA, PEMC, the Pennsylvania Independent Oil and Gas Association (PIOGA), and the Office of Consumer Advocate (OCA). While these parties raised concerns related to various aspects of the proposed rulemaking order, which we then addressed in the final rulemaking order, none of the parties expressed opposition to the Commission's proposed new definition of "Nontraditional marketer," and all seemed to agree that it was reasonable to exempt nontraditional marketers from the licensing requirement. However, no party specifically addressed the "no-compensation" limitation in the new definition. Accordingly, in the Final Rulemaking Order issued August 15, 2013, the Commission approved the proposed new definition of Nontraditional Marketer that was included in the ANOPR (with minor format changes).

Washington Gas filed the instant petition seeking clarification on one aspect of the Commission's new definition of "Nontraditional Marketer," namely, the portion of the definition that addresses the payment of compensation to Nontraditional Marketers. No responses to the instant petition were filed.

Discussion

The Public Utility Code (Code) establishes a party's right to seek relief following the issuance of our final decisions pursuant to Subsections 703(f) and (g), 66 Pa.C.S. § 703(f) and § 703(g), relating to rehearings, as well as the rescission and amendment of orders. Such requests for relief must also be consistent with Section 5.572 of our Regulations, 52 Pa. Code § 5.572, relating to petitions for relief following the issuance of a final decision. The standards for granting a Petition for Reconsideration were set forth in *Duick v. Pennsylvania Gas and Water Company*, 1982 Pa. PUC Lexis 4, *12-13 (1982):

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

See Petition of PECO Energy Company for Approval of its Revised POR Program, Docket No. P-2009-2143607 (Opinion and Order issued August 10, 2010).

In considering this Petition, we are reminded that we are not required to consider expressly or at great length each and every contention raised by a party to our proceedings. *University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984). Any argument that is not

specifically addressed herein shall be deemed to have been duly considered and denied without further discussion.

Since we did not have the benefit of any comments regarding the "no compensation" limitation in the proposed rulemaking order and because Washington Gas has raised some legitimate concerns, these are new and novel arguments and, accordingly, we shall exercise our discretion to reconsider our prior determination on this issue.

In its petition, Washington Gas states that the in the final form regulation, the exemption from the licensing requirement for a nontraditional marketer is limited only to those community-based civic, fraternal or business associations that receive no compensation from NGSs. As currently written, the new definition of Nontraditional Marketer set forth in the final form regulation states that "A Nontraditional Marketer....MAY NOT BE COMPENSATED BY THE LICENSED NGS IF MEMBERS OR CONSTITUENTS ENROLL WITH THE LICENSED NGS."

Washington Gas notes that the current regulation at 52 Pa. Code § 62.102 exempt nontraditional marketers from the requirement of obtaining a license because the Commission had determined that nontraditional marketers fall outside of the Act's definition of NGS since they are not engaged in the sale or arranging of natural gas supply to retail customers. Accordingly, the existing regulation permits the use of Community-based Civic, Fraternal or Business Associations to market natural gas services in the Commonwealth. Washington Gas asserts that such arrangements are not unusual, and have proven to be an effective method of expanding energy choice to residential and small business customers.

Washington Gas asserts that it agrees with the Commission that civic and community organizations should not be required to obtain a license in order to market natural gas services to their members. It also asserts, however, that there is no valid reason why the existence of a compensation arrangement between a nontraditional marketer and an NGS should change this conclusion. Washington Gas notes that the existing regulations at 52 Pa. Code §§ 62.101 and 62.102 do not include any limitation that would preclude nontraditional marketers from receiving compensation from NGSs. Conversely, the current regulations clearly do not prohibit the receipt of compensation from an NGS.

Washington Gas asserts that limitation in the new definition of nontraditional marketer could be interpreted to mean that Nontraditional Marketers are not necessarily compensated by the NGS, or that Nontraditional Marketers may or may not be compensated by the NGS. But the Commission should clarify that this language does not mean that Nontraditional Marketers must not be compensated by the NGS.

Washington Gas states that requiring community and civic organizations to obtain an NGS license in order to receive compensation from their NGS partners will have a chilling effect on these arrangements, as most organizations would have no interest in taking the steps necessary to obtain a license and remain compliant with the rules and regulations that go along with being an NGS, as RESA discussed in its comments to the ANOPR, at p. 6.

Furthermore, Washington Gas asserts that the August 15th Final Rulemaking Order does not discuss why such a strict limitation is imposed or the rationale behind its imposition. Accordingly, Washington Gas states that since there is no discussion of the "no-compensation" limitation

for nontraditional marketers in the Final Rulemaking Order, this issue appears to have been overlooked and its Petition for Clarification/Reconsideration should be granted to address fully address this issue.

Alternatively, Washington Gas requests that instead of clarifying its intent regarding the new definition of Nontraditional Marketer, the Commission should revise the new definition to exclude the language which states that the Nontraditional Marketer “MAY NOT BE COMPENSATED BY THE LICENSED NGS IF MEMBERS OR CONSTITUENTS ENROLL WITH THE LICENSED NGS.” Washington Gas asserts that removing the limiting language would be consistent with the current regulation and would reflect the current business practices of NGSs in the Commonwealth.

