

Office of the People's Counsel District of Columbia

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Elizabeth A. Noël
People's Counsel

February 19, 2008

Ms. Dorothy Wideman
Commission Secretary
Public Service Commission of the
District of Columbia
1333 H Street, NW, 2nd Floor, West Tower
Washington, D.C. 20005

Re: Formal Case No. 1009 (Code of Conduct)

Dear Ms. Wideman:

Enclosed for filing in the above-referenced proceeding are an original and fifteen (15) copies of the "Initial Comments of the Office of the People's Counsel on Chapter 39 Affiliate Transactions Code of Conduct."

Please contact the undersigned at (202) 727-3071, if you have questions or need additional information.

Sincerely yours,

Barbara L. Burton
Assistant People's Counsel

Enclosure

cc: All parties of record

**BEFORE THE
PUBLIC SERVICE COMMISSION
OF THE DISTRICT OF COLUMBIA**

In the Matter of)	
The Investigation into)	Formal Case No. 1009
Affiliated Activities, Promotional Practices)	
And Code of Conduct of Regulated Gas)	
And Electric Companies)	

**INITIAL COMMENTS OF THE OFFICE OF THE PEOPLES COUNSEL ON
CHAPTER 39 AFFILIATE TRANSACTIONS CODE OF CONDUCT**

The Office of the People’s Counsel of the District of Columbia (“Office” or “OPC), the statutory representative of utility customers and ratepayers in the District of Columbia,¹ submits the following Comments on Chapter 39, “Affiliate Transactions Code of Conduct” of Title 15 in response to the Notice of Proposed Rulemaking (NOPR) which was issued on January 18, 2008.²

INTRODUCTION AND SUMMARY

The Office has, throughout the Commission's long-standing efforts to create affiliate standards of conduct tailored to the specific circumstances of District energy utilities and their affiliates, sought clear and enforceable rules that will prevent the exploitation of District consumers as a result of dealings with and between the energy utilities and their affiliates. Now, more than ever, regulators must be vigilant in enforcing regulations that will protect consumers from cross subsidies between the regulated entities and its unaffiliated subsidiaries. The lines of distinction between the regulated entities and the unregulated subsidiaries have become increasingly blurry, as these entities attempt to make inroads into new markets. Consumers are often left to figure out who is actually providing the service. Consumers often ask what is the

¹ D.C. Code § 34-804 (2001).

² D.C. Reg., Vol. 55, No. 3, pp. 000574-000582 (January 18, 2008).

difference between PEPCO and PES, or Washington Gas and WGES? Hence, OPC submits strict and enforceable rules must be enacted. The issue transcends the specific industry and affects not only the energy companies, that are the subject of the instant rulemaking, but also has far reaching implications, including for telecommunication's companies. In any respect, OPC believes the following three goals are critical to a D.C.-specific code of conduct:

- prevent the regulated utilities from favoring their affiliates or providing cross subsidies to their affiliates that might allow the affiliates to compete unfairly in the competitive market;
- further the goal of preventing customer confusion about the identity of the regulated utilities and their unregulated sales affiliates;
- ensure and facilitate informed intelligent selections in the competitive market by District of Columbia retail consumers – selections based on knowledge and understanding, not confusion and lack of information.

Accordingly, OPC urges the Commission to err on the side of providing greater detail in the regulations in order to minimize the potential for ambiguity that could be exploited to the disadvantage of consumers and competitors.

Many of the proposed rules meet those criteria, and the Office reproduces those rules with which it agrees in Section II., below. Several of the other rules, however, do not meet OPC's criteria for a variety of reasons. In Section III, below, OPC sets forth those rules, its suggested changes to them, and explanations for the proposed changes.

