

PUBLIC UTILITIES

BOARD OF PUBLIC UTILITIES

Energy Competition Standards

Adopted Amendments: N.J.A.C. 14:4-2.3, 3.2, 3.4, 3.5, 6.3, 6.5, 6.6, 6.7, 6.9, and 7.6

Adopted New Rules: N.J.A.C. 14:4-6.11 and 7.12

Proposed: May 21, 2012 at 44 N.J.R. 1589(a).

Adopted: March 20, 2013 by the Board of Public Utilities, Robert M. Hanna, President; Jeanne M. Fox, Joseph L. Fiordaliso, and Mary-Anna Holden, Commissioners.

Filed: March 21, 2013 as R. 2013 d.067, **with substantial and technical changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-6.3).

Authority: N.J.S.A. 48:2-1 et seq., in particular 48:2-13, 48:2-16 through 19, 48:2-23, 48:2-29.1 and 21.2, 48:2-37, and 48:2-51.1; 48:3-7 et seq.; and 48:3-51 et seq.

BPU Docket Number: EX12020158.

Effective Date: April 15, 2013.

Expiration Date: April 11, 2019.

The New Jersey Board of Public Utilities (“Board” or “BPU”) is adopting new rules and amendments to multiple sections of N.J.A.C. 14:4 addressing energy competition standards. The new rules and amendments apply to energy anti-slamming, affiliate relations, government energy aggregation programs, and retail choice consumer protection.

Summary of Public Comments and Agency Responses:

The following commenters submitted timely comments on the notice of proposal:

Murray E. Bevan, Retail Energy Supply Association (RESA);

Usher Fogel, Dominion Energy Solutions. (DES);

Craig G. Goodman, National Energy Marketers Association (NEM);

AARP New Jersey (AARP); and

Gregory Eisenstark, Jersey Central Power & Light Company and on behalf of Atlantic City Electric Company, Public Service Electric and Gas Company and Rockland Electric Company. (EDCs).

General Comments:

1. COMMENT: The proposed changes are particularly timely as retail energy competition continues to gain momentum in New Jersey and tens of thousands of consumers are receiving marketing information and numerous, often times confusing solicitations from third-party suppliers.

Upon review of the proposed changes, we find that most of the proposed rule changes improve current energy competition standards by providing additional clarity where needed and expanding important consumer protections in this growing market.

The proposed rules will protect consumers while fostering transparency and fair competition. AARP applauds the Board's efforts in this area and supports the notice of proposal in its entirety. (AARP)

RESPONSE: The Board appreciates the commenter's support of the adopted new rules and amendments.

2. COMMENT: We appreciate this opportunity to provide comment on the proposed

amendments and proposed new regulations to be added to the Board's Energy Competition Standards. We appreciate the on-going opportunity to provide insights into the impact of the regulations applicable to the competitive energy market. (NEM)

RESPONSE: The Board appreciates the commenter's support of the adopted new rules and amendments.

3. COMMENT: We appreciate the opportunity to submit these comments and assist the Board in this matter. (DES)

RESPONSE: The Board appreciates the commenter's support of the adopted new rules and amendments.

4. COMMENT: We appreciate the Board's leadership and the collaborative approach it has taken to analyzing the energy competition rules adopted in New Jersey to permit customers to purchase electric and gas supplies from third-party suppliers (TPSs). We fully support the broad strokes of the energy competition rules adopted in New Jersey to permit customers to purchase electric and gas supplies from TPSs. (EDCs)

RESPONSE: The Board appreciates the commenter's support of the adopted new rules and amendments.

N.J.A.C. 14:4-2.3(c)2 and 5

5. COMMENT: The intent behind the proposed changes is to require that the change order verification requirements set forth in paragraph (c)2 apply to all telephonic enrollments, including customer-initiated calls. In the April 2012 readoption of N.J.A.C. 14:4, the Board

decided to allow a marketer or third-party agent to perform telephonic enrollments, including customer-initiated calls. However, the Board further decided to require recordation of the entire duration of the call. The Board stated in a response to a commenter in the notice of readoption that the phrase “made by an independent third party or by a TPS” was intended to refer to the recording, not the call itself, and that the “requirement for the recording refers to calls made to and from customers.” The Board noted its intent to clarify this issue in this rulemaking. We previously commented in opposition to the requirement that the entire marketing portion of the call be taped, noting that the requirement to tape all calls and then retain these voluminous records would be extremely expensive. We recommended, and continued to maintain, that the supplier’s recordation of the verification portion of the call should be sufficient, and this practice is commonly utilized in other jurisdictions as sufficient to ensure the customer is protected. Allowing suppliers to perform the audio verification of the enrollment in-house in addition to third-party providers does not change the validity of this methodology in verifying the customer’s intent to switch providers. But, requiring the suppliers to tape the entire marketing call significantly undermines the cost effectiveness of telephonic enrollment as a means to acquire customers. With regard to taping customer-initiated calls to a TPS as is specifically at issue here, we noted that such a requirement does not reflect the practice in other jurisdictions. Requiring that all sales calls be taped will significantly increase the compliance and cost burden for suppliers. The increase in compliance costs directly cuts into supplier’s ability to offer consumers lower priced energy products. Moreover, when a customer initiates a call to the TPS, the consumer protection concerns associated with switching are reduced because the consumer, on its own, has started the shopping process and, as a result of that, is contacting the TPS to

make its choice. As such, the level of processes needed to verify the switch that results from a customer-initiated call should logically be less stringent. (NEM)

