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December 14, 2011

VIA HAND-DELIVERY

Rosemary Chiavetta, Esq., Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, Pennsylvania 17120

**Re: Interim Guidelines Regarding Standards For
Changing a Customer's Electricity Generation Supplier
(Docket No. M-2011-2270442)**

Dear Secretary Chiavetta:

Enclosed for filing please find an original and 5 copies of the Energy Association of Pennsylvania's Comments in the above-referenced docket.

Sincerely,

A handwritten signature in black ink that reads "Terrance J. Fitzpatrick".

Terrance J. Fitzpatrick
President and CEO

CC: Robert F. Powelson, Chairman
John F. Coleman, Vice Chairman
Pamela A. Witmer, Commissioner
Wayne E. Gardner, Commissioner
James H. Cawley, Commissioner
Electronic Copy to Ra-OCMO@state.pa.us

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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Interim Guidelines Regarding Standards : M-2011-2270442
For Changing a Customer's Electricity :
Generation Supplier :

**Comments of the
Energy Association of Pennsylvania
To the Tentative Order Entered November 14, 2011**

I. Introduction

On November 14, 2011, the Commission entered a Tentative Order proposing to establish "Interim Guidelines Regarding Standards for Changing a Customer's Electricity Generation Supplier." The Tentative Order was developed by the Office of Competitive Market Oversight (OCMO) and arose from meetings held pursuant to the Commission's Retail Market Investigation, Docket No. I-2011-2237952. Comments to the Tentative Order are due on December 14, 2011. The Energy Association of Pennsylvania (EAP) hereby files these comments on behalf of its electric distribution company (EDC) members.¹ In addition, since the Tentative Order requested comments on the feasibility of applying the Interim Guidelines to natural gas distribution companies (NGDCs) and natural gas suppliers (NGSs), EAP also files these comments on behalf of its NGDC members.²

The proposed Interim Guidelines are designed to shorten the timeframe to switch a customer to an electric generation supplier (EGS). Under current regulations, this can take 16

¹ Citizens' Electric Company; Duquesne Light Company; Metropolitan Edison Company; PECO Energy Company; Pennsylvania Electric Company; Pennsylvania Power Company; Pike County Light & Power Company; PPL Electric Utilities Corporation; UGI Utilities, Inc.(Electric Division); Wellsboro Electric Company; and West Penn Power Company.

² Columbia Gas of PA; Equitable Gas Company; National Fuel Gas Distribution Corp.; PECO Energy Company; Peoples Natural Gas Company; Philadelphia Gas Works; UGI Central Penn Gas, Inc.; UGI Penn Natural Gas, Inc.; UGI Utilities, Inc. (Gas Division); and Valley Energy Company.

to 45 days. The Tentative Order states that the length of time it takes to switch customers is an impediment to achieving an effective competitive retail electric generation market. The most significant change proposed in the Interim Guidelines would be to eliminate the 10 day confirmation letter that EDCs send to customers following an EGS notification to the EDC that the customer wishes to switch. See, 52 Pa. Code § 57.173 (2). Instead, the proposed Interim Guidelines waive the current regulation and provide (paragraph I) that submission of an account transfer notice from the EGS to the EDC (or alternative default service provider) shall be evidence of the customer's authorization to transfer his or her account to the EGS for the purpose of making the switch, although not for the purpose of defending the switch in a customer complaint case.

To summarize its comments below, EAP respectfully submits that the Tentative Order and the Interim Guidelines are deficient procedurally in that they seek to establish "binding norms" of conduct outside of either an adjudication or a rulemaking proceeding. See, *Pennsylvania Human Relations Commission v. Norristown Area School District*, 374 A.2d 671 (Pa. 1977). In addition, the Interim Guidelines are flawed because guidelines may not suspend duly promulgated regulations. 1 Pa. Code § 1.4 (definition of "guideline"). For these reasons, the Commission should not make the Tentative Order final and should not adopt the proposed Interim Guidelines. Instead, the Commission should consider amending its regulations.

II. Issuance of a Tentative Order and Interim Guidelines is not the Proper Process for Amending the Commission's Customer Switching Regulations

Properly defined, a "guideline" is a tool that an administrative agency may use "which announces the policy an agency intends to implement in future rulemakings, adjudications or which will otherwise guide the agency in the exercise of administrative discretion." 1 Pa. Code § 1.4 (definition of "guideline"). Stated differently, a guideline is not legally binding; it simply allows agencies to inform the public what they intend to do in the future. Regulated entities may or may not modify their current practices in response to a guideline, and when the issue arises

in a future adjudication or rulemaking, the agency may or may not follow the guideline depending on the evidence, policy arguments, and legal arguments raised in that proceeding.