I. BACKGROUND AND PROCEDURAL HISTORY

On April 5, 2002, the Commission issued Order No. 12376 and removed all issues pertaining to transactions and relationships between electric utilities from Formal Case No. 945 and removed Designated Issue No. 8(b) in Formal Case No. 989 to a new proceeding, Formal Case No. 1009, to address those issues. Order No. 12376 also directed parties to file comments

and Staff to submit a proposed District-specific Code of Conduct. On May 14 and May 23, 2002, OPC filed, respectively, Initial Comments³ and Reply Comments.⁴ By Order No. 12405, May 17, 2002, Formal Case No. 1009, the PSC adopted on an interim basis the Retail Electric Working Group's recommendation that Potomac Electric Power Company ("PEPCO") and Washington Gas ("WG") comply with the code of conduct adopted by the Maryland Public Service Commission in Case No. 8747 until a D.C.-specific code had been adopted. On January 27, 2003, Staff issued a proposed code of conduct.⁵ OPC filed Initial Comments⁶ and Reply Comments⁷ on Staff's proposed code of conduct on March 24, 2003 and April 9, 2003, respectively. On June 11, 2004, the NOPR for an affiliate code of conduct was issued in Formal Case No. 712 in the D.C. Register. OPC filed Initial Comments⁸ and Reply Comments⁹ on July 12, 2004 and July 26, 2004, respectively. On May 13, 2005 in Formal Case No. 1009, the Commission issued a NOPR¹⁰ stating that it was reopening the comment period to allow parties to revise their previous comments on the Affiliate Transactions Code of Conduct issued on June

³Formal Case No. 1009, *In the Matter of the Investigation into Affiliated Activities, Promotional Practices and Code of Conduct of Regulated Gas and Electric Companies*, Initial Comments of the Office of the People's Counsel on a District of Columbia Code of Conduct, May 14, 2002.

⁴Formal Case No. 1009, *In the Matter of the Investigation into Affiliated Activities, Promotional Practices and Code of Conduct of Regulated Gas and Electric Companies*, Reply Comments of the Office of the People's Counsel on a District of Columbia Code of Conduct, May 23, 2002.

⁵Formal Case No. 1009, *In the Matter of the Investigation into Affiliated Activities, Promotional Practices and Code of Conduct of Regulated Gas and Electric Companies*, Staff Report of the Commission on Utilities Code of Conduct, January 27, 2003.

⁶Formal Case No. 1009, *In the Matter of the Investigation into Affiliated Activities, Promotional Practices and Code of Conduct of Regulated Gas and Electric Companies*, Initial Comments of the Office of the People's Counsel on Staff's Proposed District-Specific Affiliate Transactions Code of Conduct, March 24, 2003.

⁷Formal Case No. 1009, *In the Matter of the Investigation into Affiliated Activities, Promotional Practices and Code of Conduct of Regulated Gas and Electric Companies*, Reply Comments of the Office of the People's Counsel regarding Staff's Proposed District-Specific Affiliate Transactions Code of Conduct, April 9, 2003.

⁸Formal Case No. 712, *In the Matter of the Investigation into the Public Service Commission's Rules of Practice and Procedure*, Initial Comments of the Office of the People's Counsel on the Proposed District of Columbia Affiliate Transactions Code of Conduct, July 12, 2004.

⁹Formal Case No. 712, *In the Matter of the Investigation into the Public Service Commission's Rules of Practice and Procedure*, Reply Comments of the Office of the People's Counsel on the Proposed District of Columbia Affiliate Transactions Code of Conduct, July 26, 2004.

¹⁰Formal Case No. 1009, *In the Matter of the Investigation into Affiliated Activities, Promotional Practices and Code of Conduct of Regulated Gas and Electric Companies*, Notice of Proposed Rulemaking, May 13, 2005.

11, 2004 in Formal Case No.712. On June 13, 2005, OPC filed Initial Comments¹¹ in response to the May 13, 2005 NOPR. On January 18, 2008 in Formal Case 1009, the Commission issued a NOPR¹² for an Affiliate Transactions Code of Conduct that revises and reorganizes the Affiliate Transactions Code of Conduct issued on June 11, 2004 in Formal Case No. 712. Initial comments are due February 19, 2008 and reply comments are due March 4, 2008.

II: OPC SUPPORTS THE FOLLOWING PROVISIONS IN CHAPTER 39 AFFILIATE TRANSACTIONS CODE OF CONDUCT

OPC supports the following provisions of the proposed Affiliate Transactions Code Conduct because they are consistent with OPC's objectives.

