

**BEFORE THE PENNSYLVANIA
PUBLIC UTILITY COMMISSION**

Rulemaking Regarding Electricity Generation Customer Choice, 52
Pa. Code Chapter 54.

L-2017-2628991

COMMENT OF THE STAFF OF THE FEDERAL TRADE COMMISSION

May 22, 2018

I. Introduction

The Pennsylvania Public Utility Commission (PUC) has issued a Notice of Proposed Rulemaking (NOPR) titled “Rulemaking Regarding Electricity Generation Customer Choice, 52 Pa. Code Chapter 54.”¹ The Federal Trade Commission (FTC) staff appreciates the opportunity to submit this comment regarding certain competition and consumer protection issues raised by the NOPR, as well as the variety of service choices that the NOPR would make available to residential and small commercial customers.²

The FTC staff comment that follows generally commends the PUC for focusing on improving customers’ ability to obtain the information they need to make fully informed electricity service choices. This approach is particularly admirable and economically significant because it preserves the ability of residential and small commercial customers to contract with marketers for dynamic pricing rate plans.³ The NOPR’s proposals thus preserve an important link between wholesale and retail electricity markets – a link severed by flat rate offers. Preserving this link improves the efficiency and reliability of electricity service in Pennsylvania and beyond.

¹ Pennsylvania Public Utility Commission, Notice of Proposed Rulemaking, *Electricity Generation Customer Choice* (Dec. 7, 2017), 48 Pa. Bulletin 1696 (Mar. 24, 2018), available at <https://www.pabulletin.com/secure/data/vol48/48-12/450.html>.

² This comment expresses the view of the FTC’s Office of the General Counsel, Office of Policy Planning, and Bureau of Economics. The comment does not necessarily represent the views of the FTC or of any individual Commissioner. The Commission, however, has voted to authorize the filing of this comment.

³ When we speak of “dynamic pricing” in the retail context, we mean a subset of retail variable rate plans in which retail electricity prices vary based on changes in the wholesale costs of electricity and associated transmission services. This term encompasses several retail variable rate alternatives, ranging from real-time dynamic pricing that closely tracks variations in wholesale electricity prices and transmission conditions, to time-of-use prices that typically change only once or twice on weekdays between on-peak and off-peak demand periods. Some forms of dynamic pricing involve billing credits awarded on the basis of a customer’s reduction in electricity consumption in periods when the power system is stressed by conditions of unusually high demand and/or unusually low supply. When customers change their consumption in response to more accurate price signals, it helps to balance demand and supply on the power system, thus reducing the need to use high-cost generation to achieve all of the adjustments to fluctuations in demand. Increased retail price sensitivity to wholesale price changes can also help mitigate market power in wholesale electricity markets.

Over the past 25 years, the electric power industry has experienced a profound competitive transformation. The Federal Energy Regulatory Commission (FERC) and state regulatory authorities decided to reduce or eliminate entry barriers in parts of the industry previously deemed “off limits” to competition – decisions that in turn have led to or facilitated many competitive developments in formerly monopolized electricity markets. Prime examples include independent generators; independent transmission developers; independent retail power marketers; and small, customer-owned, on-site generators.

The retail sale of electricity is one of the stages of production in the electric power industry in Pennsylvania that is no longer organized in the form of franchised monopoly territories. Instead, electricity customers in Pennsylvania can choose among the offers of multiple independent retail electricity marketers.⁴ In turn, these independent marketers can either own generation facilities or contract with generators to supply the power that customers use. This competition among marketers in Pennsylvania takes place under rules and regulations largely determined by the PUC. The present NOPR contains proposals to update the rules and regulations that frame retail electricity competition for residential and small commercial electricity customers.⁵

The NOPR contains proposals, among others, to increase the alignment between marketing rules in the retail electricity and retail natural gas sectors. In addition, the NOPR sets forth revised disclosure requirements for the retail offers and contracts that marketers use in making sales to residential and small commercial electricity customers. The proposals in the NOPR are, at least in part, a reaction to apparent consumer confusion and discontent in the aftermath of the stressful period of extreme cold weather in the Northeast early in 2014, commonly known as the “Polar Vortex,” when wholesale electricity prices were unusually high.