Upon our review and consideration of the Washington Gas’ petition, we agree that the definition of Nontraditional Marketer set forth in our prior order should be amended. First of all, the Commission notes that the current regulation, which has been in place since 2001, contains no such limitation on a nontraditional marketer receiving compensation from an NGS, and there was no evidence in the record presented to suggest that there is a need for such a limitation. The Commission acknowledges that no objection has been made by any of the commenters regarding prohibiting a Nontraditional Marketers from receiving some form of compensation from the NGS based on the enrollment of the organization’s members.

Furthermore, the receipt of a fee does not bring the Nontraditional Marketer within the Act’s definition of “Natural Gas Supplier,” because the Nontraditional Marketer will still not be engaged in the sale or arranging of natural gas supply service to retail customers. In situations where a Nontraditional Marketer receives compensation from the NGS, customers still contract directly with the NGS for supply, and the NGS is still responsible for any violations of the statute, regulations, and orders for acts committed by the Nontraditional Marketer.

In the final form regulation in the present docket, the Commission acknowledged that it is reasonable not to require Community-based Civic, Fraternal or Business Associations to obtain an NGS license, on the condition that the organization’s members are not required to purchase the services from the endorsed NGS and if the offer is accepted the contract is between the member and the NGS. Accordingly, since no rationale was presented for adding a new limitation to the Nontraditional Marketer definition that would have the effect of requiring licensure for Nontraditional Marketers that receive a fee from an NGS based on members who enroll with the NGS, the Commission will revise the new definition of nontraditional marketer in the final form regulation by deleting this limitation.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on April 3, 2012, the Commission submitted a copy of the notice of proposed rulemaking, published at 42 Pa.B. 2034 (April 14, 2012) and Annex A, to IRRC and the Chairpersons of the House Consumer Affairs Committee and the Senate Consumer Protection and Professional Licensure Committee for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC and the House and Senate Committees were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing the 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 April 30, 2014, 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 May 1, 2014, and approved the final-form rulemaking.

Therefore,

It Is Ordered That:

1. The regulations of the Commission, 52 Pa. Code Chapter 62, are amended by amending §§ 62.101, 62.102 and 62.110 to read as set forth in Annex A.

2. The Commission hereby grants the Petition for Clarification and/or Reconsideration (Petition) filed by Washington Gas Energy Services.

3. The Commission hereby revises Annex A to its August 15, 2013 Final Rulemaking Order (August 15th Final Rulemaking Order) in the previously-captioned proceeding by modifying the definition of nontraditional marketer set forth in 52 Pa. Code § 62.101 to read as follows:

Nontraditional marketer—A community-based organization, civic, fraternal or business association, or common interest group that works with a licensed NGS as an agent to market natural gas service to its members or constituents. A nontraditional marketer may not require its members or constituents to obtain its natural gas service through a specific licensed NGS.

4. The Secretary’s Bureau shall serve a copy of the instant order granting reconsideration of the August 15th Final Rulemaking Order on all jurisdictional natural gas distribution companies, natural gas suppliers, the Office of Consumer Advocate, the Office of Small Business Advocate and all other parties that filed comments at Docket No. L-2008-2069114, Natural Gas Distribution Companies and the Promotion of Competitive Retail Markets.

5. The Secretary’s Bureau shall submit the August 15th Final Rulemaking Order, the instant order and revised Annex A to the Governor’s Budget Office for review of fiscal impact and the Office of Attorney General for approval as to legality.

6. The Secretary’s Bureau shall submit the August 15th Final Rulemaking Order, the instant order and revised Annex A for review by the designated standing committees of both houses of the General Assembly, and for review and approval by the Independent Regulatory Review Commission.

7. The Secretary’s Bureau shall certify the August 15th Final Rulemaking Order, the instant order and revised Annex A and deposit them with the Legislative Reference Bureau for publication in the *Pennsylvania Bulletin*.

8. The final regulations become effective upon publication in the *Pennsylvania Bulletin*.

9. A copy of the instant order and revised Annex A shall be posted on the Commission’s web site at the Office of Competitive Market Oversight’s web page.

ROSEMARY CHIAVETTA,
Secretary

(Editor’s Note: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 44 Pa.B. 2965 (May 17, 2014).)

Fiscal Note: Fiscal Note 57-288 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 52. PUBLIC UTILITIES

PART I. PUBLIC UTILITY COMMISSION

Subpart C. FIXED SERVICE UTILITIES

CHAPTER 62. NATURAL GAS SUPPLY CUSTOMER CHOICE

Subchapter D. LICENSING REQUIREMENTS FOR NATURAL GAS SUPPLIERS

§ 62.101. Definitions.

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

Act—66 Pa.C.S §§ 2201—2212 (relating to Natural Gas Choice and Competition Act).

Aggregator—An entity, licensed by the Commission, that purchases natural gas and takes title to it as an intermediary for sale to retail customers.

Applicant—A person or entity seeking to obtain a license to supply retail natural gas supply services to retail customers.

Broker—An entity, licensed by the Commission, that acts as an agent or intermediary in the sale and purchase of natural gas that does not take title to natural gas supply.

