

**BEFORE THE PENNSYLVANIA
HOUSE CONSUMER AFFAIRS COMMITTEE**

Testimony of

**TANYA J. McCLOSKEY
ACTING CONSUMER ADVOCATE**

Regarding

Variable Rate Plans

**Pittsburgh, Pennsylvania
April 10, 2014**

**Office of Consumer Advocate
555 Walnut Street
Forum Place, 5th Floor
Harrisburg, PA 17101-1923
(717) 783-5048 - Office
(717) 783-7152 - Fax
Email: tmccloskey@paoca.org
181515**

Blank Page

**Chairman Godshall, Chairman Daley
And Members of the House Consumer Affairs Committee**

My name is Tanya McCloskey and I am serving as the Acting Consumer Advocate for the Office of Consumer Advocate. I have worked for the Office since 1987 with a primary focus on energy issues. Thank you for giving me the opportunity to testify before you today on the issue of variable rate plans offered by competitive electric generation suppliers. As the past two months have shown, this is an issue critical to the health, safety and economic well-being of Pennsylvania's residential electric consumers.

This winter has been one of the coldest in decades and has resulted in record winter electricity demand as well as record winter time wholesale market prices. All resources in PJM, including demand side response resources and voluntary energy use curtailment by all customers, were necessary to meet the demand. While the circumstances faced in PJM this winter set records, volatility in wholesale day ahead and real time energy market prices is not in and of itself unusual. What is unusual here is the extraordinary level of the wholesale price increases and the extreme impact on many Pennsylvania residential retail customers who were directly exposed to these price spikes through their monthly electric bill.

This exposure has resulted in shockingly high cents per kilowatt-hour charges for residential customers, with reports of prices in the 20¢/kwh to 44¢/kwh range for customers on variable rate plans. We have received reports of prices even higher than these. These kilowatt-hour charges have resulted in residential customers receiving extraordinarily high monthly bills, many over \$1,000 for one month's usage and some in excess of \$2000. The public response from consumers impacted by these variable rate plans has been overwhelming.

In my 27 years at the Office of Consumer Advocate, I have not seen this level of public response to an energy issue and we may not have seen such a significant public response to an energy issue since the era of nuclear power plant construction. Our Office has clearly seen the most significant call volume in its history on a single issue. As of the end of last week, our Office has fielded nearly 2800 telephone calls and responded to over 200 letters and emails since early February. Consumers who were trying to save a few dollars a month by shopping for electricity have instead found themselves overwhelmed by shocking bills that they could not possibly have anticipated. These are **not** consumers who voluntarily and knowingly selected a product, took a gamble on the market, and just made the wrong bet. There was simply no way for consumers to know from the disclosure statements provided by suppliers, from the education about retail choice, or from any independent research that they were fully exposing themselves to such extraordinary bill increases.

The hardship that has been created is significant, as many of you have heard from your constituents. I would like to briefly share a few examples of what our Office has encountered:

- ◆ We heard from a single mother with three children from State College whose electric bill nearly quadrupled from one month to the next. Her bill went from \$370 to \$1,456 with no warning. When she called to speak to the supplier to ask for help, she was told: “We are a variable rate company, so we can do that.” She told us that “disaster is inevitable,” and she may be right for her family.
- ◆ A church from the Carlisle area contacted our Office when their rate went from 6.7¢/kwh to 20.98¢/kwh with a resulting bill of over \$1,800 rather than the \$700 they expected.
- ◆ A couple in their 80’s living on a fixed income in the Chambersburg area saw their bill more than triple with no warning. The rate paid went from 6.98¢/kwh to 22.64¢/kwh. They asked, “How is a senior living on Social Security supposed to afford bills like this?”

- ◆ We heard from a retired widow from the Hamburg area living on a fixed income. She keeps her house at 60 degrees despite the impact it has on her health issues. Her electric bill was over \$800. She has tried calling her supplier to ask them for help but they never answer the phone.
- ◆ A low income customer in the Customer Assistance Program for payment troubled customers received a generation service bill in March of \$650 with a 30.88¢/kwh price when the price with her default service supplier would have been 8.18¢/kwh, or a \$172 monthly bill for generation service.
- ◆ Another customer with automatic bill payment had to put a stop on the automatic payment of her other bills as the electric generation supplier charges cleaned out her account.

