COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Rulemaking to Amend the Provisions of 52	**:**	
Pa. Code, Section 54.5 Regulations	**:**	
Regarding Disclosure Statement for	**:**	
Residential and Small Business Customers	**:**	**Docket No. L-2014-2409385**
and to Add Section 54.10 Regulations	**:**	
Regarding the Provision of Notices of	**:**	
Contract Renewal or Changes in Terms	**:**	

COMMENTS OF THE CONSTELLATION COMPANIES

I. INTRODUCTION

On March 19, 2014, the Pennsylvania Public Utility Commission ("Commission") issued a Secretarial Letter in the above-docketed proceeding ("March 2014 Letter") opening a rulemaking to amend existing Regulations at 52 Pa. Code, Chapter 54 to revise disclosure statement requirements for residential and small business customers ("Customers"), in order to make disclosure statements more understandable and useful to Customers, especially in the context of variable-priced products.

Constellation NewEnergy, Inc. ("CNE") and Constellation Energy Power Choice, Inc. (formerly MXenergy Electric Inc.) ("CEPCI") (collectively, "Constellation") appreciate the opportunity to provide comments on the March 2014 Letter and the new Regulations proposed therein ("Proposed Regulations"). With the continuing work of the Commission and stakeholders, Constellation looks forward to a competitive retail electric market where customers are provided more thorough and better-tailored information about competitive electric service options which, coupled with the Commission's initiatives, will lead to a more robust retail electricity market.

In the event that the Commission or its Staff prepares a service list for this proceeding or otherwise requires additional information regarding the information presented herein, Constellation identifies the following individuals:

Lael E. Campbell
Director, State Government and
Regulatory Affairs
Exelon Corporation
101 Constitution Avenue, NW
Washington, DC 20001
Phone: (202) 637-0350
Mobile: (202) 568-1589
lael.campbell@constellation.com

Divesh Gupta
Asst. General Counsel
Exelon Business Services Corp.
100 Constellation Way, Suite 500C
Baltimore, MD 21202
Telephone: (410) 470-3158
Facsimile: (443) 213-3556
divesh.gupta@constellation.com

II. BACKGROUND ON CONSTELLATION

CNE and CEPCI are indirect, wholly-owned subsidiaries of Exelon Corporation, a North American energy company headquartered at 10 South Dearborn Street, Chicago, Illinois, with operations and business activities in 47 states, the District of Columbia and Canada. CNE and CEPCI are licensed EGSs in the Commonwealth, pursuant to 66 Pa.C.S. § 2809. Constellation serves Residential, Commercial and Industrial customers in most utility territories in the Commonwealth.

III. CONSTELLATION'S COMMENTS

Constellation commends the Commission for issuing the Proposed Regulations as part of its efforts to improve the Commonwealth's retail electric market and to address recent consumer concerns resulting from extreme weather-related market volatility. The Commission's actions once again recognize that competitive markets continue to represent the best way to ensure that Pennsylvania consumers receive reliable electric power and have access to innovative products and services from a broad pool of suppliers that may best meet each customer's individual needs. At the same time, the Commission is rightfully striving to assure the affordability and reliability of electric supply as competitive markets continue to grow, and protecting consumers' interests and ability to choose.

CNE markets to Pennsylvania Customers only (1) fixed price contracts, and (2) contracts in which the energy component is set (i.e. not subject to price volatility), but there are pass-through provisions and/or variability for non-energy components.[1] To the extent the term of an agreement ends and the Customer does not enter a new fixed-price contract with CNE, but continues to be supplied by CNE, those Pennsylvania customers are rolled into a term contract that is typically equal to the length of their previous term, where the electricity price is set for the entire term, and the customer can leave at any time with no early termination fee. However, there exists a subset of legacy CEPCI customers that remain on month-to-month contracts where a set rate is established each month (typically two weeks prior to the start of the month) for all kilowatts consumed in the month. In this way, in either case, the residential and small business Customers that remain with Constellation after the term of their initial contract expires still are not exposed to daily or hourly intra-month price volatility. Constellation does not market to Pennsylvania residential or small business Customers any variable index product for electricity or a variable priced electricity contract where there is variability in the energy component of the contract.