City natural gas distribution operation—A collection of real and personal assets used for distributing natural gas to retail gas customers owned by a city or a municipal authority, nonprofit corporation or public corporation formed under section 2212(m) of the act (relating to city natural gas distribution operations).

License—A license granted to an NGS under this subchapter.

Licensee—A person or entity that has obtained a license to provide natural gas supply services to retail customers.

Marketing—The publication, dissemination or distribution of informational and advertising materials regarding the licensed NGS's natural gas supply services and products to the public by personal contact, print, broadcast, electronic media, direct mail or by telecommunication.

NGDC—*Natural gas distribution company*—The term as defined in section 2202 of the act (relating to definitions).

NGS—*Natural gas supplier*—The term as defined in section 2202 of the act.

Natural gas supply services—The term as defined in section 2202 of the act.

Nonselling marketer—An individual or commercial entity, such as a telemarketing firm, door-to-door salesman or company, or auction-type web site, under contract to a licensed NGS, that provides marketing services to retail customers for natural gas supply services.

Nontraditional marketer—A community-based organization, civic, fraternal or business association, or common interest group that works with a licensed NGS as an agent to market natural gas service to its members or constituents. A nontraditional marketer may not require its members or constituents to obtain its natural gas service through a specific licensed NGS.

Offer to provide service—The extension of an offer to provide services or products communicated orally or in writing to a customer.

Retail gas customer—The term as defined in section 2202 of the act.

Supplier of last resort—A supplier approved by the Commission under section 2207(a) of the act (relating to obligation to serve) to provide natural gas supply services to customers who contracted for natural gas that was not delivered, or who did not select an alternative NGS, or who are not eligible to obtain competitive natural gas supply, or who return to the supplier of last resort after having obtained competitive natural gas supply.

§ 62.102. Scope of licensure.

(a) An NGS, including an aggregator or a broker, may not engage in marketing, or may not offer to provide, or provide natural gas supply services to retail customers until it is granted a license by the Commission.

(b) An NGDC acting within its certified service territory as a supplier of last resort is not required to obtain a license.

(c) The owners/operators of a building or facility that manage the internal distribution system supplying a building or facility and supply natural gas and other related services to occupants of the building or the facility where the owners/operators, and not the occupants, are the direct purchasers of the natural gas supply services are not required to obtain a license.

(d) A nontraditional marketer is not required to obtain a license. The licensed NGS is responsible for violations of 66 Pa.C.S. (relating to Public Utility Code), and applicable regulations of this part, orders and directives committed by the nontraditional marketer and fraudulent, deceptive or other unlawful marketing or billing acts committed by the nontraditional marketer.

(e) A nonselling marketer under contract to more than one licensed NGS is required to obtain a license.

(f) A nonselling marketer under contract to only one licensed NGS is not required to obtain a license. The licensed NGS is responsible for violations of 66 Pa.C.S. and applicable regulations of this part, orders and directives committed by the nonselling marketer and fraudulent, deceptive or other unlawful marketing or billing acts committed by the nonselling marketer.

§ 62.110. Reporting requirements.

(a) A licensee shall file an annual report on or before April 30 of each year, for the previous calendar year. The annual report must contain the following information:

(1) The total amount of gross receipts from the sales of natural gas supply services for the preceding calendar year.

(2) The total amount of natural gas sold during the preceding calendar year.

(3) The names and addresses of nontraditional marketers and nonselling marketers who are currently or will be acting as agents for the licensee in the upcoming year.

(b) A licensee shall be required to meet periodic reporting requirements issued by the Commission to fulfill the Commission's duty under the act pertaining to reliability and to inform the Governor and General Assembly of the progress to a fully competitive natural gas market.

(c) The information requested in this section will be made available for public review upon request to the Commission subject to any rulings on confidentiality made by the Commission.

[Pa.B. Doc. No. 14-1248. Filed for public inspection June 13, 2014, 9:00 a.m.]

Title 55—PUBLIC WELFARE

DEPARTMENT OF PUBLIC WELFARE

[55 PA. CODE CHS. 1187 AND 1189]

Supplemental Ventilator Care and Tracheostomy Care Payment for Medical Assistance Nursing Facilities

The Department of Public Welfare (Department), under the authority of sections 201(2), 206(2), 403(b) and 443.1 of the Public Welfare Code (62 P.S. §§ 201(2), 206(2), 403(b) and 443.1), adds § 1187.117 (relating to supplemental ventilator care and tracheostomy care payments) and amends § 1189.105 (relating to incentive payments) to read as set forth in Annex A. Notice of proposed rulemaking was published at 43 Pa.B. 4855 (August 24, 2013).

Purpose of Final-Form Rulemaking

The purpose of this final-form rulemaking is to change the Department's methods and standards for payment of Medical Assistance (MA) nursing facility services to offer two new categories of supplemental payment to qualified MA nursing facilities.

This final-form rulemaking is needed to address the financial impact that the implementation of the current Resource Utilization Group III (RUG-III) version 5.12 (RUG v. 5.12) resident classification system and the phase-out of the older RUG v. 5.01 has on nursing facilities that care for a significant number of MA ventilator care and tracheostomy care residents.