Prohibition of Favorable Treatment for Affiliates

- 3901.1 Neither an energy utility nor its service affiliate(s) shall represent that any advantage accrues to a customer or others in the use of the energy utility's services as a result of that customer or others dealing with the service affiliates.
- 3901.2 Neither an energy utility nor its service affiliate(s) shall represent that the affiliation allows the service affiliate(s) to provide a service superior to that available from other licensed energy suppliers.
- 3901.3 No energy utility shall promote the services of a service affiliate or disparage the services of a competitor
- 3901.4 An energy utility shall not condition or tie the provision of regulated utility services to:
- (a) The purchase, lease, or use of any other goods or services offered by the energy utility or its affiliates; or
 - (b) The direct or indirect commitment not to deal with any competing energy supplier.

¹¹Formal Case No. 1009, *In the Matter of the Investigation into Affiliated Activities, Promotional Practices and Code of Conduct of Regulated Gas and Electric Companies*, Initial Comments of the Office of the People's Counsel Pursuant to the Notice of Proposed Rulemaking Issued May 13, 2005, June 13, 2005.

¹²Formal Case No. 1009, *In the Matter of the Investigation into Affiliated Activities, Promotional Practices and Code of Conduct of Regulated Gas and Electric Companies*, Notice of Proposed Rulemaking, January 18, 2008.

- 3901.5 An energy utility shall not give preferential treatment to its affiliate(s) or customers of its own affiliate(s) in providing regulated services. With respect to regulated utility services, the energy utility shall treat all similarly situated providers and their customers in the same manner as the energy utility treats the affiliate or the affiliate's customers.
- 3901.6 An energy utility shall process all requests for service by any provider in the same manner and within the same period of time as it processes requests for service from its core service affiliate(s). An energy utility shall keep an annual log of the length of time it takes the energy utility to process each request for service.
- 3901.8 An energy utility shall apply all the terms and conditions of its tariff related to delivery of energy services to similarly situated providers in the same manner, without regard to whether the supplier is a core service affiliate.
- 3901.9 An energy utility shall offer the same discounts rebates, fee waivers, or penalty waivers to all similarly situated non-affiliated suppliers or customers that it may offer its core service affiliate or customers of its affiliate. The energy utility shall make such contemporaneous offers, including an appropriate posting on the energy utility's electronic bulletin board, or by some other appropriate means (e.g. Internet website).

Limitations on Joint Marketing, Space, and Sales for Service Affiliates

- 3902.1 Joint promotions, marketing, and advertising between an energy utility and its core service affiliate(s) are prohibited. Joint marketing shall include the sharing of billing materials. As such, an energy utility may not allow a core service affiliate access to space on its billing envelope or the ability to include marketing information inside the billing envelope.
- 3902.3 An energy utility shall not provide sales leads to its core service affiliate(s).
- 3902.4 Marketing/advertising material used by the service affiliate claiming an association with the energy utility shall include a disclaimer that:
- (a) The affiliate supplier is not the same company as the energy company, whose name or logo may be at least partially used;
 - (b) The prices and services of the affiliate supplier are not set by the Commission; and
 - (c) The customer is not required to buy energy or other products and services from the affiliate supplier in order to receive the same quality service from the energy utility.

- 3902.5 An energy utility and its core service affiliate(s) shall operate from physically separate locations to avoid the inadvertent sharing of information. The core service affiliate(s) shall not share office space owned or used by the energy utility.
- 3902.6 An energy utility shall not ask a customer for consent to provide the customer's name or information to its core service affiliates licensed in the District of Columbia. An energy utility shall refrain from speaking for, or appearing to speak on behalf of, its core service affiliates.

Disclosure of Information

- 3903.1 An energy utility shall not disclose any customer-specific information obtained in connection with the provision of regulated utility services except upon informed, written consent of the utility customer.
- 3903.3 Any information provided by an energy utility to its energy marketing affiliate(s) with respect to its electric or gas system, the marketing or sale of energy to customers or potential customers, or the delivery of energy to or on its system, shall be contemporaneously disclosed to all non-affiliated suppliers or potential non-affiliated suppliers on its system. Disclosure of such information must be published on the energy utility's electronic bulletin board or equivalent mechanism used to communicate with licensed energy providers.