6. COMMENT: The Board is proposing to expand the obligation of recording the entire telephonic solicitation call to encompass even customer-initiated calls to the TPS, where the TPS has not even made the initial solicitation and the customer has approached the TPS voluntarily and on their own volition. The expansion of the recording mandate is unreasonable and unnecessary. The desire by the Board to ask for the recording of the entire call apparently is related to the goal of ensuring that the preliminary discussions between the TPS and the customer are codified and not misleading. This concern does not arise with customer-initiated calls, as the customer has already displayed some knowledge with energy choice and exhibited an interest in exploring this new opportunity. The customer is well aware that contact is being made with a TPS and a decision might be made to take service from the TPS, the particular commodity product the customer has agreed to purchase from the TPS and the presentation of specific disclosure mandated by the applicable rules. All of these matters can and are covered in the verification process that is used by DES and likely most TPS providers. Thus, without the recording of the entire call all the appropriate safeguards can be fulsomely achieved by only requiring the verification of customer initiated solicitations. If the Board's concern is about marketing abuses then it should address the issue with those firms acting improperly, not impose costly new mandates on all TPSs, most of whom are acting in an appropriate manner. Ultimately, it is of vital importance that the Board reasonably balances the need to adequately protect the consumer with the important interest of allowing energy choice and its TPS participants to provide consumers with cost effective commodity products that provide real

savings and a plethora of choices. Without question, layering on additional costly marketing measures will hinder the TPS from providing lower cost products and effectively limit energy choice. Such an untoward result is wholly unnecessary as the valid consumer interests can be effectively protected by only requiring that the verification of the call be recorded. For these reasons, we urge the Board to refrain from mandating the recording of the entire call associated with customer initiated solicitations. In connection with the treatment of customer initiated calls, and due to some ambiguity in the language, we request that the Board clarify that a TPS may enroll a customer telephonically when the call is initiated by the customer and that the TPS can record that call as proper verification of the enrollment. (DES)

RESPONSE TO COMMENTS 5 AND 6: With the increased number of TPSs entering the market, the Board has also seen an increase in the number of marketing complaints it receives. These complaints are often based upon information that, according to the customer, was given by the marketer or sales agent during the sales portion of the call, which made a customer decide to switch to the TPS. However, the verification portion of the call only provides a customer's authorization to switch. In addition, while a consumer who contacts a TPS may have started the shopping process, the customer is equally entitled to protections that are designed to ensure that accurate information is given during the call. The Board acknowledges that this provision of the rules may increase the costs for some TPSs. However, the Board believes that the consumer protection benefits achieved by recording the entire marketing call outweigh the increased costs incurred by implementation of this provision. Therefore, the commenters' suggested revision has not been made.

N.J.A.C. 14:4-2.3(h)

7. COMMENT: We concur that the Board should adopt a well-defined process that codifies the manner by which a TPS can reinstate a dropped customer. However, in this process it should remain the responsibility of the TPS to assure that it has obtained the proper authorization from the customer or proof of customer intent. The TPS should not have the obligation to provide proof or other documentation of its right to reinstate a dropped customer to the utility, particularly in those agreements with commercial customers. Such a process places the utility in the improper role of adjudicating the TPS's contract rights and obligations. (DES)

RESPONSE: The Board notes that N.J.A.C. 14:4-2.3(h) does not require a TPS to provide the proof or documentation at the time it reinstates a customer. However, if a TPS reinstates a dropped customer and the customer challenges the reinstatement, the TPS will be required to demonstrate that it has obtained a new authorization from the customer for the reinstatement. Therefore, the commenter's suggested revision has not been made.

8. COMMENT: We agree that there is a need to have a defined process through which a TPS is allowed to reinstate a customer, with the customer's authorization, under the circumstances delineated by the Board. Indeed, in the highly competitive energy market, a consumer is likely receiving multiple TPS offerings, even after they have selected a TPS from which to receive service. Setting forth a process to ensure a consumer is served by the TPS of its choice, in a manner that requires proper notice to all parties will minimize consumer confusion, will allow the consumer to avoid early termination fees and minimize TPS disputes about customers.

This proposed new subsection also implicates two additional situations: 1) the situation wherein a customer that was scheduled to return to utility service changes its mind and

determines it wants to remain with its competitive marketer; and 2) the current practice whereby a customer name change or other data modification that triggers a utility account number change in the utility recordkeeping system results in a drop of the customer from the customer's competitive supplier. In these situations, the rules should function to better effectuate the intent of consumers participating in the competitive marketplace, that is, to receive competitive service consistent with their expectations and desires. In the case of a utility drop from consumer service attendant with a name change or other event that triggers a utility account number change, the impact on consumers is particularly egregious. In essence, the customer will have been changed to a different commodity provider (the utility) without its consent. Moreover, this practice improperly interferes with the contractual relationship entered into between the consumer and its competitive marketer. (NEM)

RESPONSE: Regarding the commenter's recommendation that the rules be modified as they relate to the two situations addressed in the comment, the Board believes that the rules provide an appropriate balance between consumer protection and consumer choice. Consumers who are scheduled to return to their utility can choose to stay with their current supplier. They can authorize this as set forth in N.J.A.C. 14:4-2.3(c). However, a name change on an account can often signify a new account and/or new customer. For example, "updating" the account name can represent new ownership of a company, or putting the service under someone else's name. The LDC cannot assume that the new consumer would select the same supplier as the prior consumer. Therefore, the commenter's suggested amendments have not been made.