It appears from their language that the Tentative Order and Interim Guidelines are designed to do more than announce the Commission's intentions, they are designed to make the new policy effective when the Commission issues its Final Order. Much of the language used in the Interim Guidelines is mandatory -- the word "shall" is used repeatedly. For example, paragraph I. 1. of the Interim Guideline states that submission of an account transfer notice to an EDC "shall" constitute evidence of a customer's authorization to switch suppliers -- this requires EDCs to switch customers without going through the confirmation process in the current regulations. The Tentative Order recognizes (at p. 24) that some of the guidelines are written in directory language and explains that this was done "when it is consistent with the Public Utility Code, an existing regulation, a prior Commission order, or directive or when it relates to a policy that the Commission proposes to follow." This appears to mean that the Commission will follow the proposed policy once a Final Order is issued, not after some future proceeding. This interpretation is supported by the fact that the Commission also states in the Interim Guidelines that it is waiving some sections of its regulations that are inconsistent with the proposed policy, and states in the Tentative Order (p. 22) that it anticipates setting an "effective date" for the Interim Guidelines 90 days after the Final Order.

The Commission's use of the word "shall," its waiver of the current regulations, and its intention to set an "effective date" all indicate that the Commission intends to establish "binding norms" of conduct in the Tentative Order and Interim Guidelines. The courts have held that an agency may only establish binding norms through rulemaking or adjudication. See, *Pennsylvania Human Relations Commission v. Norristown Area School District*, 374 A.2d 671 (Pa. 1977). This proceeding is not a rulemaking, as the Commission is not proposing here to follow the process set forth in the *Commonwealth Documents Law*³ and the *Regulatory Review*

³ 45 P.S. § 1102 *et seq.*

*Act*⁴ for promulgating regulations. This proceeding is also not an adjudication, such as a complaint case or other matter in which the Commission exercises its quasi-judicial powers to resolve a dispute. This proceeding was initiated by the Commission for the purpose of establishing a new statewide policy on the process for switching customers to an EGS. Efforts initiated by an agency to establish broad policies for an entire industry are in the nature of regulations, and agencies may not avoid the process for adopting regulations. See, *Dept. of Environmental Resources v. Rushton Mining Co.*, 591 A.2d 1168 (Pa. Cmwlth. 1991), *appeal denied*, 600 A.2d 541.

EAP also respectfully submits that the Interim Guidelines may not waive existing regulations. The proposed waiver is not based upon circumstances that make application of the regulation inappropriate in a particular factual situation, rather it is based upon an across-the-board policy change by the Commission. A better word to describe the Commission's proposed treatment of its current regulations is that it is "suspending" them.⁵ Since a guideline, unlike a regulation, does not have the force of law, a guideline may not suspend a published regulation. See, 1 Pa. Code § 1.4 (definition of "guideline" – "The document may not amend, repeal, or suspend a published regulation.")

III. Comments on the Feasibility of Applying the Interim Guidelines to NGDCs and NGSs

The Tentative Order (at p. 23) requested comments on the feasibility of applying the Interim Guidelines to NGDCs and NGSs. EAP respectfully submits the following comments on behalf of its NGDC members.

The *Natural Gas Competition Act*⁶ and the Commission's regulations implementing the Act contain provisions regarding the process for switching customers and preventing slamming that are virtually identical to those that apply to the retail electric market.⁷ In particular, the

⁴ 71 P.S. § 745.1 *et seq.*

⁵ One definition of "suspend" is "[t]o render temporarily ineffective (*suspend the regulations*)." (emphasis in original) Webster's II New College Dictionary, 3rd Edition (2005).

⁶ 66 Pa.C.S. § 2201 *et seq.*

⁷ See, 66 Pa.C.S. § 2206 (b), 52 Pa. Code § 59.93.


regulations provide for a 10 day confirmation period before a customer is switched to a new supplier. Because the Commission's policy regarding gas switching is firmly established in its regulations, the same concern expressed above regarding the procedure employed for changing that policy via the Tentative Order and Interim Guidelines that applies to the electric retail market also applies to the natural gas retail market.

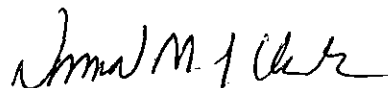
In addition, unlike the situation in the retail electric market, there have not been previous discussions at OCMO meetings/conference calls among NGDCs, NGSs, consumer representatives, and other interested parties regarding accelerating switching timeframes in the retail gas market. Moreover, because of different requirements to maintain reliability in the two industries, such as those related to the timing of gas supply arrangements and assignments of pipeline capacity, it should not be assumed that the Interim Guidelines can or should be applied to the gas industry without a separate discussion of that issue, and without initiating a rulemaking proceeding.

IV. Conclusion

EAP respectfully requests that the Commission consider these comments when it adopts a Final Order in this proceeding.

Respectfully submitted,


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