Background

The Department published a notice at 42 Pa.B. 3824 (June 30, 2012) announcing its intention to implement a new category of supplemental ventilator care payment to qualified MA nonpublic and county nursing facilities that provide medically necessary ventilator care for a significant portion of their MA-recipient resident population. The Department submitted State Plan Amendment (SPA) 12-030 on September 27, 2012, regarding supplemental ventilator care payments to nonpublic and county nursing facilities to the Centers for Medicare and Medicaid Services (CMS). CMS approved the SPA on December 13, 2012, with an effective date of July 1, 2012. On August 24, 2013, the Department published a proposed rulemaking at 43 Pa.B. 4855 regarding the supplemental ventilator care payment for MA nursing facilities.

After soliciting and considering public comments, the Department decided to offer the supplemental payment to qualified MA nonpublic and county nursing facilities that provide medically necessary ventilator care or tracheostomy care for a significant portion of their MA-recipient resident population. Making these additional funds available to promote the growth of ventilator care and tracheostomy care is part of the Department's ongoing efforts to ensure that MA recipients continue to receive access to medically necessary nursing facility services and that

those services result in quality care that improves the lives of those who receive them.

The Department intends to submit a SPA to CMS end-dating the supplemental ventilator care payment and adding a supplemental ventilator care and tracheostomy care payment.

Affected Individuals and Organizations

This final-form rulemaking affects nonpublic and county nursing facilities enrolled in the MA Program.

Accomplishments and Benefits

This final-form rulemaking benefits MA nursing facility residents in this Commonwealth by ensuring they continue to have access to medically necessary nursing facility services and that those services result in quality care that improves the lives of those who receive them.

Fiscal Impact

This change resulted in an annual supplemental ventilator care payment of \$1.825 million in total funds (\$0.848 million in State funds) in Fiscal Year (FY) 2012-2013. The estimated annual supplemental ventilator care payment is \$1.825 million in total funds (\$0.848 million in State funds) for FY 2013-2014. The estimated supplemental ventilator care and tracheostomy care payments are \$3.965 million in total funds (\$1.911 million in State funds) for FY 2014-2015.

Paperwork Requirements

There are no new or additional paperwork requirements. The Case-Mix Index (CMI) Report used to determine the number of MA-recipient residents who receive ventilator care or tracheostomy care is an existing report.

Public Comment

The Department received seven letters through the public comment process, which included written comments from nursing facility providers, hospitals and a consulting group. The Independent Regulatory Review Commission (IRRC) also commented on the proposed rulemaking.

Discussion of Comments and Major Changes

Following is a summary of the major comments received within the public comment period following publication of the proposed rulemaking and the Department's response to those comments.

General—Ventilator exception program and peer group 13

One commentator requested further details and a summary of the changes the final-form rulemaking will have on those currently in the ventilator exception program or peer group 13.

Response

The Department contacted the commentator and advised the commentator that the information requested can be found in the Regulatory Analysis Form (RAF) posted on the IRRC web site at <http://www.irrc.state.pa.us/>.

No one will be adversely affected by the final-form rulemaking. In addition, this final-form rulemaking positively affects MA nonpublic and county nursing facilities that provide ventilator care or tracheostomy care for a significant portion of their MA-recipient resident population by receiving additional reimbursement for providing these medically necessary services.

§§ 1187.117 and 1189.105(c)—Ventilator care and tracheostomy care patients

Three commentators expressed gratitude for the Department recognizing the additional costs incurred by providers who care for ventilator patients. However, six commentators requested that the Department also consider including MA residents who require tracheostomy care in the formula used to calculate the supplemental payment. Several of the commentators stated that there is little to no cost difference between residents on a ventilator and those receiving tracheostomy care because both require the same level of care and monitoring. Some commentators expressed concerns about the unintended negative financial consequences of not including tracheostomy care residents in the formula. These commentators are concerned with the facilities' ability to remain financially viable with the increase of MA recipients resulting in increasing dependency on the level of MA reimbursement. Two commentators stated facilities that can accommodate ventilator and tracheostomy care residents are very limited and should be supported to maintain placement options.

IRRC also requested that the Department consider including trach collar patients at the same reimbursement level as ventilator patients.

Response

After careful consideration, the Department decided to offer the supplemental payment to qualified MA nonpublic and county nursing facilities that provide medically necessary ventilator care or tracheostomy care for a significant portion of their MA-recipient resident population. The supplemental ventilator care payment is effective July 1, 2012, through June 30, 2014, and the supplemental ventilator care and tracheostomy care payment will be effective July 1, 2014, and thereafter. The Department amended §§ 1187.117 and 1189.105(c) by ending the supplemental ventilator care payments effective June 30, 2014. Sections 1187.117 and 1189.105(c) were also amended to include provisions for a supplemental ventilator care and tracheostomy care payment effective July 1, 2014. In addition, these sections were renumbered accordingly. The supplemental ventilator care and tracheostomy care payment will be calculated on a quarterly basis and paid to nursing facilities caring for a minimum of ten MA-recipient residents who receive medically necessary ventilator care or tracheostomy care, with at least 10% of the facility's MA-recipient resident population receiving medically necessary ventilator care or tracheostomy care. For those nursing facilities meeting both of the threshold criteria on the appropriate picture date, the total supplemental ventilator care and tracheostomy care payment is the nursing facility's supplemental ventilator care and tracheostomy care per diem multiplied by the number of paid MA facility days and therapeutic leave days. If the Department grants a nursing facility a waiver to the 180-day billing requirement, the MA-paid days billed under the waiver and after the authorization date of the waiver will not be included in the calculation of the supplemental ventilator care and tracheostomy care payment and the payment amount will not be retroactively revised. Since this payment is a supplemental payment and not part of the case-mix per diem rates, it is not subject to the budget adjustment factor under § 1187.96 (relating to price- and rate-setting computations).