In addition to preserving the ability of residential and small commercial customers to choose dynamic pricing plans – which we support – the NOPR proposes various disclosures, some of which the PUC may wish to revise in order to make them more compatible with potential innovations in retail electricity rate offers.

The NOPR also requests comments on whether a proposed limitation on early termination fees could result in unintended consequences. In our view, the proposed limitation on early termination fees reduces customers’ switching costs, but may also introduce additional risks for marketers and the generators that they own or with which they contract. One alternative for the PUC to consider is to make switching orders (received after issuance of contract expiration notices) effective at the end of the contract period unless the customer explicitly indicates that the switch should take place earlier (which will result in the customer’s payment of an early termination fee).

⁴ Customers may also choose to take default service or the PUC’s standard offer program, launched in 2013. Pennsylvania PUC, “Innovation and Savings: The PUC’s Standard Offer,” *available at* [http://www.puc.state.pa.us/General/pdf/PAPS-Standard Offer Program.pdf](http://www.puc.state.pa.us/General/pdf/PAPS-Standard%20Offer%20Program.pdf).

⁵ The proposals set forth in the NOPR would not apply to larger commercial and industrial customers, which already typically buy power under dynamic pricing rate plans. (See note 3 *supra* for further discussion of retail dynamic pricing.)

II. Interest and Experience of the FTC

The FTC is an independent agency of the United States Government responsible for maintaining competition and safeguarding the interests of consumers. The FTC accomplishes these goals through law enforcement, policy research, and advocacy. For example, in the field of consumer protection, the FTC enforces (among other statutes) Section 5 of the Federal Trade Commission Act, which prohibits unfair or deceptive acts or practices. In its competition mission, the FTC enforces Section 5's prohibition of unfair methods of competition, including anticompetitive mergers, agreements in restraint of trade, and unlawful monopolization. The FTC may also challenge mergers and other anticompetitive conduct under provisions of the Clayton Act. With regard to advocacy, the FTC often analyzes regulatory or legislative proposals that may affect competition, allocative efficiency, or consumer protection. It also engages in considerable consumer education through its Division of Consumer and Business Education.⁶

The energy sector, including the electric power industry, has been an important focus of the FTC's merger review and other antitrust enforcement, competition advocacy, and consumer protection efforts.⁷ The FTC and its staff have filed numerous comments advocating competition and consumer protection principles with state utility commissions, state legislatures, the Department of Energy (DOE), and the Federal Energy Regulatory Commission (FERC).⁸ In particular, we have filed a number of advocacy comments concerning demand response (DR) and dynamic pricing, as well as their interactions with retail competition.⁹ The FTC staff also

⁶ For an overview of the FTC's education efforts, *see* the FTC staff's comment to the Consumer Financial Protection Bureau concerning "Request for Information on Effective Financial Education," Docket No. CFPB-2012-0030 (Nov. 2, 2012), available at <http://www.ftc.gov/os/2012/11/1211cfpb.pdf>.

⁷ *See, e.g.*, Opening Remarks of the FTC Chairman at the FTC Conference on *Energy Markets in the 21st Century: Competition Policy in Perspective* (Apr. 10, 2007), accessible at <http://www.ftc.gov/news-events/events-calendar/2007/04/energy-markets-21st-century-competition-policy-perspective>. FTC merger cases involving electric power markets have included *DTE Energy/MCN Energy* (2001) (consent order), accessible at <http://www.ftc.gov/enforcement/cases-and-proceedings/cases/2001/05/dte-energy-company-and-mcn-energy-group-inc>; and *PacifiCorp/Peabody Holding* (1998) (consent agreement), available at <http://www.ftc.gov/sites/default/files/documents/cases/1998/02/9710091.agr.htm>.

⁸ A listing, in reverse chronological order, of FTC and FTC staff competition advocacy comments to federal and state electricity regulatory agencies is available at http://www.ftc.gov/policy/advocacy/advocacy-filings?combine=&field_matter_number_value=&field_advocacy_document_terms_tid=5290&field_date_value%5Bmin%5D%5Bdate%5D=2013-10&field_date_value%5Bmax%5D%5Bdate%5D=&=Apply. The FTC staff and the staff of the Antitrust Division of the Department of Justice submitted some comments to FERC jointly.