These are only a few examples of the nearly 3,000 contacts that we have had at the OCA alone.

What these examples, and many others show, is that these are customers who entered the retail competitive market as a way to save money but now find themselves in a compromised financial position.

As I mentioned at the beginning, electric service is essential to the health, safety and economic well-being of all citizens of this Commonwealth. An electric bill has a major impact on a customer's life, no matter the customer's income level. When that bill soars to an unaffordable level, it can be a life changing event. For some customers, it means that spending on other life necessities will have to be stopped or reduced. For other customers, it may mean the difference between staying in their home and being forced to leave. And for still others, it may mean that their essential electric service will be terminated because they are unable to make payment on these bills.

The customers that have been able to contact my Office, the Commission, or the Attorney General's Office represent only the tip of the iceberg. Not all customers are able to contact our agencies and not all customers have the time to do so as they tend to the needs of their daily life. Many other customers may be discouraged from trying to reach out for

assistance if they think there is no help that can be afforded to them. What we are finding out as more information comes to light is that the number of customers on variable rate plans may be much larger than we initially thought. Testimony last week before the Senate Consumer Protection and Professional Licensure Committee by two large electric generation suppliers suggests that the number of customers on variable rates is significant. We also know that there are a significant number of variable rate plan offers in the retail competitive market and that some suppliers only offer variable rate products. It is not as clear how customers became embroiled with such a product, but many of these plans begin with a low introductory price for new customers for one or two months that looks favorable, and are then followed by the variable rate plan with little to no explanation or price disclosure. We also know that many electric generation suppliers with fixed price contracts have been moving customers onto variable price plans at the end of the fixed price term if the customer does not affirmatively select a new fixed price term. I believe this is exactly the wrong thing to do and should be stopped immediately. No consumer should be placed on a variable price plan without the consumer's express, affirmative consent.

I do not want to imply that all variable rate products or all variable rate providers have approached this winter in the same way. Our Office has seen very different levels of pricing under these variable rate plans, different levels of disclosure, and vastly different levels of customer service among variable rate providers. Some suppliers may have pursued purchasing strategies to hedge against such short term wholesale market risks thus mitigating the impact of any wholesale market volatility on the variable rate plan. Some suppliers may have chosen to mitigate the impact on a single month bill by spreading out the price increase over several months. And, some suppliers have offered rebates or credits to customers when a

customer is able to register a complaint about the bill. One of the problems, though, is that we do not know what suppliers have done to mitigate price changes, we do not know how market costs are being determined or reflected in the pricing, and we do not know what suppliers will do in response to these events.

Since I last testified on these issues before this Committee, the Public Utility Commission has promulgated two rulemakings to address the disclosure requirements for variable rate products and accelerated switching of suppliers. My Office filed Comments in both of these rulemakings on the expedited schedule set forth by the Commission recommending that further consumer protections be provided by the Commission. The final Rulemaking Order did not adopt many of the OCA's recommendations and I remain concerned that further disclosure requirements and consumer protections beyond those contained in the Commission's rulemaking are needed to address the problems encountered with variable rate products.

I also remain concerned that these two rulemakings alone will not redress the far ranging problems that have been seen with these variable rate products. My Office, along with AARP, the Pennsylvania Utility Law Project, and Community Legal Services filed additional comments with the Commission on April 3, 2014 urging a broader fact finding effort and review of the rules, policies, and consumer education regarding variable rate products. I also would note that there are legislative efforts underway both in this Committee and in the Senate to address these problems and provide additional, necessary protections for consumers. I look forward to working with the Members of this Committee and all Members of the General Assembly in these efforts.

In today's testimony, I would like to discuss several problems that my Office has identified to date. The topics I will cover in this written testimony include disclosure, advanced

price notification, customer service, marketing, consumer protections for low income customers in the Customer Assistance Programs, the purchase of receivables program, the Commission's authority over the retail market and consumer education.