A nursing facility's supplemental ventilator care and tracheostomy care per diem is calculated as follows: ((number of MA-recipient residents who receive medically necessary ventilator care or tracheostomy care/total MA-recipient residents) × \$69) × (the number of MA-recipient residents who receive medically necessary ventilator care or tracheostomy care/total MA-recipient residents).

The maximum supplemental ventilator care and tracheostomy care per diem is \$69 for nursing facilities whose percent of MA-recipient residents who received medically necessary ventilator care or tracheostomy care to total MA-recipient residents equals 100%.

In addition, the Department added language to final-form §§ 1187.117(a)(1)(iv) and 1189.105(c)(1)(i)(D) (proposed §§ 1187.117(a)(4) and 1189.105(c)(1)(iv)) and final-form § 1187.117(b)(1)(iv) to clarify the total MA-recipient residents listed on the nursing facility's CMI report does not include MA-pending individuals or those individuals found to be eligible after the nursing facility submits a valid CMI report as provided under § 1187.33(a)(5) (relating to resident data and picture date reporting requirements). Further examples to clarify the term "two percentage decimal points" were added to final-form § 1187.117(a)(1)(ii) (proposed § 1187.117(a)(2)), § 1187.117(b)(1)(ii), § 1189.105(c)(1)(i)(B) (proposed § 1189.105(c)(1)(ii)) and § 1189.105(c)(2)(i)(B).

Regulatory Review Act

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on August 14, 2013, the Department submitted a copy of the notice of proposed rulemaking, published at 43 Pa.B. 4855, to IRRC and the Chairpersons of the House Committee on Human Services and the Senate Committee on Public Health and Welfare for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC and the House and Senate Committees were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing the 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 April 30, 2014, 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 May 1, 2014, and approved the final-form rulemaking.

Findings

The Department finds that:

(a) The public notice of intention to adopt § 1187.117 and amend § 1189.105 by this order has been given under sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No. 240) and regulations promulgated thereunder, 1 Pa. Code §§ 7.1 and 7.2.

(b) The adoption of this final-form rulemaking in the manner provided by this order is necessary and appropriate for the administration and enforcement of the Public Welfare Code.

Order

The Department, acting under sections 201(2), 206(2), 403(b) and 443.1 of the Public Welfare Code, orders that:

(a) The regulations of the Department, 55 Pa. Code Chapters 1187 and 1189, are amended by adding § 1187.117 and amending § 1189.105 to read as set forth in Annex A.

(b) The Secretary of the Department shall submit this order and Annex A to the Offices of General Counsel and Attorney General for approval as to legality and form as required by law.

(c) The Secretary of the Department shall certify and deposit this order and Annex A with the Legislative Reference Bureau as required by law.

(d) Sections 1187.117(a) and 1189.105(c)(1) shall take effect upon publication and apply retroactively from July 1, 2012, through June 30, 2014. Sections 1187.117(c)—(e) and 1189.105(c)(3)—(5) shall take effect upon publication and apply retroactively from July 1, 2012. Sections 1187.117(b) and 1189.105(c)(2) take effect July 1, 2014.

BEVERLY D. MACKERETH,
Secretary

(Editor's Note: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 44 Pa.B. 2965 (May 17, 2014).)

Fiscal Note: 14-535. (1) General Fund; (2) Implementing Year 2013-14 is \$848,000; (3) 1st Succeeding Year 2014-15 is \$1,911,000; 2nd Succeeding Year 2015-16 is \$1,911,000; 3rd Succeeding Year 2016-17 is \$1,911,000; 4th Succeeding Year 2017-18 is \$1,911,000; 5th Succeeding Year 2018-19 is \$1,911,000; (4) 2012-13 Program—\$765,923,000; 2011-12 Program—\$737,356,000; 2010-11 Program—\$728,907,000; (7) MA—Long-Term Care; (8) recommends adoption. Funds have been included in the budget to cover this increase.

Annex A

TITLE 55. PUBLIC WELFARE

PART III. MEDICAL ASSISTANCE MANUAL

CHAPTER 1187. NURSING FACILITY SERVICES

Subchapter H. PAYMENT CONDITIONS, LIMITATIONS AND ADJUSTMENTS

§ 1187.117. Supplemental ventilator care and tracheostomy care payments.

(a) *Supplemental ventilator care payments.*

(1) A supplemental ventilator care payment will be made each calendar quarter, effective July 1, 2012, through June 30, 2014, to nursing facilities subject to the following:

(i) To qualify for the supplemental ventilator care payment, the nursing facility shall satisfy both of the following threshold criteria on the applicable picture date:

(A) The nursing facility shall have a minimum of ten MA-recipient residents who receive medically necessary ventilator care.