9. COMMENT: We do not support the provision for several reasons. First, New Jersey already has rigorous anti-slamming regulations that require TPSs to obtain customer authorization to

confirm a customer's intent to accept service from a TPS. Additionally, New Jersey already has specific regulations and procedures to address customer allegations of slamming. These existing customer protection regulations are sufficient.

Second, this proposed new regulation unduly treats an LDC drop notice as a true and valid indication of a customer's intent to no longer receive electric or gas service from the TPS. Because the intent of this regulation appears to be intended to prevent a TPS from reinstating a customer who has not authorized such reinstatement, it inappropriately assumes that in all instances where an LDC initiates a customer drop, the customer has taken some recent action to request the drop (for example, by switching to another TPS or by requesting a switch to BGS service). However, in many cases, LDC drop notices are a result of error either on the part of the LDC or the customer (for example, where an unauthorized member of the household selects a new TPS). It is unduly burdensome to require TPSs to re-establish customer authorization in order to continue serving a customer simply because an LDC initiates a drop transaction.

Third, the proposed rule unduly places the burden and expense of confirming a customer's intent on TPSs, rather than requiring the LDCs to confirm a customer drop notice. A TPS must already meet rigorous customer authorization standards at the time of initial enrollment, including obtaining a signed contract, documenting an electronic transaction to enroll, or verifying a telephonic enrollment through an audio recording and third-party verification. There are no such prerequisites for an LDC-initiated drop transaction. Therefore, it is inappropriate to assume that an LDC-initiated drop transaction is a more "valid" indication of customer intent than a TPS initiated re-instatement transaction.

Finally, we do not support this rule because the term "demonstrate" is too vague, as it does not specify the particular methods by which a TPS may show that an LDC initiated drop

occurred without the customer's authorization. We assert that the Board should instead delineate the specific methods by which an LDC-initiated drop occurred without the customer's authorization.

For all of the foregoing reasons, we urge the Board not to adopt this proposed new rule. However, if the Board determines that there is a need to establish customer intent in cases regarding LDC-initiated drop transactions, we submit that the LDCs should be required to verify customer intent before initiating a drop transaction. Such a requirement would be both equitable and would also avoid potential disruption in customer service. We offer the following revision, should the Board wish to adopt this approach:

An LDC may not submit a customer drop notice to a TPS, unless the LDC obtains oral or written confirmation from the customer verifying that the customer has authorized the drop. An LDC must provide the TPS with such documented customer authorization. Following the receipt of an authorized drop notice for which the LDC has obtained oral or written confirmation, the TPS may not submit a change order to the LDC to reinstate that customer unless it has valid authorization from the customer to continue to supply electric generation service to the customer consistent with one of the methods set forth in N.J.A.C. 14:4-2.3(c).

We believe that this revised language protects customers, while also providing both the necessary specificity and a more proportionate share of burden among LDCs and TPSs. (RESA)

RESPONSE: The Board agrees with the commenter's assumption that the intent of the regulation is to prevent a TPS from reinstating a customer who has not authorized such reinstatement. While the commenter is concerned that the LDC may have erroneously issued the drop, the rule provides that the TPS may reinstate the customer if the TPS can demonstrate that the switch was done without the customer's authorization. The LDCs are the suppliers of last resort. LDCs are not engaged in energy competition since they do not market supply service to retail customers, but are fully regulated by the Board, including by the Board's rules for all utilities found at N.J.A.C. 14:3, company-specific tariffs, and Board orders arising from various proceedings including rate cases. Under these various mandates, the Board imposes extensive consumer protection requirements upon LDCs, which are generally equivalent to, and in many cases more stringent than, the requirements in this chapter. In addition, what may seem to the commenter like an erroneous drop notice from an LDC, may in fact be appropriate. A name change on an account can often signify a new account and/or new customer. For example, "updating" the account name can represent new ownership of a company, or putting the service under someone else's name. Therefore, the commenter's suggested change has not been made.

N.J.A.C. 14:4-6.3(1)

10. COMMENT: We concur with this notice of proposal. The imposition of an exit fee for leaving an aggregation program is a restrictive practice that hinders energy choice development in New Jersey. (DES)

RESPONSE: The Board appreciates the commenter's support of the adopted new rule.

11. COMMENT: We support this proposed addition. In order to ensure that energy consumers are provided with access to the full panoply of available energy offers, they should not be subjected to unnecessary hurdles, such as an exit fee or other similar impediment, which would prevent the customer from leaving an aggregation program at the customer's discretion. (NEM)

RESPONSE: The Board appreciates the commenter's support of the adopted new rule.