This section is acceptable to OPC if its changes to Section 3903.4 are accepted.

Cost Allocation and Accounting

- 3904.1 Within four (4) months of the close of the energy utility's fiscal year, an energy utility must file annual a Cost Allocation Manual ("CAM") with the Commission explaining how it will allocate and account for shared services between the energy utility and any affiliate.

Loans and Loan Guarantees

- 3905.2 Notwithstanding any provision to the contrary, an energy utility may participate in a cash management or money pool subject to federal regulations of the Securities and Exchange Commission or the Federal Energy Regulatory Commission.

Transfer or Sale of Assets

- 3906.2 The Commission maintains its authority to restrict and mandate use and terms of sale of utility assets of \$50,000 or more.

Restrictions on Use of Employees and Equipment

- 3907.3 An energy utility shall not temporarily assign any employee of the energy utility to a core service affiliate. However, energy utility employees may be temporarily assigned to a non-core service affiliate, provided those energy utility employees are not subsequently transferred to a core service affiliate.
- 3907.4 For the purposes of this section, a temporary assignment is for a term less than one year.

Ring-Fencing

- 3908.1 Any energy utility owned by a holding company that transfers more than 5 percent of the utility's earnings to a holding company parent, or declares a Special or regular cash dividend to the holding company parent, shall notify the Commission in writing no less than 30 days before such action.
- 3908.2 Energy utilities shall maintain standalone credit and bond ratings separate from their affiliates or holding company.

Emergency Suspension

- 3909.1 The provisions of this Code of Conduct may be suspended during an emergency. Energy utilities subject to the Code of Conduct shall, within 24 hours of the emergency suspension, and every 72 hour period thereafter, notify the Commission of the basis of the emergency that warrants the suspension of the Code of Conduct. The energy utility shall notify the Commission within 24 hours following the expiration of the emergency.

Waiver

- 3910.1 An energy utility may petition for a waiver from any section of the DC Regulated Energy Utility Affiliate Transactions Code of Conduct, which may be granted by the Commission upon a showing of good cause.

DEFINITIONS

OPC approves all of the definitions except for non-core service, non-operational employee and operational employees. See OPC's recommended modifications in Section II.

SECTION III: THE COMMISSION SHOULD MODIFY THE FOLLOWING PROVISIONS OF THE PROPOSED CODE AS INDICATED BECAUSE THE CHANGE PROVIDE CLEARER AND MORE COMPREHENSIVE CONSUMER PROTECTIONS.

OPC's proposed changes are in *bold italics*.

3901.7 An energy utility shall provide the same information about its distribution and transmission services contemporaneously to all licensed energy providers in a manner that does not favor its core service affiliates *in either the type or manner of access to such information*.

Rule 900.5 of the June 11, 2004 NOPR contained a qualifying specification of the prohibited behavior that has been apparently inadvertently omitted in the reorganization. OPC proposes to restore that qualification by adding the phrase "*in either the type or manner of access to such information*" to the rule. OPC believes that such additional detail will enhance the clarity of the rule and eliminate possible ambiguity.

3902.2 Joint sales calls shall not be initiated either by an energy utility or its core service affiliate(s). However, when a customer requests a joint sales call, a joint sales call may be conducted. If a customer enters into a contract with a core service affiliate, a joint call relating to that contract may be conducted. *If a regulated utility does conduct joint sales under any circumstance, it must also do so with non-affiliated competitive suppliers under the same circumstance. If a regulated utility agrees to conduct joint sale conversations with any retail competitive provider, it must contemporaneously notify all providers of the availability of this service.*

OPC's proposed modifications to 3902.2 (above, in *bold italics*) are intended to promote the development of competition in the District of Columbia by removing the advantage that affiliated competitive suppliers inherently possess because of their affiliation with the regulated utility. As OPC explained in its Formal Case No. 1009 Initial Comments¹³ and in its Formal Case

¹³ Formal Case No. 1009, *In the Matter of the Investigation into Affiliated Activities, Promotional Practices and Code of Conduct of Regulated Gas and Electric Companies*, Initial Comments of the Office of the People's Counsel on Staff's Proposed District-Specific Affiliate Transactions Code of Conduct, pp. 13-14. (March 24, 2003).