⁹ For example, the FTC staff discussed electricity dynamic pricing, DR, and competition issues in its Comment Before the District of Columbia Public Service Commission in the Matter of the Investigation into the Potomac Electric Power Company's Residential Air Conditioner Direct Load Control Program and the Potomac Electric Power Company's District of Columbia Dynamic Pricing Program Proposal, Formal Cases 1086 and 1109 (Feb. 6, 2014), available at https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-reply-comment-district-columbia-public-service-commission-concerning-proposed-program.1086-1109/140117dcdynamicpricing.pdf; Comment Before the Public Service Commission of the State of Delaware in the Matter of the Adoption of Rules and Regulations To Implement the Provisions of 26 DEL. C. CH. 10 Relating to the Creation of a Competitive Market for Electric Supply Service, PSC Regulation Docket No. 49 (Nov. 13, 2013), available at http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-public-service-commission-state-delaware-concerning-its-proposal-revised-its-rules/131114delawareretailelectric.pdf; Comment Before the Public Utility Commission of Texas in the Rulemaking Regarding Demand Response in the

has issued two reports on electric power industry restructuring issues at the wholesale and retail levels.¹⁰ In addition, the FTC staff (along with staff from FERC, the Department of Justice, the Department of Agriculture, and the Department of Energy) contributed to the work of the Electric Energy Market Competition Task Force, which issued a *Report to Congress* in the spring of 2007.¹¹ And in 2016, the FTC held a workshop – attended by a wide variety of stakeholders – about the competition and consumer protection issues associated with distributed solar generation.¹²

III. 52 Pa. Code §§ 54.5(c)(3), 54.5(c)(3)(i), 54.5(c)(3)(iv) : Variable Rate Offers That Entail Dynamic Prices

The NOPR proposes three revisions to 52 Pa. Code § 54.5(c)(3) that are applicable to variable rate offers. We commend these provisions of the NOPR: they preserve the ability of residential and small business customers to contract for variable pricing services from marketers (rather than banning variable price offers), and they do so without adding potentially crippling disclosure or notification requirements. We are particularly interested in preserving the subset of variable price offers that entail dynamic prices – the kind of pricing that links short-term variations in retail prices to short-term variations in wholesale market prices. We note that the procurement of electricity at the wholesale level is typically the largest component of the cost to supply power at the retail level.

Electric Reliability Council of Texas (ERCOT) Market, Project No. 41061 (Mar. 11, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-public-utility-commission-texas-concerning-rulemaking-regarding-demand-response/1303texaspuccomment.pdf; Comment Before the New York State Public Service Commission in the Proceeding To Assess Certain Aspects of the Residential and Small Non-residential Retail Energy Markets in New York State, Cases 12-M-0476, 98-M-1343, and 06-M-0647 (Jan. 24, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-state-new-york-public-service-commission-ny-psc-concerning-ny-pscs-review/130125nypsccomment.pdf; Comment Before the Federal Energy Regulatory Commission in the Matter of Demand Response Compensation in Wholesale Energy Markets, Docket No. RM10-17-000 (Oct. 13, 2010), *available at* http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-comment-federal-energy-regulatory-commission-concerning-demand-response-compensation-organized_rm10-17-000/1010wholesaleenergymarkets.pdf; Comment Before the Federal Energy Regulatory Commission in the Matter of Discussion Draft of Possible Elements of a National Action Plan on Demand Response, Docket No. AD09-10-000 (Dec. 11, 2009), *available at* http://www.ftc.gov/sites/default/files/documents/advocacy_documents/federal-trade-commission-comment-federal-energy-regulatory-commission-concerning-possible-elements/v100002ferc.pdf.

¹⁰ FTC Staff Report, *Competition and Consumer Protection Perspectives on Electric Power Regulatory Reform: Focus on Retail Competition* (Sept. 2001), *available at* <http://www.ftc.gov/reports/competition-consumer-protection-perspectives-electric-power-regulatory-reform-focus-retail>; FTC Staff Report, *Competition and Consumer Protection Perspective on Electric Power Regulatory Reform* (July 2000), *available at* <http://www.ftc.gov/reports/competition-consumer-protection-perspectives-electric-power-regulatory-reform> (containing edited compendium of excerpts from previous comments that the FTC and its staff provided to various state and federal agencies).