12. COMMENT: We believe that the prohibition on exit fees for leaving a government energy aggregation program should be applicable to both residential and non-residential customers, rather than just residential customers. The same policy—i.e., promoting energy competition and choice consistent with EDECA—should apply for all customers, regardless of whether they are residential or commercial. (RESA)

RESPONSE: The Board believes that prohibition on exit fees for residential customers leaving a government energy aggregation program is appropriate because residential customers are included in the program on an opt-out basis. Commercial customers are included in government energy aggregation programs on an opt-in basis. Therefore, exit fees for commercial customers may be appropriate if they are set at a reasonable level, if the commercial customers are fully aware of them when they opt-in, and if having exit fees for commercial customers results in lower bids which ultimately benefits the commercial customers. Therefore, the commenter's recommendation to prohibit exit fees for commercial customers has not been made.

N.J.A.C. 14:4-6.5(g)

13. COMMENT: We believe that in addition to including the information about the customer's right to opt-in or opt-out of a government-private energy aggregation program as set forth in N.J.A.C. 14:4-6.5(f), the Board should also be required to include in the form notice specific information about how customers could shop for electricity generation service with a TPS. In order to convey such information, the form notice should reference the portion of the Board's website that contains a list of TPSs and their contact information in each service territory. (RESA)

RESPONSE: The opt-in/opt-out notice is sent by, or on behalf of, the lead agency that is establishing the government energy aggregation program to customers who purchase their supply from their local utility, not from a TPS. The Board requires that the lead agency include information in the form that will inform the customer about the government energy aggregation program that the lead agency is offering and allow the customer to choose whether or not to join the program. The information that must be included in the form, as required by the Board, is related to this choice, rather than other choices as recommended by the commenter. Therefore, the commenter's suggested change has not been made.

N.J.A.C. 14:4-6.7(a)

14. COMMENT: We believe that this proposed amendment should be reconsidered by the Board. The sample forms for municipal aggregation programs to be used by the municipality and utility should continue to be posted on-line as an educational vehicle, while specific terms of the agreements remain negotiable. The posting of the form provides the parties with a meaningful understanding of the key elements to be covered in an aggregation agreement and helps ensure that each party addresses the terms that are of import in such an arrangement. (DES)

15. COMMENT: We suggest that a sample form should continue to be posted and made available on the Board's website. While the municipality and LDC may still arrive at their own negotiated agreement, the availability of a sample form should be a beneficial aid to municipalities that may not be as familiar with the terms and conditions of such agreements. By posting a sample form on its website, the Board will be providing a valuable educational tool. (NEM)

16. COMMENT: The Board has proposed amending N.J.A.C. 14:4-6.7(a) to allow individually-negotiated aggregation agreements between the LDC and the participating municipality. Since the enactment of the Electric Discount and Energy Competition Act (EDECA), the Board's government aggregation rules have called for the LDC and municipality to use a standard form agreement that was to be posted on the Board's website. The Summary explanation for the proposed change to this rule is cursory and does not indicate the "problem" the amendment is trying to address:

Proposed amendments to N.J.A.C. 14:4-6.5(b), 6.6(c), and 6.7(a) remove the language that indicates that the agreement between the LDC and the municipality participating in a government energy aggregation program can be obtained from Board staff. This will allow the municipality and the LDC to create an agreement that can be tailored to the specific government aggregation program.

We oppose the proposed amendments to N.J.A.C. 14:4-6.7(a) for several reasons. First and foremost, a standardized agreement makes the most sense for a government-private energy

aggregation program. The Board has adopted standard form TPS and billing services agreements for use by LDCs and TPSs. The rationale the Board used for employing standard TPS and billing services agreements applies equally to a government-private energy aggregation program, namely, that all utilities and third parties should employ standard terms and conditions for all such programs. While government-private aggregations programs have not drawn much interest, if the concept does take hold, it would be administratively difficult for a utility to administer many different agreements, each of which has different terms and conditions. Moreover, employing negotiated, “one-off” agreements would likely lead to a higher number of disputes between the utility and the municipality, which in turn could result in the Board having to engage in dispute resolution more frequently. Finally, a uniform LDC agreement for government-private energy aggregation programs would likely facilitate such programs. In contrast, under the proposed amendments, the utility would have to develop a new agreement for each aggregation program and negotiate different terms and conditions for each municipal program, which may hinder or delay implementation of these programs.

We request that the Board not adopt the proposed amendments to N.J.A.C. 14:4-6.7(a) and leave the regulation unchanged. The EDCs also urge the Board to move to expeditiously finalize and post the approved form of aggregation agreement. (EDCs)

RESPONSE TO COMMENTS 14, 15, AND 16: The Board notes that this amendment was designed to allow flexibility regarding the contract so that it can be tailored to the specific program and better meet the needs of the parties to the contract. N.J.A.C. 14:4-6.7 identifies specific information that must be included in the contract providing the parties with a meaningful understanding of the key elements to be covered in an aggregation agreement, and helps ensure that each party addresses the terms that are of import in such an arrangement. While the Board’s

rules have contained provisions for government energy aggregation programs for some time, as of January 2013, only one government energy aggregation program has been implemented in New Jersey. Therefore, it would be difficult to anticipate all of the contractual needs of the counties and municipalities who may enter into these contracts in the future. The Board believes that having flexibility in these contracts will be beneficial to the parties entering into them. Therefore, the commenter's suggested change has not been made.

N.J.A.C. 14:4-7.6(a)

17. COMMENT: We agree with the Board on the importance of providing consumers with a copy of the terms and conditions that they have agreed to in order to promote fully informed consumer shopping. We also agree with the Board's proposed amendment to permit TPSs to meet this requirement through different means, that is, electronic copy, mail copy, or in-person delivery, to reflect the different modalities through which TPSs are making offers available in the marketplace and the different ways in which consumers are shopping for energy today.