No. 712 Initial Comments¹⁴, the Office's proposals require that non-affiliate competitive suppliers have the same opportunity as core affiliates to make joint sales calls with the electric company. They do not prohibit a customer from requesting that a joint sales call be made by a regulated utility and its core service affiliate. The Commission's proposal would create an unlevel playing field to the disadvantage of non-affiliated competitors. This result is contrary to the goal of a code of conduct. Accordingly, OPC urges the Commission to modify 3902.2 by adding the italicized language.

3903.2 Notwithstanding the limitations in 3903.1, customer-specific information *necessary for the purposes for which it is sought* may be disclosed for lawful bill collection or credit reporting purposes, pursuant to a subpoena or request by a duly authorized law enforcement official, or pursuant to a lawful request authorized by local or federal law.

The rule as written is overly broad and could be read as allowing disclosure of customer-specific information that has no relevance to e.g., the collection of bills. The disclosure of customer-specific information should be narrowly tailored to disclose no more information than is absolutely necessary. OPC proposes to insert the phrase "*necessary for the purposes for which it is sought*" after the phrase "customer-specific information" to ensure that only customer-specific information specifically necessary to the requested purpose is disclosed.

3903.4 Notwithstanding the limitations in 3903.3 above, an energy utility may disclose the following information without making the disclosure publicly available.

- (a) Information *disclosed in [delete "that is subject to"]* the administration of a contract to supply Standard Offer Service; *[delete ", or to carry out an interconnection agreement"]*
- (b) Information disclosed to a supplier, whether affiliated or non-affiliated, *concerning the supplier's customer [delete "as"]* that is necessary for the supplier to bill or provide services to its customer; and
- (c) Information *disclosed to [delete "with it's the"]* the energy utility's affiliates *required for the affiliates [delete "to the extent necessary"]* to comply with federal and state laws and regulations, including those relating to financial reporting and corporate governance.

¹⁴ Formal Case No. 712, *In the Matter of the Investigation into the Public Service Commission's Rules of Practice and Procedure*, Initial Comments of the Office of the People's Counsel on the Proposed District of Columbia Affiliate Transactions Code of Conduct, pp. 13-14, (July 12, 2004).

The rule as written is ambiguous and unclear as to the information that may be disclosed without public disclosure. For example, the statement in subpart (a) that the energy utility may disclose “information that is subject to the administration of a contract to supply Standard Offer Service” is not clear. How is information “subject to the contract”? OPC proposes modifications to clarify and make more specific the information that may be disclosed without public disclosure.

3904.2 The CAM must include the following:

- (a) An explanation of the corporate organization;
- (b) A description of each corporate entity, including location, list of officers and the statement of the business of each entity;
- (c) *A listing of each type of cost which is allocated or charged direct between entities and the factor(s) which is (are) used in the allocation;*
- (d) *An explanation and calculation of each of the cost allocation factors used for transfers between and among corporate entities; and*
- (e) A listing of the total amount of each cost allocated *or charged direct between or among corporate entities [delete “to each entity”]* during the annual period.

The energy utility shall make the CAM available for free upon request, subject to the signing of a confidentiality agreement where appropriate. In addition, any interested person may file at the Commission in response to these materials, and the Commission will review any such response prior to acting upon the filed materials.