¹¹ That report is available at <http://www.ferc.gov/legal/fed-sta/ene-pol-act/epact-final-rpt.pdf>.

¹² Something New Under the Sun: Competition & Consumer Protection Issues in Solar Energy, <https://www.ftc.gov/news-events/events-calendar/2016/06/something-new-under-sun-competition-consumer-protection-issues>.

As we have noted in submissions to FERC and to a number of state electricity regulatory authorities,¹³ one of the most significant technological developments in the electricity industry over the past 25 years has been the wide deployment of smart meters that measure and report power use in small time intervals and that also can communicate price and power system status information to customers.¹⁴ Plans that use dynamic pricing – offered by retail electricity marketers – can present many benefits to power customers, including enabling them to better match their preferences for bill savings and increasing power system reliability. For example, under dynamic pricing, customers have an economic incentive to lower their electricity bills by shifting power use away from periods when the power system depends on more costly generation resources or faces challenges to its reliability.

When technological developments and economically appropriate dynamic pricing incentives are adopted, customers are in a position to help address the challenges of balancing supply and demand in the power industry, either locally or on a wider geographic scale. When customers are compensated for providing this help, the response is often substantial.¹⁵ Customer responses to higher power prices (or equivalent credits for reducing power use) can be automated through equipment that cuts back or delays power use at pre-set price points or credit levels.¹⁶ Alternatively, customers can manually adjust their air conditioners or other heavy power uses when meters (or other communication sources) alert them either that prices are going up or that they can earn credits for reducing power consumption.

Customer responses to retail price signals that accurately reflect wholesale market conditions reduce system costs, support reliability, and provide environmental benefits.¹⁷ For example, a DR program that entails reduction of power use during periods of high wholesale prices can reduce overall system costs by utilizing lower-cost generation units and reducing the

¹³ *Supra* note 8.

¹⁴ Other important developments in the industry have included (1) a trend toward smaller, highly efficient generation units; (2) the increased use of wind, solar, biofuel, and geothermal renewable energy sources for generation (some at the utility level and some on the customer's side of the meter); (3) the automation of generator dispatch and of transmission and distribution operations; and (4) advances in energy storage technology.

¹⁵ For a bibliography of papers on DR prepared by Brattle Group, *see* Toni Enright and Ahmad Faruqui, "A Bibliography on Dynamic Pricing and Time-of-Use Rates, Version 2.0" (Jan 1, 2013), *accessible at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2178674. Dr. Faruqui (along with colleagues Sanem Sergici and Eric Shultz) summarized several reviews of DR projects in "Consistency of Results in Dynamic Pricing Experiments – Toward a Meta Analysis" (Jan. 29, 2013), *available at* http://www.brattle.com/system/publications/pdfs/000/004/400/original/Consistency_of_Results_in_Dynamic_Pricing_Experiments_Faruqui_et_al_DistribuTECH_012913.pdf?1378772104.

¹⁶ Robert Letzler, "Using Incentive Preserving Rebates to Increase Acceptance of Critical Peak Electricity Pricing," Univ. of Cal. Energy Inst. Working Paper 162R (rev'd May 31, 2010), *available at* <http://www.ucei.berkeley.edu/PDF/csemwp162r.pdf>; *see also* Baltimore Gas & Elec., "MADRI: All About Peak-Time Rebates" (Feb. 2, 2012) (presentation to the Mid-Atlantic Distributed Resources Initiative Working Group), *available at* http://sites.energetics.com/MADRI/pdfs/Hindes_MADRI_Feb_2_2012.pdf.

¹⁷ *See, e.g.*, Charles J. Black, "Dynamic Pricing Evaluation for Washington" (Jan. 2011), *available at* http://www.naruc.org/Publications/SERCAT_Washington_2010.pdf; Ahmad Faruqui, "The Case for Dynamic Pricing" (Aug. 23, 2010), *available at* http://www.brattle.com/system/publications/pdfs/000/004/517/original/The_Case_for_Dynamic_Pricing_Faruqui_S_G_Latin_America_Aug_23_2010.pdf?1378772111.

need for high-cost peaking generators to meet demand spikes. It can support reliability by cutting power consumption when the system is at greatest risk of blackouts or is recovering from a service interruption. It can provide environmental benefits by facilitating integration of renewable energy sources and by avoiding the use of older, higher-cost generators with higher pollutant emissions that operate during peak demand periods. This DR process is a critical justification for grid modernization, including smart meters and other smart grid technologies.