We do request that the Board change the proposed 24-hour timeframe within which the contract is required to be provided to three business days. A three-business-day timeframe will better account for instances such as when an enrollment occurs on a weekend or holiday and provide TPSs with an adequate compliance window to provide the contract. Changing the proposed amendment to provide a three-business-day window would also be more in keeping with standard practice within the industry. (NEM)

18. COMMENT: We are supportive of the proposed amendment that marketers provide customers with copies of their contracts and that the contracts can be disseminated through

regular mail, hand delivery, or electronically. It is important that customers be apprised of the terms and conditions associated with service to be provided by the TPS and allowing the use of all available mediums recognizes the realities of today's energy choice markets and the various communication methods available to consumers and TPSs.

We, however, recommend a change to the proposed amendments that TPSs must send the contract within 24 hours of when a customer authorizes a contract renewal. This exceedingly narrow time frame is highly impractical from an operational perspective. For example, a customer may authorize a renewal in the late afternoon, thus preventing the TPS from sending out the contract until the next business day and thereby breaching the 24-hour time period. Similarly, the renewal authorization can occur on late Friday afternoon or on the eve of a legal holiday. This would also hinder the ability of the TPS to send out the contract within the 24-hour window. Further, application of a rushed highly circumscribed period can lead to errors and omissions that can be prevented by using a more reasonable time frame. Rather than the 24-hour period, DES recommends that the contract be sent out within three business days after the customer authorizes the contract renewal. In this manner, the TPS from an operational perspective will have an enhanced capability to ensure that the renewal is processed accurately, and also accommodate the time lags created by weekends and holidays and late afternoon authorizations. (DES)

19. COMMENT: We do not support the provision of the proposed amendment requiring the TPS to submit a change order to an LDC, and within 24 hours of when a customer authorizes a contract renewal, to send a copy of the TPS contract to the customer for several reasons. First, TPSs are not required to submit a change order when a customer renews a contract and imposing

this requirement through this subsection would be inconsistent with the current energy competition standards, as well as unnecessary, unduly burdensome and costly to both TPSs and customers. Second, the 24-hour timeline is unrealistic and unworkable for TPSs to send a contract to customers either upon initial acceptance or customer authorization of a contract renewal. We submit that a five-day timeline would be more appropriate and reflective of market conditions, while still meeting customer expectations. Finally, we believe that the requirements in this subsection should only apply to residential customers, since commercial customers do not need any such requirement.

In addition to these concerns with the first new requirement in the provision, we also have concerns with the second requirement that:

The TPS may do this by an electronic method or regular mail at the option of the customer, or if the customer signed up in person, the TPS may hand deliver the contract to the customer.

We submit that sending a copy of the agreement using the method selected “at the option of the customer,” adds a new and unnecessary level of administrative complexity for TPSs. Instead, we believe that the language should be modified to enable TPSs to decide whether to provide a copy of the contract by regular mail, electronic mail, or hand delivery, and then give customers the option to request a follow-up copy of the contract using an alternative method.

To address the aforementioned concerns, we submit that the proposed language at the end of this subsection should be modified to read:

A TPS must send residential customers a copy of the TPS contract upon the initial establishment of service and when a customer authorizes contract renewal. The TPS may do this by an electronic

method or by regular mail, or if the customer signed up in person, the TPS may hand deliver the contract to the customer. Upon initial establishment of service, a TPS must send the residential customer a copy of the TPS contract within five business days after the customer accepts the TPS contract. When customer authorization of a contract renewal is necessary, the TPS shall send the residential customer a copy of the renewal contract within five business days after the customer authorizes contract renewal.

We believe that this modified language represents the appropriate balance between market conditions and the needs of residential customers. (RESA)

RESPONSE TO COMMENTS 17, 18, AND 19: The Board recently reduced the amount of time provided by N.J.A.C. 14:4-7.6(b)4 that a customer has to rescind a TPS contract from 14 to seven days. Therefore, it is essential that the customer be given the contract on a timely basis since all the terms and conditions are not disclosed during the marketing process. To the extent that the TPS is in a position to enroll a customer, accept a renewal of a customer, or submit a change order to the LDC, the TPS should also be in a position to provide the customer with a copy of the contract. However, the Board has determined that changing the timeframe from 24 hours to one business day would provide the flexibility sought by the commenters without weakening the consumer protections that extending the period to three or five days could entail. Therefore, the Board has made this change upon adoption.

N.J.A.C. 14:4-7.6(1)

20. COMMENT: We understand the relevance of ensuring that customers are afforded the protection of the lasting nature of the terms and conditions under which service from the TPS was agreed to. Nonetheless, the realities of the market and regular swirl of changes in regulatory mandates that impact retail energy service necessitate a realistic application and appraisal of the limitations placed on modifying an existing contract term. To this end it is important to differentiate between “material” and “non-material” changes to a customer’s contract as underscored in the language noted above. However, the categories exempt from prior notice and authorization should include in addition to non-material contract changes, those changes that benefit a consumer. These types of modifications can include, for example, a price reduction, additional protections, etc. Where the consumer is directly benefited prior notice should not be required.