---

[1] Pass-through provisions and variable non-energy elements to retail contracts are often related to non-market-based ("NMB") charges such as the Network Integration Transmission Service (NITS), Generation Deactivation (or "RMR"), and Transmission Enhancement line items on the PJM Interconnection, L.L.C. invoice. NMB charges are unpredictable and not hedgeable; therefore, absent a pass-through they represent a difficult risk for suppliers to price into retail contracts. Pass-through and other variable provisions relating to NMB charges are not necessary in jurisdictions where a utility has a non-bypassable rider in place to collect these charges from all customers, shopping and non-shopping.

Constellation supports, generally, the Commission's Proposed Regulations. In particular, we laud the Commission's proposal for an EGS Contract Summary, which will provide to Customers a plain language, one-page overview of key contract terms. Constellation recognizes the importance of transparency and communication with customers regarding the terms of their contracts. However, Constellation requests that any final rule reflect the most cost-effective and least burdensome means to achieve this end, in particular as they are related to the timing and form of customer notification. As described further below, Constellation requests that the Commission consider the cost and burden of direct mailings, and recognize the well-established and common use of web-based or electronic notification.

A. Proposed Regulation § 54.5(c)(14)(i)

The Commission should clarify that the information to be provided to a Customer pursuant to this provision should include only the average monthly billed price for each of the prior 12 months, for that Customer's rate class and electric distribution company ("EDC") territory, such that the Customer will be provided 12 prices (one average price for each prior month). In addition, the Commission should clarify that, to the extent that the Customer's EGS has not supplied a Variable Pricing product to that Customer's rate class and in that Customer's EDC territory, the EGS need only provide data for those prior months in which it supplied such product within the previous 12-month period.

B. Proposed Regulation § 54.5(c)(14)(iv)

In light of substantial recent volatility in wholesale markets that serve Pennsylvania, the notice requirement should be triggered only for those rate increases that are greater than 100 percent, rather than 50 percent. Particularly in the case of direct mail, this type of notice can present significant operational cost increases for an EGS. Constellation estimates that the cost of customer direct mail, including postage and printing costs, is in the neighborhood of 65 cents per notice. The issue is exacerbated to the extent the requirement is triggered more frequently – i.e., due to a lower trigger threshold such as 50 percent. If EGS costs rise, in this way, the result will be higher administrative costs that must be passed onto consumers through less competitive offers. Moreover, these higher administrative costs present a charge that will not need to be present in the commodity costs of default service against which EGSs offers must compete.

C. Proposed Regulation § 54.10

Constellation comments only generally that the Commission in the Proposed Regulations has not identified the means by which EGSs must provide the communications required in § 54.10. Constellation proposes that these notices be provided in a manner similar to that outlined in § 54.5(c)(14)(iv) – i.e., that these notices may be provided to Customers via electronic means for those Customers that have elected to receive electronic communications. As explained above, direct mailings are costly, and Constellation requests that the Commission consider allowing use of the most cost-effective and least burdensome means to achieve the goal of customer notification.

E. Proposed Regulation § 54.10(a)(2)(i)

Constellation recommends that this Proposed Regulation be revised as follows:

> (I) A STATEMENT ADVISING THE CUSTOMER OF THE SPECIFIC CHANGES BEING PROPOSED BY THE EGS AND INFORMING THE CUSTOMER OF THE

> CUSTOMER'S OPTIONS, INCLUDING THE CUSTOMER'S ABILITY TO ACCEPT THE PROPOSED CHANGES, **TO CHOOSE ANOTHER PRODUCT OFFERING FROM THEIR CURRENT EGS,** TO SELECT ANOTHER EGS WITHIN A CERTAIN TIME PERIOD, OR TO RETURN TO DEFAULT SERVICE.