Some recent developments appear to underscore the importance of gaining customer assistance in balancing the power system. Electric vehicles (EVs) illustrate this point well.¹⁸ Recharging EVs off peak (overnight) helps flatten load profiles (reduce peaks and fill troughs in consumption), so that the fixed costs of more fully utilized generation and distribution assets are spread over more power volume, allowing a lower per-kilowatt unit rate. Conversely, recharging EVs during peak demand periods could cause significant demand increases during the most costly time of day for power generation and could stress the grid, to the detriment of reliability. These harmful effects could occur either on a local distribution line or over a larger area. Consequently, all consumers benefit if EV owners respond to incentives to avoid recharging their EVs during peak demand periods for the grid, even if that is not always convenient for EV owners. Both EV owners and electricity customers in general could obtain even more benefits if EV owners scheduled their vehicle charging to coincide with abundant supply and uncongested transmission conditions. For example, an EV owner could set the recharging equipment to draw power only (or primarily) when the price net of credits is below a specified level.

Another reason for the PUC to be particularly attentive to preserving opportunities for innovative dynamic prices is that, under flat-rate electricity pricing, contracts likely entail considerable additional costs to society and higher electricity bills for customers. Flat-rate electricity pricing at the retail level – in the face of volatile generation and transmission prices at the wholesale level – severs the link between the cost of power generation and the consumption of power. Without price signals that reflect the cost of consumption to the power system, retail electric power customers can make consumption decisions that result in inefficiencies in the power system, to the detriment of all electricity consumers.

Further, flat rates distort incentives to invest in methods to improve energy efficiency or in devices to shift consumption to off-peak periods (when system costs and wholesale electricity prices are lower). As with any market, pricing electricity closer to the marginal cost of supply improves the overall efficiency of the consumption of the good and reduces deadweight losses.¹⁹

¹⁸ See, e.g., Ahmad Faruqui, Ryan Hledik, Armando Levy, and Alan Madian, Brattle Group Discussion Paper, “Will Smart Prices Induce Smart Charging of Electric Vehicles?” (July 2011), *accessible at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1915658.

¹⁹ For further discussion of opportunities to improve the performance of the electricity sector, *see* Executive Office of the President, National Science and Technology Council, A Policy Framework for the 21st Century Grid: Enabling Our Secure Energy Future, esp. § 4.2 (Demand Management) (June 13, 2011), *available at* <http://energy.gov/sites/prod/files/oeprod/DocumentsandMedia/nstc-smart-grid-june2011.pdf>. (In “Key Action 5,” this report (at 31) states: “Federal, state, and local officials should strive to reduce the generation costs associated with providing power to consumers or wholesale providers during periods of peak demand and encourage participation in demand management programs. Innovative rate designs will be more feasible as smart grid technologies become more widely available.”) *See also* Paul L. Joskow and Catherine D. Wolfram, “Dynamic

When a customer with distributed generation (DG) facilities (*e.g.*, rooftop solar panels) faces flat rates, the rates discourage investment in energy storage devices that could help balance supply and demand, especially when the power system is under stress and close to shedding load or allowing a voltage sag in order to prevent a larger blackout.²⁰

For the above reasons, the NOPR's approach that allows variable (dynamic) pricing options for residential and small commercial and industrial customers is beneficial not only to customers that select such options but also to the whole electric system.

We agree that customers should be informed about how and when they will be notified about price changes for variable price offers. We suggest adding a provision under which sellers can refer customers to publicly available indices of electricity prices if such indices are key factors in determining power bills. Further, we encourage the PUC to accommodate retailer experimentation regarding variable rate plan disclosures. Such disclosures are likely to be complicated because a customer's expected payment depends not only on the amount of electricity consumed during a pay period, but also on when during the day that electricity is consumed. Moreover, an additional complication arises from the need to take into account DR payments from the wholesale power markets or credits on power bills that are received in exchange for reductions in power consumption during specific periods. Restrictions on disclosures that do not permit customers to make an apples-to-apples price comparison could harm customers by dissuading them from accepting variable price offers that increase their ability to reduce their power bills.