We concur with the recommendation that changes occurring by operation of law do not require prior authorization. Nonetheless, the ambit of such category requires a more expansive view. The Board in describing what could constitute a change by operation of law, provides the following example: “Changing the price to reflect a change in the Sales and Use Tax or other State-mandated charge would be permitted as a change required by operation of law.” The emphasis here is only on a “State” mandated “charge.” This fails to take into account that there are also Federally mandated charges that can impact on the uncontrolled costs incurred by a TPS.

Moreover, it does not underscore that in addition to a direct change in a particular government charge, such as sales or excise taxes, a TPS can also be affected by a Federal or State “mandate” that has the direct impact upon the ability of a TPS to provide service and the costs related thereto. Just recently, the New Jersey Legislature passed A2966/S1925, a statute that imposes new, costly, solar renewable energy requirements on each TPS. This represents a

State mandate, outside the control of the TPS that will impose significant additional costs on the TPS providing electricity in New Jersey.

Finally, governmental changes can also occur at the local municipal level that impact upon energy choice and the operations of the TPS. This can occur in the areas of taxation, bonding, and others.

In view of these considerations, we request that the description of a change required by operation of law include as follows:

Changing the price to reflect a change in the Sales and Use Tax or other State Federal or local mandated charge or any State, Federal or local mandate impacts upon the provision or cost of service by a TPS would be permitted as change required by operation of law.

Further, we request that the Board clarify that the requirement of affirmative authorization where deemed otherwise applicable would not apply to month-to-month contracts or to those that transfer automatically to a variable-price agreements. In view of the limited and short term of such contracts which are cancellable on 30 days' notice, it would be highly impractical and unnecessary to require a TPS to comply with this requirement. Further, imposing such a prior authorization obligation would also pose a conflict with N.J.A.C. 14:4-7.6(j). (DES)

21. COMMENT: We do not support the Board's proposed addition of this subsection, which would require that:

The contract may not include provisions (sometimes referred to as "material change notices") that permit the TPS to change material terms of the contract without the customer's affirmative

authorization unless the change is required by operation of law. “Material terms of a contract” include, but are not limited to, terms regarding the price, deliverability, time period of the contract, or ownership of the gas or electricity. “Non-material” terms include those regarding the address where payments should be sent or the phone number to be used for customer inquiries. Changing the price to reflect a change in the Sales and Use Tax or other State-mandated charge would be permitted as a change required by operation of law.

First, this new subsection imposes added risk on TPSs, which will likely lead them to price their products in an upward manner. Second, this rule will increase administrative complexity for TPSs, as well as confusion among customers, as TPSs will be motivated to lengthen their contracts and make them more vague to protect themselves from any type of market change that may arise. Third, we are not aware of any particular public outcry or examples of TPSs using amendment provisions in an inappropriate manner. Indeed, material change provisions are common in contracts for all kinds of products (credit cards, mortgages, etc.). Finally, this rule is unnecessary, because customers are always free to reject contracts with “material change” clauses and choose BGS service or shop with another TPS that does not have such a provision.

For the foregoing reasons, we believe that the proposed new provision should be altogether rejected. However, should the Board determine that there is a need to explicitly prohibit “material change clauses” absent a customer’s affirmative consent, we submit that the rule should be modified in such a way as to mitigate the mechanical and practical challenges it

poses for TPSs. First, the rule should not apply to non-residential customers, which are more sophisticated than residential customers and frequently execute contracts that include provisions permitting amendments under certain circumstances. Second, the rule should provide similar flexibility for non-material changes as it provides for material changes. The current proposed language leaves the definition of “material change” open to additions (“including, **but not limited to**” (emphasis added)), but does not leave the definition of a “non-material change” open to such additions. Similar flexibility should be provided for non-material changes, to allow TPSs to make ministerial changes without affirmative consent from the customer. Third, the rule should exclusively apply to any new contracts entered into after the effective date of the rule since having to revise existing contracts would be burdensome and cost prohibitive. Finally, the rule should be amended to provide that execution of specific pricing provisions in an original contract are not a “material change.” For example, if the contract is for an introductory fixed rate with a variable price after month three, then the TPS should be free to change the price starting in month four without obtaining affirmative consent. Similarly, if the contract provides for the pass-through of certain cost items as they change, then the TPS should be able to update the price for those items without providing customer notice each time.

To address the aforementioned concerns, we submit that the proposed language at the end of this subsection should be modified to:

Residential contracts entered into after the date this rule goes into effect may not include provisions (sometimes referred to as “material change notices”) that permit the TPS to change material terms of the contract without the customer’s affirmative authorization unless the change is required by operation of law.

“Material terms of a contract” include, but are not limited to, terms regarding the price, deliverability, time period of the contract, or ownership of the gas or electricity. “Non-material” terms include, but are not limited to, those regarding the address where payments should be sent or the phone number to be used for customer inquiries. Changing the price to reflect a change in the Sales and Use Tax or other State-mandated charge would be permitted as a change required by operation of law. Changing the price in a manner specifically agreed to by a customer in the original contract shall not be considered a “material change.”