The purpose of the rule is to require disclosure and explanation of all intra-corporate transfers to or from the utility. Such transfers can be either an allocated portion of a cost incurred by the utility or other corporate entities or an unallocated cost that is charged directly to or by the utility. OPC proposes to insert the phrase “or charged direct” after the phrase “which is allocated” in 3904.2(d). In addition, as a matter of logic, (c) should follow (d) and OPC proposes that the order of (c) and (d) be reversed. Finally, rule 902.1 of the June 11, 2004 NOPR contained provision for public access to the CAM that was apparently inadvertently omitted in the reorganization. OPC proposes to restore that provision by adding the rule 902.1 language to rule 3904.2 – ***“The energy utility shall make the CAM available for free upon request, subject to the signing of a confidentiality agreement where appropriate. In addition, any interested person may file at the Commission in response to these materials, and the Commission will review any such response prior to acting upon the filed materials.”***

3904.3 When changes occur to the CAM prior to the next annual filing period, the energy utility must *timely* file amendment(s) to the CAM as necessary.

The Office proposes inserting the word “*timely*” before the phrase “file amendment(s). While the Office does not see the need to establish a hard and fast deadline for such filings, it is important that the energy utility recognize that the filing of such amendments is a priority and must be accomplished with reasonable expedition.

3904.4 An affiliate and an energy utility must maintain *such* separate books and records *as required by [Delete “that shall be subject to review pursuant to”] the Public Utility Holding Company Act of 2005 (“PUHCA 2005”)] and, upon written request, by the Commission and/or OPC, provide timely access to those books and records. The Commission shall identify in reasonable detail, in a separate proceeding established for such purpose, the separate books, accounts, memorandum, or other records to be so maintained.*

As written, this section makes the obligations of the energy utility and its affiliates to maintain books and records, and the Commission’s and OPC’s rights to access such books and records derivative of the rights and obligations under PUHCA 2005.¹⁵ The universe of books and records that the energy utility and its affiliates must maintain can be defined as those required to be maintained under PUHCA 2005. PUHCA 2005 mandates that the books and records to be so maintained must be identified in reasonable detail, in a separate proceeding established for such purpose,¹⁶ and that requirement is set forth in the final sentence of the section.

The terms of access to the separate books and records, however, should be spelled out clearly in this Commission’s rules, as set forth in OPC’s proposed additional language. As proposed in the NOPR, the section could create confusion and impediments to access. For example, to assert that the separate books and records “shall be subject to review pursuant to the Public Utility Holding Company Act of 2005 . . . “ means that, first, one must ascertain what rights the Commission has under that statute. There should be no question that, if the Commission or OPC requests access to the books and records, the energy utility and affiliate must comply. In addition, PUHCA 2005 affords OPC no explicit rights to access such book and records and clearly such access should be provided. See OPC’s comments to Section 3904.5.

3904.5 Commission Staff and the Office of the People’s Counsel (“OPC”) shall be provided full access [*delete “pursuant to PUHCA 2005”]* to the books and records of any affiliate and energy utility *identified pursuant to Section 3904.4 [delete “that relate to the sharing of costs with the energy utility through direct assignment or an allocation methodology”]*.

¹⁵ Energy Policy Act of 2005 § 1265.

¹⁶ *Id.*

PUHCA 2005 does not explicitly provide access to these books and records by consumer advocates and independent agencies such as OPC. As currently written, therefore, Section 3904.5 could be read to afford OPC no access to those books and records, because PUHCA 2005 affords OPC no such access. OPC proposes to eliminate the reference to PUHCA 2005 to preclude the possibility of such a reading. The language “identified pursuant to Section 3904.4” is intended to clarify that the Commission and OPC are entitled to access to all separate books and records obligated to be maintained under Section 3904.4. There should not be any argument that, even though a particular record is required to be maintained by Section 3904.4, the Commission and OPC are not entitled to access to it because the energy utility or its affiliate contends that the record does not “relate to the sharing of costs with the energy utility through direct assignment or an allocation methodology.” The deletion of the quoted language will eliminate such a possibility.