IV. 2016 Natural Gas Supplier Disclosure Regulation Revisions: Parallel Rules for Electricity and Natural Gas Marketing

We commend the PUC for its interest in providing parallel marketing rules for both electricity and natural gas retailers. We agree that parallel rules are likely to lessen the confusion that dissimilar rules can create for consumers, particularly those who buy electricity and natural gas from different entities. From a competition policy perspective, parallel marketing rules are highly appropriate for end uses in which electricity and natural gas compete head-to-head.²¹

Pricing of Electricity" (Jan. 2012), *available at* <http://faculty.haas.berkeley.edu/wolfram/Papers/AEA%20DYNAMIC%20PRICING.pdf>.

²⁰ For example, wind DG units generally produce power most abundantly during off-peak, windier hours. If retail prices are flat, there is less incentive for a wind DG owner to store power produced in the off-peak hours (in order to sell it during peak hours) than there would be if peak-hour prices considerably exceeded – and prices in off-peak hours were less than – flat-rate prices.

²¹ The PUC may wish to be prepared to devote additional attention to maintaining a level playing field for direct competition between electricity and natural gas in various end uses. Parallel marketing rules can be a major step in that direction. We note that the Regulatory Assistance Project (RAP) and others have indicated that “beneficial electrification” will be a major theme of research and policy initiatives in the near future, albeit with an initial focus on the transportation sector. *See* Ken Colburn & Richard Sedano, RAP, “Utilities Can Get a ‘LEG’ Up with Beneficial Electrification – But Regulators Also Have to be Ready” (Feb. 9, 2017), <http://www.raponline.org/blog/utilities-can-get-a-leg-up-with-beneficial-electrification-but-regulators-also-have-to-be-ready/>, as well as the November 2017 edition of *Public Utilities Fortnightly 2.0*.

Efficient electrification (the same concept as “beneficial electrification”) involves identifying energy end uses, analyzing the efficiency of alternatives, and promoting switching to the more efficient energy source. Initial

Parallel marketing rules for both industries maximize opportunities for effective competition between electricity and natural gas.²² Parallel rules also would increase chances for additional end-use competition between electricity and natural gas in the future. Fostering parallel marketing rules for retail electric and natural gas sectors is particularly timely in view of ongoing direct competition between electricity and natural gas for some end uses and increased national interest in efficient electrification.

We agree that sellers of both natural gas and electricity should identify introductory prices and distinguish introductory prices from subsequent prices. As discussed in Section VIII below, we encourage the PUC to make sure that sellers can disclose truthful information about other aspects of price or service offers in an informative manner.

V. 52 Pa. Code § 54.3. Standards and Pricing Practices for Retail Electricity Service: Early Termination Fees for Residential and Small Commercial Customers

The NOPR proposes to eliminate early termination fees once the marketer has sent the contract expiration notice required by 52 Pa. Code § 54.3(2). The NOPR describes the benefits of this proposal (in the form of less confusion and less frustration) to customers who wish to switch suppliers and seeks comments on the proposed rule's possible unintended consequences.

The proposal aims to reduce switching costs for customers, with the intended consequence of increasing competition among marketers. One potential unintended consequence of reducing switching costs is that marketers might increase the minimum duration of customer contracts.

The PUC may wish to engage marketers in a discussion of whether these and other potential costs associated with the proposal are likely to occur, and then weigh the benefits against the costs in reaching a determination on this element of the NOPR.

One alternative would be to keep the early termination fees in place but allow switching orders received during the post-notification period to take effect automatically at the end of the contract period, unless the customer indicates specifically that he or she is willing to pay the early termination fee in order to switch before the end of the current contract. This approach would avoid both the increased risk for marketers and generators and the customer frustration associated with incurring an unexpected early termination fee.

attention has been on efficient electrification in the transportation sector, but interest is also developing in the heating of buildings as well as the heating of air, liquids, or solids involved in commercial and industrial processes in which electricity is more likely to compete with direct use of natural gas. In some areas of the United States, natural gas is used heavily to generate electricity. In those areas, efficient electrification may result in complex iterative adjustments between electricity and natural gas supplies.