Customers should be encouraged to explore all of their options, including additional options for service from their existing EGS. For instance, a Customer on a "plain-vanilla" fixed price EGS product may not be interested in the EGS's renewal offer because the Customer now seeks a green supply product. The Customer should be encouraged to also contact its existing EGS for more information on its green offerings, rather than simply pushed to contact other EGSs.

F. Proposed Regulation § 54.10(a)(2)(ii)

For a variable renewal price, an EGS may not have its pricing available for the first month of service 30 days in advance of the delivery date. In the case of variable priced renewal products, such as month-to-month contracts, the EGS should be required to provide its renewal price closer-in-time to the delivery date, perhaps no earlier than seven to fourteen (7-14) days prior to the first day of delivery under the renewal product. As explained above, for CEPCI customers that remain on month-to-month contracts, the monthly rate for the upcoming month is typically established a few weeks in advance of the month. Requiring suppliers to make this determination further in advance increases risk and uncertainty, which likely will result in suppliers establishing a higher rate for the upcoming month in order to reflect this additional risk. Furthermore, in light of the Commission's proposed rule changes for accelerated switching within three (3) days, a seven to fourteen (7-14) day advance notice requirement for a variable renewal price, still will allow sufficient time for a customer to switch suppliers.

G. Proposed Regulation § 54.10(a)(2)(ii)(a)

Again, for a variable priced product, an EGS may not have its pricing available 30 days in advance of the delivery date. Constellation similarly asks that the Commission reduce this notice period to no earlier than seven to fourteen (7-14) days prior to the next month's delivery period.

H. Proposed Regulation § 54.10(a)(2)(iv)

With respect to this Proposed Regulation, Constellation simply seeks clarification as to the reasons why the Commission proposes to have EGSs include all of these organizations' information on an options notice. Options notices should strive to include only the information that is necessary for the Customer to make a decision, in order to avoid confusion and encourage full review by the Customer.

I. Proposed Regulation § 54.10(a)(2)(v)

Constellation encourages the Commission to review the New York Public Service Commission's ("NYPSC") recent order regarding similar issues.[2] In that NYPSC Order, the NYPSC required that, for renewal notices, all EGSs must include the following specific language on envelopes in bold lettering: "**IMPORTANT: YOUR [ESCO NAME] CONTRACT RENEWAL OFFER IS**

---

[2] *Order Taking Actions to Improve the Residential and Small Nonresidential Retail Access Markets*, NYPSC Case No. 12-M-0476 (issued Feb. 25, 2014) ("NYPSC Order").

ENCLOSED. THIS MAY AFFECT THE PRICE YOU PAY FOR ENERGY SUPPLY."[3] Constellation recommends that the Commission adopt the same universal statement that is now to be used in New York State. Moving towards more universal statements will ensure that EGSs are operating on the same playing field within the Commonwealth, and will lead to some operational cost efficiencies for those EGSs that operate in both Pennsylvania and New York.

Additionally and/or alternatively, Constellation asks that the Proposed Regulation's required statement be allowed to appear in an envelope's clear window, rather than on the envelope itself, as this would reduce certain implementation complications and added costs when dealing with such printings.

J. Proposed Regulation § 54.10(a)(3)(i)(a)

Constellation asks the Commission to clarify in its final order that when referring to "the same terms and conditions," the Commission is referring to non-price terms and conditions, as a fixed term contract being renewed on a month-to-month variable rate cannot have the same pricing terms as the original contract. Separately, Constellation supports the Commission's proposal for elimination of cancellation fees for such month-to-month contracts.