Disclosure

For a customer to make a knowing choice of any product, and enter into any valid agreement or contract, there must be clear and complete disclosure about the product. In the case of variable rate plans, this must include at least a clear disclosure about the level of price increase that the consumer may be exposed to by selecting this product and the type of risk that the customer is assuming in selecting the product. The Customer Choice Act directs the Commission to establish regulations requiring electric generation suppliers to provide "adequate and accurate" information to customers so that they may "compare prices and services on a uniform basis." See 66 Pa. C.S. § 2807(d)(2). With respect to variable rate products, in my opinion, clear and conspicuous disclosure of the conditions of variability and the limits of variability, stated as a floor and ceiling price are necessary. Without such information, consumers have no meaningful basis upon which to compare offers. In my view, this is what is required by the Customer Choice Act and was required by the Commission's original regulations at 52 Pa. Code §54.5(c)(2) implementing the Act.

From my review of the disclosure statements provided to our Office by customers, however, serious questions arise as to whether the disclosure statements are so vague and so open-ended as to be meaningless. By way of example, the following are actual disclosure statements that were provided to customers:

Variable rate products are subject to change without notice and may change due to current and predicted weather patterns, retail competition, wholesale

commodity energy costs, fluctuations in energy supply and demand, industry regulations, pricing strategies, costs to serve customers, among many factors.

Electric Variable Price shall each month reflect the cost of electricity obtained from all sources (including energy, capacity, settlement, ancillaries), related transmission and distribution charges and other market-related factors plus all applicable taxes, fees, charges, or other assessments and [Supplier Name] costs, expenses and margins.

The variable price for all electricity and natural gas sold under this Agreement and established on an approximately monthly basis based upon electricity and natural gas market pricing, transportation or transmission, and other market and business price related factors. Notwithstanding any other provision in this Agreement, [Supplier Name] may change the Variable Price without additional notice and such price may be higher or lower than LDC's price in any particular month.

I do not see how any residential customer would know from these types of disclosure statements that they were exposing themselves to a potential increase in their bill of 300% to 600% in one month's time and that they were fully taking on the risk of the complex PJM wholesale spot markets.

Equally troubling, there is simply no way for residential customers to even determine if the prices they were charged bear any relationship to the cost of electricity in PJM's wholesale markets, or whether their supplier employed purchasing practices in these markets that were designed to protect them from the risk of such extreme price spikes. PJM runs an extraordinarily complex wholesale market that has evolved over many years with thousands of prices for many different products and components of generation service that can be bought and sold on a real time basis. In this type of market, consumers would have no means of assessing whether the price charged to them fairly represents the costs incurred by their supplier in the market.

The Commission had occasion in the 1999-2000 time frame to consider the disclosure statements for variable rate products. In an Order entered on December 20, 2000, the Commission concluded that a floor and ceiling price was needed to properly inform customers about the product and that disclosure should include more than a statement that the price will vary based on market conditions. The Commission found that inadequate disclosure “amounts to nothing more than a simple *caveat emptor* and would have the consumer assuming the complete risk of fluctuating market conditions within a potentially volatile market of which they possess only limited knowledge and available information sources.” Petition of Shell Energy Services Co., L.L.C. for Declaratory Order and in the Alternative Waiver of 52 Pa. Code § 54.5(c)(2), Docket No. P-0001848 (Order entered December 20, 2000). If anything, market volatility and complexity has increased since this Order was entered in the year 2000, and disclosure statements have become more vague.

Disclosure requirements must be strengthened and additional steps need to be considered given the complexities of the markets and these products. The need for better disclosure is particularly great in light of the wide use of introductory or “teaser” rates by many variable rate providers. In many cases, the introductory rate is the only rate that is actually disclosed by the provider, either on the Commission’s PaPowerSwitch website or in the electric generation supplier’s sales materials. As we have seen this past winter, the actual prices being charged to existing customers by many of these providers were several hundred percent greater than the introductory rates that they were simultaneously advertising in order to attract new customers.