²² Emerging and increasing competition between electricity and natural gas for specific end uses could increase concern about potential anticompetitive effects of mergers between electricity and natural gas utilities, as discussed in the FTC's *DTE Energy/MCN Energy* consent order (2001), cited in note 7, *supra*. Similar concerns could arise in the case of a proposed merger between large retail energy marketers that both focus on end-use competition between natural gas and electricity.

Finally, customers should be informed if a retail electricity contract is assignable, and should be further apprised when a contract is assigned to another retailer. Even if the contract terms remain the same, the PUC may wish to consider mandating an opt-out provision (without early termination penalties) if the customer is dissatisfied with the new supplier.²³

VI. 52 Pa. Code § 54.5(c)(2): Introductory Pricing Discounts and Premiums

The NOPR appropriately contains provisions requiring retailers to make clear whether introductory rates are lower than the rates that will apply after the introductory period. We agree that disclosures about temporary price discounts are important for customers in retail electricity markets (and other energy markets) to make fully informed decisions. Developing accurate and clear price comparisons may be an important step to support customization of retail electricity offers and to support competition based on such customization. Customization can benefit customers by better matching their preferences to available offers.

We are concerned, however, that the NOPR may focus too narrowly on problems with initial price discounting (for making apple-to-apples price comparisons among offers). This concern arises because innovations in retail electricity marketing are increasingly likely to involve bundling of price and non-price elements, where the non-price elements also provide value to customers. The challenge for marketers is to develop a reasonable and truthful way to include the value of non-price elements in making price comparisons. A key example is when a marketer's electricity contract offer bundles electricity supply with a physical device that can help reduce the customer's power use and power bills. For instance, some marketers are providing advanced thermostats or smart appliance devices to customers who sign supply contracts.²⁴ Energy management devices, for example, not only have a purchase price or a rental price value but also present a means to provide bill savings to customers by helping them to reduce electricity use or – in the case of dynamic (variable) pricing plans – to shift their electricity consumption to low-price periods.²⁵ In other instances, the contract may bundle

²³ Such an opt-out provision could be conditioned on the PUC's or the customer's identification of some material source of potential dissatisfaction associated with the assignment. Examples of justified objections could include: that the new supplier has a substantially inferior customer satisfaction rating; that the new supplier's generation mix differs greatly from that of the original supplier; and that the new supplier has a substantially inferior financial position that increases the risk (compared to the original supplier) that it will default on the contract.

²⁴ "Direct Energy to Launch New Smart Home Bundles Energy Plans, *Retail Energy X* (Sept. 19, 2017), available at <http://www.retailenergyx.com/sy.cfm/3312/Direct-Energy-To-Launch-New-Smart-Home-Bundle-Energy-Plans>; Paul Ring, "Direct Energy Launches Energy Offers Bundles with Own Brand (Hive) Smart Thermostats in Texas, Five Other States," *Energy Choice Matters* (Apr. 13, 2017), available at <http://www.energychoicematters.com/stories/20170413b.html>; Katherine Tweed, "Comcast and NRG Launch Electricity Bundle in Pennsylvania," *GTM* (Mar. 11, 2014), available at <https://www.greentechmedia.com/articles/read/comcast-and-energy-plus-launch-electricity-bundle-in-pa#gs.rayuyWg>.

²⁵ In some cases, energy conservation or load shifting may reduce an electricity customer's bill by more than lowering the per-unit price. In order to fully inform a customer comparing two such different offers from marketers, it may be necessary to develop a price-equivalent value for non-price devices or services that are bundled in retail electricity offers. The PUC may wish to consult with marketers for suggestions about how to reasonably design such comparisons.

electricity supply with unrelated services, such as gift cards or entertainment discounts that the customer receives at some point after the supply contract is signed.²⁶ We encourage the PUC to allow marketers to explore how best to incorporate the value of bundled goods or services for purposes of developing accurate and clear apples-to-apples price comparisons. A policy that requires marketers to value these bundled goods or services at zero does not allow for an apples-to-apples comparison.²⁷