As another alternative to this proposed rule, we believe that the Board might enact a rule requiring that TPSs provide language in their residential contracts providing that material change would not be valid without notice to the customer within 15 days of the change and the opportunity for the customer to rescind the contract. Such a requirement would inform residential customers of any changes to their contracts and also allow them to cancel without incurring early termination fees or other types of charges. (RESA)

22. COMMENT: We submit that a clear distinction should be drawn with respect to the types of changes to a contract and the correspondingly appropriate notice to be provided to the consumer. In the case of contract changes that benefit a consumer (that is, a reduction in price), changes that occur by operation of State or Federal law, as well as non-material changes to a contract, we recommend that notice to the consumer should not be required. In addition, a consumer should not be required to provide affirmative consent to a contract renewal with a rate change when they

have received prior advance notice. Advance notice of the change should be sufficient, provided that the consumer is afforded the ability to opt-out of the contract without penalty.

Notwithstanding the above recommendations, we request that the Board clarify that it did not intend that the affirmative authorization requirement of this subsection was to apply to month-to-month contracts or to a contract that automatically converts to a monthly variable-priced agreement. From a general standpoint, requiring affirmative authorization for the renewal of a month-to-month contract would be impracticable to comply with and would also conflict with N.J.A.C. 14:4-7.6(j). Moreover, given that these contracts are terminable under 30 days notice anyway, the application of such affirmative authorization requirement would be excessive and unnecessarily costly.

We also recommend that the language be modified to explicitly recognize that Federally mandated charges are changes that are required by operation of law. Federally mandated charges, like State taxes, are beyond the control of TPSs and should be classified similarly in this subsection. In addition, there are other State and Federally mandated changes that directly impact suppliers' costs of doing business, that should also be included within the scope of price changes that take effect by operation of law. For example, legislation can change applicable solar renewable energy requirements, such as the recent A2966/S1295, and significantly increase suppliers' costs of doing business. Suppliers must be able to adjust their pricing to account for these changes, which as was previously mentioned, are outside of the scope of their control and occur without meaningful notice that would have permitted the supplier to have contemplated or anticipated that any such change may occur. We recommend that the language therefore be modified as follows (additions in boldface **thus**):

Changing the price to reflect a change in the Sales and Use Tax or

other **federally-mandated or State-mandate charge or any State, federal or local mandate that impacts the provision or cost of service by a TPS** would be permitted as a change required by operation of law.

RESPONSE TO COMMENTS 20, 21, AND 22: A TPS may experience increased costs during the time period covered by a contract and wish to increase fixed price customer contracts to recoup these costs. However, for many customers, this would defeat the purpose of a fixed price contract. Customers who choose fixed priced contracts do so in order to avoid price risk. For example, a customer may choose a TPS offer that is higher than its utility's price to compare because the TPS is offering a fixed price. The customer in this case has chosen to pay a higher price because the customer believes that even if the TPS's costs go up the customer will continue to pay the same rate. If the TPS is permitted to impose a rate increase to this customer through a material change clause in the contract because the TPS's costs increase, this customer will pay the higher rate and then be denied the benefit of the fixed rate when the TPS's costs go up. Even if the TPS allows the customer to leave the contract without a penalty or exit fee, the customer would still be denied the benefit of the fixed price after paying the higher rate for the initial portion of the contract. For a customer receiving variable rate service from a TPS, this subsection will not prohibit the TPS from changing the variable rate pursuant to the contract terms. However, if contract includes a formula for the variable rate, for example the utility price to compare minus two cents, the TPS cannot use a material change clause to change the variable formula.

Regarding the inclusion of Federal or local mandates in the definition of "non-material," the Board notes that the basis for the exception for State taxes lies in the ability of the State to

collect these taxes directly from the customer if not collected by the TPS. Allowing other mandated charges to be included changes the contract from a fixed rate benefiting the customer to a variable rate benefitting the TPS.

The Board believes that the terms of a fixed rate contract, which the customer has agreed to for a predetermined amount of time, provide appropriate consumer protection and the changes suggested by the commenters could require the Board and/or staff to make determinations on whether the modifications favor the consumer when it may not be clear. This produces an additional ambiguity into the contract and therefore, the commenters' suggested change have not been made

Additionally, regarding the commenter's request for a change to the definition of non-material change open to open to additions ("including, **but not limited to**"), the Board believes that this change would expand the possibility for an argument that any change is not material and that this provision is meant to primarily address administrative changes. Therefore, the commenter's suggested change has not been made.

N.J.A.C. 14:4-7.6(j)

23. COMMENT: The proposed language would explicitly recognize that TPSs can obtain consent for renewal through telephonic, electronic, and written means. We support this change as it provides TPSs with the increased ability to cost-effectively renew consumers using all of the currently approved and utilized methods of enrollment without reducing any measure of consumer protection. (NEM)

RESPONSE: The Board appreciates the commenter's support of the adopted amendment.

N.J.A.C. 14:4-7.12

24. COMMENT: In view of the language in proposed N.J.A.C. 14:4-7.6(l), as it pertains to changes in price that occur by operation of law, NEM suggests that N.J.A.C. 14:4-7.12 should be modified to explicitly recognize that these changes may be made without the customer's affirmative authorization without implicating this section. As mentioned in our comments regarding N.J.A.C. 14:4-7.6, changes that occur by operation of law are beyond the control of competitive suppliers. As such, N.J.A.C. 14:4-7.12(a)2 is recommended to be modified as follows (additions indicated in boldface **thus**):

The TPS may not charge the customer a rate that is higher than the fixed rate during the period for which it is fixed, **except as permitted in N.J.A.C. 14:4-7.6(l)**, without the customer's affirmative consent.