(B) The nursing facility shall have a minimum of 10% of their MA-recipient resident population receiving medically necessary ventilator care.

(ii) Under subparagraph (i), the percentage of the nursing facility's MA-recipient residents who require medically necessary ventilator care will be calculated by dividing the total number of MA-recipient residents who receive medically necessary ventilator care by the total number of MA-recipient residents as described in paragraph (2)(i). The result of this calculation will be rounded to two percentage decimal points. (For example, 0.0945 will be rounded to 0.09 (or 9%); 0.1262 will be rounded to 0.13 (or 13%).)

(iii) To qualify as an MA-recipient resident who receives medically necessary ventilator care, the resident shall be listed as an MA resident and have a positive

response for the MDS item for ventilator use on the Federally-approved PA-specific MDS assessment listed on the nursing facility's CMI report for the applicable picture date.

(iv) The number of total MA-recipient residents is the number of MA-recipient residents listed on the nursing facility's CMI report for the applicable picture date. MA-pending individuals or those individuals found to be MA eligible after the nursing facility submits a valid CMI report for the picture date as provided under § 1187.33(a)(5) (relating to resident data and picture date reporting requirements) may not be included in the count and may not result in an adjustment of the percent of ventilator dependent MA residents.

(v) The applicable picture dates and the authorization of a quarterly supplemental ventilator care payment are as follows:

<i>Picture Dates</i>	<i>Authorization Schedule</i>
February 1	September
May 1	December
August 1	March
November 1	June

(vi) If a nursing facility fails to submit a valid CMI report for the picture date as provided under § 1187.33(a)(5), the facility cannot qualify for a supplemental ventilator care payment.

(2) A nursing facility's supplemental ventilator care payment is calculated as follows:

(i) The supplemental ventilator care per diem is ((number of MA-recipient residents who receive medically necessary ventilator care/total MA-recipient residents) × \$69) × (the number of MA-recipient residents who receive medically necessary ventilator care/total MA-recipient residents).

(ii) The amount of the total supplemental ventilator care payment is the supplemental ventilator care per diem multiplied by the number of paid MA facility and therapeutic leave days.

(b) *Supplemental ventilator care and tracheostomy care payment.*

(1) A supplemental ventilator care and tracheostomy care payment will be made each calendar quarter, effective July 1, 2014, to nursing facilities subject to the following:

(i) To qualify for the supplemental ventilator care and tracheostomy care payment, the nursing facility shall satisfy both of the following threshold criteria on the applicable picture date:

(A) The nursing facility shall have a minimum of ten MA-recipient residents who receive medically necessary ventilator care or tracheostomy care.

(B) The nursing facility shall have a minimum of 10% of their MA-recipient resident population receiving medically necessary ventilator care or tracheostomy care.

(ii) Under subparagraph (i), the percentage of the nursing facility's MA-recipient residents who require medically necessary ventilator care or tracheostomy care will be calculated by dividing the total number of MA-recipient residents who receive medically necessary ventilator care or tracheostomy care by the total number of MA-recipient residents as described in paragraph (2)(i). The result of this calculation will be rounded to two

percentage decimal points. (For example, 0.0945 will be rounded to 0.09 (or 9%); 0.1262 will be rounded to 0.13 (or 13%).)

(iii) To qualify as an MA-recipient resident who receives medically necessary ventilator care or tracheostomy care, the resident shall be listed as an MA resident and have a positive response for the MDS item for ventilator use or tracheostomy care on the Federally-approved PA-specific MDS assessment listed on the nursing facility's CMI report for the applicable picture date.

(iv) The number of total MA-recipient residents is the number of MA-recipient residents listed on the nursing facility's CMI report for the applicable picture date. MA-pending individuals or those individuals found to be MA eligible after the nursing facility submits a valid CMI report for the picture date as provided under § 1187.33(a)(5) may not be included in the count and may not result in an adjustment of the percent of ventilator dependent or tracheostomy care MA residents.

(v) The applicable picture dates and the authorization of a quarterly supplemental ventilator care and tracheostomy care payment are as follows:

<i>Picture Dates</i>	<i>Authorization Schedule</i>
February 1	September
May 1	December
August 1	March
November 1	June

(vi) If a nursing facility fails to submit a valid CMI report for the picture date as provided under § 1187.33(a)(5), the facility cannot qualify for a supplemental ventilator care and tracheostomy care payment.

(2) A nursing facility's supplemental ventilator care and tracheostomy care payment is calculated as follows:

(i) The supplemental ventilator care and tracheostomy care per diem is ((number of MA-recipient residents who receive medically necessary ventilator care or tracheostomy care/total MA-recipient residents) × \$69) × (the number of MA-recipient residents who receive medically necessary ventilator care or tracheostomy care/total MA-recipient residents).

(ii) The amount of the total supplemental ventilator care and tracheostomy care payment is the supplemental ventilator care and tracheostomy care per diem multiplied by the number of paid MA facility and therapeutic leave days.

(c) *Waiver to 180-day billing requirement.* If the Department grants a nursing facility a waiver to the 180-day billing requirement, then the MA-paid days that may be billed under the waiver and after the authorization date of the waiver will not be included in the calculation of the supplemental ventilator care payment under subsection (a) or the supplemental ventilator care and tracheostomy care payment under subsection (b). The Department will not retroactively revise the supplemental payment amount under subsections (a) and (b).