VII. 52 Pa. Code § 54.5(c)(4): Marketing/Sales Activities: Treatment of Non-Volumetric Charges

The NOPR points out that few offers from electricity marketers today involve explicit block rates under which the price changes based on the level of consumption. To adjust for the diminishing role of block rates in how offers are now framed, the NOPR proposes to allow any offers without volume discounts or penalties to omit bill comparisons covering a variety of consumption levels. At the same time, the NOPR's discussion of 52 Pa. Code § 54.5(c)(11) cautions that an apples-to-apples price comparison requires a disclosure of all fees.

We agree with the NOPR's proposal to require offers that include non-volumetric charges to continue to disclose the total billing amounts corresponding to different consumption levels. The reason is that the effect of these non-volumetric fees on prices is akin to the impact of block rates. To help ensure that customers understand the implications of non-volumetric charges, an additional or alternative approach could be to classify offers that include non-volumetric charges as variable rate plans, in which the average net per-unit price varies based on the level of consumption.

VIII. 52 Pa. Code § 54.5(c)(11): General Commentary on Minimum Disclosures v. Restrictions on Disclosures

To the extent that customers depend on disclosures governed by the PUC's marketing rules, it is important for marketers to be allowed to explain their offers with sufficient detail to alert customers to the salient features of the offers. Limitations on truthful disclosures run the risk of cutting off information that customers need in order to make fully informed decisions. For this reason, we encourage the PUC to continue framing its disclosure requirements as minimum disclosure requirements, rather than as rules that limit truthful disclosures to specific categories that may not be sufficient to describe some offers. Although the requirements in the

²⁶ An additional complication for price comparisons can arise if equipment is lent or leased to (rather than purchased by) the customer. The customer buys equipment, issues may include the point during the contract at which ownership transfers; allocating the benefits of receiving durable equipment when some of the benefits may occur after termination of the contract; and adjusting the value of the equipment based on how the customer uses it. In the case of leased or rented equipment, the issues may include damage or late fees; whether the fees are based on the degree of use of the equipment; and how equipment upgrades are handled.

²⁷ We encourage the PUC conduct a periodic review of the rules concerning apples-to-apples comparisons among marketers' offers. This review could be important as additional types of offers emerge in the marketplace. It might be challenging to devise an apples-to-apples comparison that would cover such an approach. We hope that the PUC revises its rules to permit companies' experimentation with such offers and the disclosures likely to persuade customers to switch.

NOPR are not onerous, we nevertheless encourage the PUC to continue with this generally positive approach to additional truthful voluntary disclosures about contract offers for residential and small commercial customers.

We note that retail marketers in other industries have introduced alternative pricing approaches and service bundles that customers may prefer if such approaches are applied to retail electricity sales. We encourage the PUC to facilitate truthful disclosures about such novel forms of retail electricity offers. In general, differentiation among electricity services can help customers better match their preferences for specific electricity services to the electricity services that they actually receive.

IX. Updating Electricity Marketing Rules

We applaud the PUC's practice of periodically updating marketing rules in both sectors to keep pace with new products, new services, and new marketing approaches. At the same time, changing marketing rules frequently can impose costs by creating perceptions of high regulatory risk that could discourage entry and damp innovation. Further, it can be difficult to understand the effects on competition and on consumers if rules change too quickly for suppliers to fully adjust their marketing practices, procurement arrangements, and back-office operations.

On the other hand, updates to rules can have the countervailing benefit of reducing the risk that antiquated rules will continue to impede effective competition or raise costs without corresponding benefits. We encourage the Pennsylvania PUC to weigh these cost/benefit factors in deciding to make specific rules changes and in determining the frequency and depth of such reviews. Overall, we commend the PUC for its consistent focus on helping customers in both the electricity and natural gas retail sectors to make well-informed decisions rather than imposing particular views of what choices electricity customers should be allowed to make.

X. Conclusion

The FTC staff appreciates the opportunity to submit this comment. If you have any questions or comments, please feel free to contact John H. Seesel, Office of the General Counsel, at (202) 326-2702, or Derek Moore, Office of Policy Planning, at (202) 326-3367.