Disclosure statements should be in plain language, understandable to consumers, and should be required to state a ceiling or limit on the price variability that can be experienced

by the customers. The ceiling limit should be stated in a cents per kilowatt-hour price that can be charged or as a percentage change that can occur in a one month time frame. In my view, disclosure statements should not be allowed to simply state that there is “no limit” on the variability of the price. Legislation setting forth these protections is necessary as the Commission’s recent rulemaking now explicitly allows for a statement of “no limit” rather than requiring a statement of the ceiling price.

Other information that should be required would include such things as the specific pricing methodology used to develop the price charged to the customer rather than just a reference to “market conditions,” the highest and lowest price charged by the supplier over an extended period of time and the monthly prices charged for the last twelve months. The General Assembly may also wish to consider establishing a price cap by prohibiting price changes in excess of a certain percentage or certain cents per kilowatt-hour in a one month time frame for a variable rate product. These types of caps may be necessary if consumers cannot otherwise be given adequate information about the product. The General Assembly may also wish to prohibit termination and cancellation fees for variable rate plans so that customers can switch away from these products without penalty if the price becomes too high.

As I mentioned earlier, the practice of moving customers onto variable price plans at the end of fixed price term if the customer does not respond to a renewal notice should be stopped immediately. These types of “negative check-offs” are generally not favored in the area of consumer law and should certainly not be allowed for essential service. Additionally, it has recently come to our attention that some fixed price disclosure statements are including in the fine print that the customer will be placed on a variable rate contract at the end of the fixed term. Many things can change over the length of a fixed term agreement, particularly if it extends 12

months or more. Market conditions can change dramatically and a customer's financial situation can also change dramatically, even in a short period of time. A disclosure statement should not be allowed to be used to bind a customer well into the future to a new product that may no longer suit the customer's needs.

Affirmative consent should be required before any customer is placed on a variable price plan. I would ask the General Assembly to act to require affirmative consent for every variable rate plan and to prohibit the use of a disclosure statement that would switch a customer from a fixed price plan to a variable price plan without further, explicit affirmative consent.

Advanced Price Notification

We have heard from variable rate plan customers that they were not told, and even upon request could not get, the price that they would be charged before they used the electric service. In other words, the customer had no notice of the price change and there was no transparency on the price that the customer was being charged while the customer was using the electricity. As a consumer recently said to me, that would be like pulling into the gas station, filling the tank and then finding out 30 days later that you filled your tank for \$12 a gallon rather than at a price in the \$3 to \$4 range that you expected. Without information about what you are being charged, consumers cannot make informed choices about their energy use, whether they need to make a different choice of price plan or supplier, or whether they need to return to default service.

Variable rate suppliers should be required to provide to customers the price that the customer is going to be charged *before* the billing cycle begins. This notice should be given sufficiently far in advance so that a customer who wants to switch away from the supplier or

change their plan has the time to switch and so that the customer has the time to adjust their usage in response to the price if they remain on the plan. This, of course, raises the issue of whether the time needed to switch suppliers should be accelerated. Accelerating the switching time is not alone sufficient to protect consumers, but it should be considered as one part of a more comprehensive plan.

Accelerated switching achieved at reasonable cost, and in a manner that respects consumer protections, could be a positive development for consumers. We should not, however, simply trade one set of problems for another. Protections that have been in place through a 5-day confirmation process to prevent slamming have worked successfully. For example, PECO reported in recent comments to the Commission that it receives approximately 100 to 150 contacts each week during the confirmation period about unauthorized switching. These unauthorized switches are able to be stopped, saving the customer much time and effort to reverse a mistake and saving the costs of undoing these mistakes. In addition, accelerated switching must not come at the expense of the customer's 3-day right of rescission, particularly in light of the high pressure door-to-door marketing and telemarketing that is being utilized by many suppliers.

At this time, it is not clear to me what the right time frame is for completing a switch of suppliers that respects consumer protections and can be achieved at reasonable cost. These issues should be resolved before much unnecessary time and expense is incurred, which will eventually be charged to ratepayers.