(d) *Calculation of qualifying facility's supplemental ventilator care or supplemental ventilator care and tracheostomy care payments.* The paid MA facility and therapeutic leave days used to calculate a qualifying facility's supplemental ventilator care or supplemental ventilator care and tracheostomy care payments under subsections (a)(2)(ii) and (b)(2)(ii) will be obtained from the calendar quarter that contains the picture date used in the qualifying criteria as described in subsections (a) and (b).

(e) *Quarterly payments.* The supplemental ventilator care or supplemental ventilator care and tracheostomy care payments will be made quarterly in each month listed in subsections (a) and (b).

CHAPTER 1189. COUNTY NURSING FACILITY SERVICES

Subchapter E. PAYMENT CONDITIONS, LIMITATIONS AND ADJUSTMENTS

§ 1189.105. Incentive payments.

(a) *Disproportionate share incentive payment.*

(1) A disproportionate share incentive payment will be made based on MA paid days of care times the per diem incentive to facilities meeting the following criteria for a 12-month facility cost reporting period:

(i) The county nursing facility shall have an annual overall occupancy rate of at least 90% of the total available bed days.

(ii) The county nursing facility shall have an MA occupancy rate of at least 80%. The MA occupancy rate is calculated by dividing the MA days of care paid by the Department by the total actual days of care.

(2) The disproportionate share incentive payments will be based on the following:

	<i>Overall Occupancy</i>	<i>MA Occupancy (y)</i>	<i>Per Diem Incentive</i>
Group A	90%	≥ 90% y	\$3.32
Group B	90%	88% ≤ y < 90%	\$2.25
Group C	90%	86% ≤ y < 88%	\$1.34
Group D	90%	84% ≤ y < 86%	\$0.81
Group E	90%	82% ≤ y < 84%	\$0.41
Group F	90%	80% ≤ y < 82%	\$0.29

(3) The disproportionate share incentive payments as described in paragraph (2) will be inflated forward using the first quarter issue CMS Nursing Home Without Capital Market Basket Index to the end point of the rate setting year for which the payments are made.

(4) These payments will be made annually within 120 days after the submission of an acceptable cost report provided that payment will not be made before 210 days of the close of the county nursing facility fiscal year.

(5) For the period July 1, 2005, to June 30, 2009, the disproportionate share incentive payment to qualified county nursing facilities shall be increased to equal two times the disproportionate share per diem incentive calculated in accordance with paragraph (3).

(i) For the period commencing July 1, 2005, through June 30, 2006, the increased incentive applies to cost reports filed for the fiscal period ending December 31, 2005.

(ii) For the period commencing July 1, 2006, through June 30, 2007, the increased incentive applies to cost reports filed for the fiscal period ending December 31, 2006.

(iii) For the period commencing July 1, 2007, through June 30, 2008, the increased incentive applies to cost reports filed for the fiscal period ending December 31, 2007.

(iv) For the period commencing July 1, 2008, through June 30, 2009, the increased incentive applies to cost reports filed for the fiscal period ending December 31, 2008.

(b) *Pay for performance incentive payment.* The Department will establish pay for performance measures that will qualify a county nursing facility for additional incentive payments in accordance with the formula and qualifying criteria in the Commonwealth's approved State Plan. For pay for performance payment periods beginning on or after July 1, 2010, in determining whether a county nursing facility qualifies for a quarterly pay for performance incentive, the facility's MA CMI for a picture date will equal the arithmetic mean of the individual CMIs for MA residents identified in the facility's CMI report for the picture date. An MA resident's CMI will be calculated using the RUG-III version 5.12 44 group values in Chapter 1187, Appendix A (relating to resource utilization group index scores for case-mix adjustment in the nursing facility reimbursement system) and the most recent classifiable assessment of any type for the resident.

(c) *Supplemental ventilator care and tracheostomy care payments.*

(1) *Supplemental ventilator care payments.*

(i) A supplemental ventilator care payment will be made each calendar quarter, effective July 1, 2012, through June 30, 2014, to county nursing facilities subject to the following:

(A) To qualify for the supplemental ventilator care payment, the county nursing facility shall satisfy both of the following threshold criteria on the applicable picture date:

(I) The county nursing facility shall have a minimum of ten MA-recipient residents who receive medically necessary ventilator care.

(II) The county nursing facility shall have a minimum of 10% of its MA-recipient resident population receiving medically necessary ventilator care.

(B) For purposes of subparagraph (i), the percentage of the county nursing facility's MA-recipient residents who require medically necessary ventilator care will be calculated by dividing the total number of MA-recipient residents who receive medically necessary ventilator care by the total number of MA-recipient residents as described in subparagraph (ii)(A). The result of this calculation will be rounded to two percentage decimal points. (For example, 9% not 9.45%; 13% not 12.62%.)

(C) To qualify as an MA-recipient resident who receives medically necessary ventilator care, the resident shall be listed as an MA resident and have a positive response for the MDS item for ventilator use on the Federally-approved PA-specific MDS assessment listed on the county nursing facility's CMI report for the applicable picture date.