We additionally request Board clarification that the proposed language is not intended to include or be applicable to changes in utility delivery rates. In other words, changes to the utility delivery rate that impact the overall customer bill should not be factored into the characterization of a TPS "fixed" rate contract. The fixed portion of the rate referenced in N.J.A.C. 14:4-7.12 should pertain solely to the charge from the competitive supplier. (NEM)

25. COMMENT: Under this section the Board requires that in the case of fixed or firm contracts the TPS must identify the applicable term and is precluded from changing the price without prior customer authorization. DES concurs with this approach, but would suggest the need for two clarifications.

First, a price change caused by an operation of law should not require prior authorization

consistent with the proposed N.J.A.C. 14:4-7.6(1).

Second, the rates deemed to be considered “fixed” or “firm” only apply to charges from the TPS, and would not incorporate modifications in the utility delivery rates. (DES)

26. COMMENT: We have several concerns with the new provision’s requirement that:

The TPS may not charge the customer a rate that is higher than the fixed rate during the period for which it is fixed, without the customer’s affirmative consent.

First, such a provision is unnecessary because the rules already provide consumer protections against supplier misrepresentations with respect to pricing. Second, the proposed provision would prohibit TPSs from providing innovative, hybrid products that include fixed rates for certain components and variable or pass-through rates for other components. Consequently, it would limit customer choice. Finally, it is unclear how the provision would impact “change of law/regulations” provisions that TPSs use to protect themselves in case of extraordinary legislative or regulatory change. For example, a TPS serving a customer under a fixed priced product, with such change in law language has explicitly reserved the right to adjust the price in certain circumstances when changes to laws or regulations increase the cost to serve customers. It would not be appropriate to require affirmative consent from a customer to pass through increased costs that are explicitly allowed under such a contractual arrangement. In order to address these concerns, we recommend that the Board eliminate this provision. (RESA)

RESPONSE TO COMMENTS 24, 25, AND 26: Regarding the commenter’s first recommended change, it is the Board’s intent that this section should be read with N.J.A.C. 14:4-7.6(1). Therefore, the Board will add the recommended cross-reference upon adoption, so that N.J.A.C.

14:4-7.12(a)2 will read, “The TPS may not charge the customer a rate that is higher than the fixed rate during the period for which it is fixed, except as permitted in N.J.A.C. 14:4-7.6(1), without the customer’s affirmative consent.” Regarding the commenter’s second recommended change to this section, this section addresses the rates for which a TPS signs up a customer or renews a customer; therefore, it is implicit that this section does not refer to the utility delivery rate. The commenter’s suggestion in this regard has not been made.

Additionally, this section is not designed to limit the types of products that the commenter identifies. This section is designed to avoid situations where a customer believes it has entered into a “fixed-rate” contract that will provide price certainty for a period of time when in fact the rate can be increased during this time period because of a “material change” provision in the contract.

27. COMMENT: We wish to express our support and appreciation for proposed N.J.A.C. 14:4-7.12, intended to provide clarity on “fixed” or “firm” rate offerings by TPSs. The EDCs believe the proposed language will aid in ensuring that customers are provided with the most accurate pricing information reasonably available at the start of a TPS contract, and ensure that if the offering is not for a “fixed” or “firm” price, customers are made aware of the possibility that the TPS may not in all cases be contractually obligated to fulfill its obligations under the purportedly fixed price contract arrangements in place at the time when the service was initiated. (EDCS)

RESPONSE: The Board appreciates the commenter’s support of the adopted new rule.

Federal Standards Statement

Executive Order No. 27 (1994) and N.J.S.A. 52:14B-1 et seq. require State agencies that adopt, readopt, or amend State regulations exceeding any Federal standards or requirements to include in the rulemaking document a Federal standards analysis. There are no Federal standards applicable to the adopted amendments and new rules. Accordingly, Executive Order No. 27 (1994) and N.J.S.A. 52:14B-1 et seq. does not require a Federal standards analysis for the adopted amendments and new rules.

Full text of the adoption follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks ***[thus]***):

14:4-7.6 Contracts

(a) A TPS shall not provide electric generation service or gas supply service to a retail customer without the customer's written signature on a contract or such alternative forms of verification identified in N.J.A.C. 14:4-2.3 and as the Board may permit to initiate such service(s), for switching TPSs or for renewal thereof. On or before the date the TPS submits a change order to an LDC, and within ***[24 hours]*** ***one business day*** of when a customer authorizes a contract renewal, the TPS shall send a copy of the TPS contract to the customer. The TPS may do this by an electronic method or by regular mail, at the option of the customer, or if the customer signed up in person, the TPS may hand deliver the contract to the customer.

(b) - (l) (No change from proposal.)

14:4-7.12 Fixed rates

(a) If a TPS signs up a customer or renews a customer for a rate that the TPS characterizes as “fixed” or “firm,” or the TPS uses other language to describe the rate as not variable:

1. (No change from proposal.)

2. The TPS may not charge the customer a rate that is higher than the fixed rate during the period for which it is fixed, ***except as permitted in N.J.A.C. 14:4-7.6(l),*** without the customer’s affirmative consent.