Customer Service

The service problems encountered by consumers with suppliers during the last two months are extremely troublesome. It was bad enough that customers were provided a

monthly bill that in some instances exceeded their monthly income, but when they tried to contact the supplier to determine if it was correct or if there was anything that could be done, they could not get through at all or had long wait times. We had numerous callers who informed us that they had three hour waits just to speak to a supplier's representative, had their call dropped, or were put into voice mail but never received a return call. Based on our own experience, it is not surprising that these supplier call centers were quickly overwhelmed, but frankly, any supplier issuing a bill that increased 300% to 600% should have anticipated that additional call center staffing was going to be required. Certainly by the end of the first day or two, supplier call center staffing should have been increased to address these problems.

The lack of adequate customer service impacted consumers in at least three significant ways. First, customers who could not get through to their supplier were not afforded any refunds or credits as were some other customers that managed to have their call answered. Second, in light of the provisions of Chapter 14 that a consumer must first talk to their utility, or in this instance their supplier, before the Commission will take in an informal or formal complaint, many customers thought that they were not able to enter the Commission complaint process because they could not affirm that they had contacted the supplier. The Commission has clarified that it will accept complaints if the customer made the attempt to contact the supplier but could not get through. Third, even if the customer wanted to leave the supplier and return to default service, the customer cannot do so without contacting their existing supplier and requesting this switch back to default service. Without access to the supplier call center, any action that the customer may need to take in these extreme circumstances is delayed.

In light of these customer service problems, I think the General Assembly should make clear that every customer has the right to return to default service by contacting their

electric distribution company and requesting to be returned to default service. No customer should be required to wait excessive periods of time for a supplier to answer their call, as they did in January and February, to exercise their right to return to default service.

In addition, the provisions regarding technical fitness to receive a license in Pennsylvania should require an initial and on-going demonstration of a supplier's ability to maintain adequate customer service. If legislation is needed to provide the Commission authority to require specific quality of service, I would recommend that such authority be provided to the Commission.

Marketing Practices

The information my Office has received from consumers raises serious concerns about the marketing of these variable price plans. We have heard from many consumers that they did ask how high their price might go when talking to the supplier's sales agents. In many instances, consumers were told by these sales agents that the price will "always be competitive with the price to compare" or that the price will "always be within a few cents of the price to compare." Not one customer reported to us that they were told by the sales agent that the price was unlimited or that it could go as high as 20¢/kwh to 44¢/kwh, and in some instances even higher.

Unfair and deceptive marketing of these products must not be tolerated. While the rules prohibiting the use of unfair and deceptive marketing may be in place, additional efforts will be needed to monitor these practices.

Consumer Protections For CAP Customers

I know that others will testify in more detail today about additional consumer protections that are needed for low income customers who participate in the utility Customer

Assistance Programs, but I would like to address one specific consumer protection in this testimony. Customer Assistance Programs, or CAPs, are programs for low income, payment troubled customers of the utility. A low income customer is generally defined as one with a household income that is at or below 150% of the Federal Poverty Level. The average household income for electric CAP program participants in the Commonwealth in 2012 was \$14,350.

While we do not yet know how many CAP customers or low income households were on the variable price plans, we have received contacts from CAP customers who have been caught up in this crisis. We also have information that shows that CAP customers who participate in the retail choice market in some service territories do not always do so with great success. In a recent proceeding at the Public Utility Commission, it came to light that CAP customers in the PPL service territory paid more to competitive suppliers than they would have paid if they had remained on default service with PPL. In 2013, on average, 67% of the bills rendered to CAP customers served by electric generation suppliers were higher than the PPL price to compare.

I strongly recommend that legislation be enacted to ensure that CAP customers who select service from an electric generation supplier do not pay more than they would have paid if they had remained on default service. This protection is fundamentally necessary to ensure that affordability is maintained for these customers and that the costs of the CAP programs borne by other non-CAP residential customers are not increased by ineffective shopping decisions of CAP customers. While in my view the Commission already has this authority, it should be made explicit so that the proper consumer protections can be put in place.