(D) The number of total MA-recipient residents is the number of MA-recipient residents listed on the county nursing facility's CMI report for the applicable picture date. MA-pending individuals or those individuals found to be MA eligible after the county nursing facility submits a valid CMI report for the picture date as provided under § 1187.33(a)(5) (relating to resident data and picture date reporting requirements) may not be included in the count and may not result in an adjustment of the percent of ventilator dependent MA residents.

(E) The applicable picture dates and the authorization of a quarterly supplemental ventilator care payment are as follows:

<i>Picture Dates</i>	<i>Authorization Schedule</i>
February 1	September
May 1	December
August 1	March
November 1	June

(F) If a county nursing facility fails to submit a valid CMI report for the picture date as provided under § 1187.33(a)(5), the facility cannot qualify for a supplemental ventilator care payment.

(ii) A county nursing facility's supplemental ventilator care payment is calculated as follows:

(A) The supplemental ventilator care per diem is ((number of MA-recipient residents who receive medically necessary ventilator care/total MA-recipient residents) × \$69) × (the number of MA-recipient residents who receive medically necessary ventilator care/total MA-recipient residents).

(B) The amount of the total supplemental ventilator care payment is the supplemental ventilator care per diem multiplied by the number of paid MA facility and therapeutic leave days.

(2) *Supplemental ventilator care and tracheostomy care payment.*

(i) A supplemental ventilator care and tracheostomy care payment will be made each calendar quarter, effective July 1, 2014, to county nursing facilities subject to the following:

(A) To qualify for the supplemental ventilator care and tracheostomy care payment, the county nursing facility shall satisfy both of the following threshold criteria on the applicable picture date:

(I) The county nursing facility shall have a minimum of ten MA-recipient residents who receive medically necessary ventilator care or tracheostomy care.

(II) The county nursing facility shall have a minimum of 10% of its MA-recipient resident population receiving medically necessary ventilator care or tracheostomy care.

(B) For purposes of subparagraph (i), the percentage of the county nursing facility's MA-recipient residents who require medically necessary ventilator care or tracheostomy care will be calculated by dividing the total number of MA-recipient residents who receive medically necessary ventilator care or tracheostomy care by the total number of MA-recipient residents as described in subparagraph (ii)(A). The result of this calculation will be rounded to two percentage decimal points. (For example, 0.0945 will be rounded to 0.09 (or 9%); 0.1262 will be rounded to 0.13 (or 13%).)

(C) To qualify as an MA-recipient resident who receives medically necessary ventilator care or tracheostomy care, the resident shall be listed as an MA resident and have a positive response for the MDS item for ventilator use or tracheostomy care on the Federally-approved PA-specific MDS assessment listed on the county nursing facility's CMI report for the applicable picture date.

(D) The number of total MA-recipient residents is the number of MA-recipient residents listed on the county nursing facility's CMI report for the applicable picture date. MA-pending individuals or those individuals found to be MA eligible after the county nursing facility submits a valid CMI report for the picture date as provided under § 1187.33(a)(5) may not be included in the count and may not result in an adjustment of the percent of ventilator dependent or tracheostomy care MA residents.

(E) The applicable picture dates and the authorization of a quarterly supplemental ventilator care and tracheostomy care payment are as follows:

<i>Picture Dates</i>	<i>Authorization Schedule</i>
February 1	September
May 1	December
August 1	March
November 1	June

(F) If a county nursing facility fails to submit a valid CMI report for the picture date as provided under

§ 1187.33(a)(5), the facility cannot qualify for a supplemental ventilator care and tracheostomy care payment.

(ii) A county nursing facility's supplemental ventilator care and tracheostomy care payment is calculated as follows:

(A) The supplemental ventilator care and tracheostomy care per diem is ((number of MA-recipient residents who receive medically necessary ventilator care or tracheostomy care/total MA-recipient residents) × \$69) × (the number of MA-recipient residents who receive medically necessary ventilator care or tracheostomy care/total MA-recipient residents).

(B) The amount of the total supplemental ventilator care and tracheostomy care payment is the supplemental ventilator care and tracheostomy care per diem multiplied by the number of paid MA facility and therapeutic leave days.

(3) *Waiver to 180-day billing requirement.* If the Department grants a county nursing facility a waiver to the 180-day billing requirement, the MA-paid days that may be billed under the waiver and after the authorization date of the waiver will not be included in the calculation of the supplemental ventilator care payment under paragraph (1)(ii) or the supplemental ventilator care and tracheostomy care payment under paragraph (2)(ii). The Department will not retroactively revise the supplemental payment amount under paragraphs (1) and (2).

(4) *Calculation of quarterly payments.* The paid MA facility and therapeutic leave days used to calculate a qualifying facility's supplemental ventilator care or supplemental ventilator care and tracheostomy care payments under paragraphs (1)(ii) and (2)(ii) will be obtained from the calendar quarter that contains the picture date used in the qualifying criteria as described in paragraphs (1) and (2).

(5) *Quarterly payments.* The supplemental ventilator care or supplemental ventilator care and tracheostomy care payments will be made quarterly in each month listed in paragraphs (1) and (2).

[Pa.B. Doc. No. 14-1249. Filed for public inspection June 13, 2014, 9:00 a.m.]