3904.6 The energy utility and all affiliates *[delete “to or from which assets included in rate base have been transferred by or to the energy utility and all affiliates that provide services to, or share costs with, the energy utility through any allocation method”]* must make available for inspection and review by the Commission books and records identified in Sections 3904.4 and 3904.5 *[delete “relating to the foregoing pursuant to PUHCA 2005”]* so that the Commission may determine compliance with the Code of Conduct *and the regulated utility’s Code of Conduct Implementation Plan*. Books shall be maintained for inspection and review for at least five (5) calendar years. The initiation of an investigation by the Commission shall not shift the energy utility’s burden of proving compliance with these rules. *The energy utility still bears the burden of proving compliance with these rules.*

Again, OPC proposes to delete the references to PUHCA 2005 to make it clear that the Commission’s or OPC’s access to books and records is not derivative or dependent upon legal rights under PUHCA 2005. OPC proposes adding the final sentence in order to make unambiguously clear that the burden of proof remains with the utility.

3904.7 Biennially, the energy utility shall conduct, at shareholder expense, an audit of its books and the books of any affiliate to ensure compliance with the District’s Code of Conduct. The energy utility shall choose an independent auditor (*subject to [delete “approved by”] the Commission’s approval*). *[delete “, and shall notify”]* *The energy utility shall present for approval its selection to the Commission and notify the Office of the People’s Counsel of the presentation [delete “of that choice”]* at least sixty (60) days prior to the beginning of the audit. *The Office of the People’s Counsel shall file with the Commission comments on the presented auditor within two weeks of notification.*

OPC believes that it is appropriate for OPC to have an opportunity to provide comments for the Commission’s consideration in approving the Code of Conduct auditor. In the event that

the Commission, after consideration of those comments, concludes that the proposed independent auditor is not appropriate, the Commission could require the energy utility to propose one or more alternative auditors for OPC comment and Commission consideration.

3905.1 Energy utilities shall not provide loans or loan guarantees to their affiliates or to their holding company [~~delete “without prior written approval of the Commission”~~]. The general prohibition includes use of utility rate base asset as collateral for any affiliate activity.

This provision is intended to prevent the regulated utility from subsidizing the activities of affiliates or endangering the credit rating or financial stability of the regulated utility. No reason is provided for allowing the regulated utility to guarantee debt of the unregulated subsidiary. As OPC stated in its Formal Case No. 1009 initial Comments, “The only business reason for a regulated utility to loan an affiliate money or to guarantee an affiliate loan from a third party would be to enable the affiliate to obtain a loan which it might not otherwise be able to obtain, or to obtain a loan at a lower rate than would otherwise be available to it. To allow such transactions for core affiliates would clearly be in violation of §34-1513(c) of the District of Columbia Code.”¹⁷

The Office prefers and recommends a total prohibition on energy utilities’ providing loans or loan guarantees to their affiliates or to their holding company. Accordingly, OPC urges the Commission to delete the language (in *bold italics*) from 3905.1. Under 3910.1 the utility has the right to petition for a waiver of any of the provisions of the Code of Conduct. If the utility wishes to make such a loan, it can petition the Commission for a waiver.

3906.1 ***Asymmetric Pricing.*** Transfers of assets from an energy utility to an affiliate must be recorded at the greater of book cost or market value. Transfers of assets from an affiliate to the energy utility should be at the lesser of book cost or market value. Such asymmetric pricing shall not apply to any transaction resulting from a competitive bidding process.

OPC proposes to add the title “Asymmetric Pricing” to this provision in the interest of clarity.

3907.1 An energy utility shall *not* share [~~delete “only non-operational”~~] employees with its core service affiliate. ***An energy utility may not share officers and/or directors with its affiliates. An affiliate must maintain its own board of directors.***

¹⁷ Formal Case No. 712, *In the Matter of the Investigation into the Public Service Commission’s Rules of Practice and Procedure*, Initial Comments of the Office of the People’s Counsel on the Proposed District of Columbia Affiliate Transactions Code of Conduct, pp. 15-16, (July 12, 2004).

OPC opposes the sharing of officers, other employees, and/or directors between an energy utility and its affiliate. OPC recommends the deletion and insertion (above, in ***bold italics***). This approach is the only approach that is consistent with D.C. Code Section 34-1513(c)(3) which mandates “a prohibition on the sharing of employees by the electric company and the affiliate.”