Purchase of Receivables

I would also like to highlight today a problem that affects all customers, not just customers on variable rates. That is, higher utility costs will result from payment problems associated with these variable rate plans and those costs will eventually be paid for by all customers. Under the Purchase of Receivables program that is in place for electric generation supplier charges, the electric distribution companies provide the bill to the customer for the supplier charges and “purchase” those receivables. Because the receivable is purchased by the utility, the supplier will receive payment of all charges for the supply (unless the customer places the bill in dispute through a filing at the PUC) whether or not the electric distribution company receives payment from the customer. In other words, the supplier gets its money, but the utility and its customers must deal with increased uncollectible accounts, credit and collection costs, and the costs of potential termination of service. The supplier bears no risk of increased uncollectibles from its pricing practices since it receives full payment whether the customer can pay the bill or not.

While the Purchase of Receivables Program can provide benefits to the operation of the retail choice market, and in particular, allows low income, credit challenged customers the opportunity to switch to alternative competitive suppliers without posting prohibitive deposits, the impact of this approach under these variable rate plans on other customers could be significant. The resulting uncollectible cost as well as the cost of credit and collection, establishing payment arrangements and the cost of termination will be paid by all electric customers. It may be necessary to revisit some of the details of these Purchase of Receivables Programs to address the potential for high uncollectible costs, as well as the costs of credit, collection, payment arrangements and terminations resulting from these pricing plans.

Commission Authority Regarding the Retail Market

I have also been concerned that the Public Utility Code might not be as clear as needed to confer authority on the Commission for the oversight of the pricing plans in the retail market, especially in the instance of vague and inadequate disclosure. There certainly can be a fine line between overseeing the marketplace and interfering with the marketplace. When there are such fine lines and gray areas, consumers are often the ones left holding the bag. The Commission, if it does not already have such authority, should, at a minimum, be given the clear authority to ensure that the prices charged under the variable price plans, and indeed any price offers, conform with the disclosure statements. Where the disclosure statement is so vague as to make this determination impossible, or where the disclosure statement has not been followed, the Commission should have the clear authority to determine if any undue advantage was taken of the consumer.

The Commission must have clear authority to establish the rules for the operation of the retail choice markets in Pennsylvania to ensure, at the end of the day, that essential electric service to consumers is reasonable. Retail choice was but one means provided in Chapter 28 to the end of achieving adequate electric service at reasonable prices for all electric consumers in the Commonwealth. My recommendation here is that the Commission be given clear authority to protect consumers and ensure that the prices paid by the consumer, in the end, meet all statutory standards.

Consumer Education

I would also like to address consumer education. Education will always be a part of the retail choice market. Retail choice for electric service is complex, and as we know, presents significant risks to consumers. Our education efforts will need to continue and to

expand as new products enter the market every day. Consumers, though, have borne the lion's share of the costs for education in this market. It is time for a broader base of funding for consumer education with contributions from suppliers who greatly benefit from these efforts.

Conclusion

There are many more challenges that we will face as more information comes to light about these variable rate plans. And many more challenges are already being seen as a result of this winter's price spikes. Since my last testimony, one major supplier in Pennsylvania is informing its fixed price customers that a one time surcharge will be added to the bills in June due to the winter events. Our Office is looking into this issue, particularly the disclosure statement that was provided to customers who are receiving this notification and surcharge.

Pennsylvania consumers, and perhaps even the Pennsylvania retail choice market, cannot continue to weather such events. I still believe that with the right design, the right rules and regulations for consumer protection, and with oversight, the competitive generation market as Pennsylvania has envisioned it can provide benefits to consumers. Pennsylvania's model, with a default service procured through a mix of resources in the competitive wholesale market, provides a solid foundation for consumers who wish to participate in the retail market, and provides transparency through the default service price to compare. The Pennsylvania model has allowed substantial growth in our retail markets, making it all the more important to address the problems arising from these variable rate plans quickly and fairly for all consumers. The changes I propose today should allow this market to continue to develop without the significant shocks that have been experienced this winter.

I would like to thank this Committee for allowing me to testify on this critical issue. I look forward to working with members of this Committee and the General Assembly to help ensure that essential protections are put in place for variable rate plans.