K. Proposed Regulation § 54.10(a)(3)(i)(b)

As noted above, Constellation agrees that cancellation fees or early termination fees ("ETFs") are not appropriate for month-to-month or other types of contracts where the rate for the energy component varies over a period of less than three months. On the other hand, *reasonably*-determined ETFs in *fixed-price* products, or in pass-through contracts where the

3 NYPSC Order at p.34.

price for energy is set for a longer term, represent important provisions that uphold the benefit of the bargain reached between the two contracting parties – the customer and the ESCO – even in the instance of renewals. Such ETFs are commonplace in all types of service contracts with consumers, from telecommunications contracts, to alarm service contracts, to cable television agreements.

With respect to fixed-price energy commodity EGS contracts, often times an EGS may purchase all or a portion of the power necessary to supply the Customer for the entire contract term at the time the contract is formed. Once the Customer elects to terminate the EGS contract prior to the supply term end date, absent wrongdoing by the EGS or other extenuating circumstances evaluated on a case-by-case basis, it is appropriate for the customer to be subject to an ETF.

A reasonable ETF included in fixed-price contracts would allow the EGS to recover, for instance, the difference between the amounts the customer would have paid to the EGS under the contract had it not been terminated early and the amount for which the EGS can resell such electricity to a third party under then-current market conditions, as well as other costs the EGS may incur in collecting amounts owed under the contract (e.g., including attorneys' fees, expenses and court costs). Not allowing reasonable ETFs in fixed-price contracts, including through renewals, on the other hand, will serve only to increase costs for all other customers in the marketplace. Without ETFs for fixed-price contracts, the risk that a customer will leave a longer term fixed-price contract mid-term will rise, and the EGS will not have the certainty or protection necessary to hedge or procure the long term power it is selling to the customer.

Instead, an EGS would need to allocate the risks of defaults by fixed-price customers across all other customers it serves or intends to serve.

An explanation of an ETF such as this should be clearly identified in the customer's terms and conditions prior to enrollment. For these reasons, the Commission should revise this Proposed Regulation as follows:

> (B) ANOTHER FIXED TERM CONTRACT, AS LONG AS THE NEW CONTRACT INCLUDES A CUSTOMER-INITIATED CANCELLATION PROVISION THAT ALLOWS THE CUSTOMER TO CANCEL AT ANY TIME, FOR ANY REASON, ~~AND CONTAINS NO~~ **SUBJECT TO ANY** CANCELLATION FEES **EXPLAINED IN THE CUSTOMER'S TERMS AND CONDITIONS**.

L. Proposed Regulation § 54.10(a)(3)(ii)

For all of the reasons stated above, this Proposed Regulation should make clear that these options should be subject to any reasonable and clearly identified ETFs contained in the Customer's terms and conditions. Constellation notes, however, that it supports a proceeding to examine the appropriateness of very high ETFs for very short term products, and adds that some jurisdictions have contemplated or implemented limits on ETFs vis-à-vis the number of months in (or remaining in) a term. Unreasonably severe or extreme limitations, however, are likely to result in EGSs either opting to not offer fixed price products to Customers or having to price in so much risk that fixed price offers are not competitive, both to the ultimate detriment of the Commonwealth's Customers.

IV. CONCLUSION

Constellation appreciates this opportunity to submit to the Commission its Comments on the Proposed Regulations in the March 2014 Letter. The proposals for improvements herein will promote continued development of the Commonwealth's competitive retail markets, subject to appropriate protections for Customers, for the ultimate benefit of Pennsylvania's consumers. Constellation looks forward to continued discussions with all stakeholders during this proceeding regarding the issues addressed herein.

Respectfully submitted,

Divesh Gupta
Asst. General Counsel
Exelon Business Services Corp.
100 Constellation Way, Suite 500C
Baltimore, MD 21202
Telephone: (410) 470-3158
divesh.gupta@constellation.com

On Behalf of Constellation NewEnergy, Inc. and Constellation Energy Power Choice, Inc.

DATED: **March 24, 2014**