3907.2 An energy utility and a core service affiliate may ***not*** share the same telecommunications system or computer system. ***[delete “, so long as adequate security and system protections are in place to prevent the accessing of information or data of the energy utility by core service affiliates that would be in violation of other provisions of this Chapter.”]***

Rule 902.6 of the June 11, 2004 NOPR prohibited sharing of telecommunication and computer systems – “902.6 An energy utility and a core service affiliate may ***not*** share the same telecommunications system or computer system.” OPC proposes to restore the language of rule 902.6. In the event that the utility believes that security and system protections adequate to permit sharing exist, it can petition the Commission under 3910.1 for a waiver from the sharing prohibition and make a showing of the systems’ adequacy.

3907.5 ***An affiliate and an energy utility must maintain separate books and records that shall be subject to review by the Commission upon reasonable request.***

This Section 3907.5 is the same as Section 3904.4 and should be deleted as redundant.

DEFINITIONS

OPC recommends the modifications as indicated below be made in the Definitions.

OPC proposes to modify the definition of “energy supplier” to make it consistent with the definition of “electricity supplier” in DC Code, D. V, T. 34, Subt. III, Ch. 15 and to correct a typographical error in (B)(I).

“Energy supplier” means a licensed person including an aggregator, broker, or marketer, who generates energy (natural gas or electricity); sells energy (natural gas or electricity); or purchases, brokers, arranges or markets energy (natural gas or electricity) for sale to customers in the District of Columbia. The term excludes the following: (A) building owners, lessees, or managers who manage the internal distribution system serving such building and who supply energy (natural gas or electricity) solely to the occupants ***of the building for use by occupants***; (B) (I) any ***person who [delete “energy”]*** purchases ***energy*** (natural gas or electricity) for its own use or its subsidiaries or affiliates; or (II) any apartment building or office building manager who aggregates energy (natural gas or electricity) service requirements for his or her buildings,

and who does not: (a) take title to the energy (natural gas or electricity); (b) market energy (natural gas or electricity) services to the individually-metered tenants for his or building; or (c) engage in the resale of energy (natural gas or electricity) services to others; (C) property owners who supply small amounts of power, at cost, as an accommodation to lessors or licensees of the property; and (D) a consolidator.

OPC proposes the deletion of the qualifying phrase “an essential” from the definition of “non-core service.” The phrase is both undefined and unnecessary.

“Non-core service” means any service or activity performed by an affiliate that does not duplicate or replace a ~~an essential~~ service provided by the energy utility.

OPC proposes the insertion of the phrase “transmission and distribution” following the word “generation” in the definitions of “non-operational employees’ and “operational employees.”

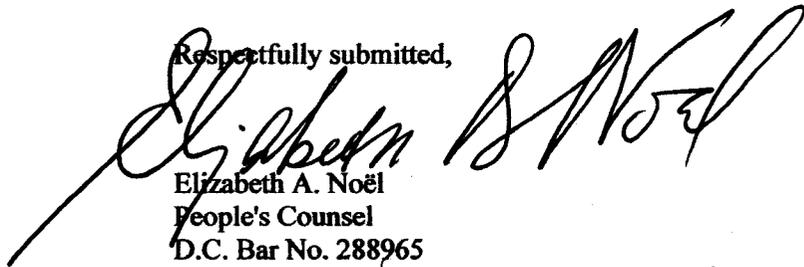
“Non-operational employees” means employees not directly involved in the purchase and/or generation, *transmission and distribution* of energy for use by customers.

“Operational employees” means employees directly involved in the purchase and/or generation, *transmission and distribution* of energy for use by customers.

III. Conclusion

For the foregoing reasons, the Office of the People’s Counsel recommends the Commission adopt OPC’s recommendations contained herein.

Respectfully submitted,



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Dated: February 19, 2008

CERTIFICATE OF SERVICE

Formal Case No. 1009 (Code of Conduct)

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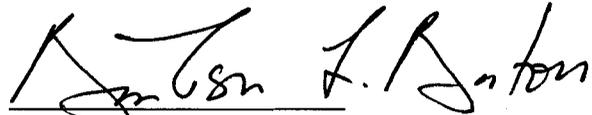
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