

PUBLIC UTILITIES

BOARD OF PUBLIC UTILITIES

Energy Competition Standards

Readoption with Amendments: N.J.A.C. 14:4

Proposed: May 2, 2011 at 43 N.J.R. 1150(a).

Adopted: April 11, 2012, by the Board of Public Utilities, Robert M. Hanna, President; Jeanne M. Fox, Joseph L. Fiordaliso, Nicholas Asselta and Mary-Anna Holden, Commissioners.

Filed: April 11, 2012 as R.2012 d.091, **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, 48:2-51.1, 48:3-7 et seq., and 48:3-51 et seq.

BPU Docket Number: EX11020089.

Effective Dates: April 11, 2012, Readoption;
May 7, 2012, Amendments.

Expiration Date: April 11, 2019.

The New Jersey Board of Public Utilities (“Board” or “BPU”) is herein readopting its Energy Competition rules at N.J.A.C. 14:4 (also called Chapter 4). These rules implement provisions of the Electric Discount Energy Competition Act (EDECA), N.J.S.A. 48:3-49 et seq., and other statutory authority. The rules apply to electric power suppliers, gas suppliers, electric public utilities, gas public utilities, energy aggregators, energy agents, public utility holding companies, and entities that provide basic generation service (BGS) and/or basic gas supply service (BGSS).

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);

Dominion Retail (DOM);

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

Ira G. Megdal, FirstEnergy Solutions (FES);

Sarah H. Steindel, New Jersey Division of Rate Counsel (RC); and

Alexander C. Stern, Public Service Electric and Gas Company, on behalf of AGL Resources Inc. d/b/a Elizabethtown Gas, Atlantic City Electric Company, Jersey Central Power & Light Company, New Jersey Natural Gas, Public Service Electric and Gas Company, Rockland Electric Company, and South Jersey Gas Company (LDCs).

General Comments:

1. COMMENT: We appreciate the Board's leadership as well as 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. We look forward to continuing to work with the Board and interested stakeholders so that New Jersey's energy competition goals are met in a manner that properly balances the risks being assumed by TPSs, BGS/BGSS suppliers, distribution utilities, and consumers. (LDCs)

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

2. COMMENT: It remains critical for the Board to continue to sustain regulations that adequately protect consumers and thereby ensure the integrity of the energy marketplace. We believe that as New Jersey has only recently begun to experience increased levels of customer switching, now is not the time to make changes to the existing robust and balanced energy competition rules. (LDCs)

RESPONSE: The Board reiterates its commitment to a robust regulatory framework to protect consumers. However, the Board believes that modifications to enhance the current rules will improve the energy marketplace while adequately protecting customers.

3. COMMENT: We appreciate BPU staff's efforts to engage the stakeholders in informal discussions about issues of concern with the energy competition rules, beginning last year with the submission of comments and convening a workshop to have a dialogue about rule provisions that stakeholders felt were in need of revision. (NEM)

RESPONSE: The Board appreciates the commenter's support of the Board's stakeholder outreach.

Subchapter 1. General Provisions and Definitions

4. COMMENT: We support a number of the proposed rule modifications. These proposed rule modifications are reasonable changes that represent common sense adaptation of the rules to the current state of market development and supplier's experience with how the rules have worked in practice over time. Specifically,

N.J.A.C. 14:4-7.6(b)4 is proposed to be modified to provide a consumer with a seven-calendar-day right of contract rescission, instead of the current 14-calendar-day provision. The 14-day rescission period significantly increases marketers' business risk as they procure supplies in a dynamic market to serve a consumer that has two weeks to change its mind. This increased risk is reflected in higher energy prices for consumers, making choice options less economic. We therefore support the proposed change to a seven-calendar-day right of rescission. (NEM)

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

5. COMMENT: There are positive enhancements being proposed in the rule readoption process. For instance, the zip + four information that is currently required to be filed as part of the marketer license renewal process is now proposed in N.J.A.C. 14:4-5.5(e) to be provided to Board staff within five days after a request. Changing the reporting requirement is a reduction in burden to suppliers while requiring that the information be given to Board staff upon request ensures that it is still made available should concerns arise. Additional positive changes to documentation requirements include the revision to N.J.A.C. 14:4-2.4(e) to eliminate certain supplier recordkeeping requirements for electronic enrollments as well as the change to N.J.A.C. 14:4-5.7(d)10 with respect to the documentation requirement that LDCs be provided with notice from the supplier of the supplier's submission of a license application to Board. The proposed revision would reasonably permit the use of an LDC email acknowledgement. (NEM)

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

Subchapter 2. Energy Anti-Slamming

6. COMMENT: To reflect the expanded purposes of this subchapter, N.J.A.C. 14:4-2.1(a) should be modified to read as follows: "This subchapter is intended to specify the procedures for implementing changes in or 'switching' a customer's electric power supplier or natural gas supplier, and to protect against switches that are made without the customer's authorization, or without the customer's documented agreement to the supplier's energy supply service offer. (RC)

RESPONSE: The Board believes the present language fully and accurately describes the intent of the subchapter. Therefore, the commenter's suggested modifications have not been made.

7. COMMENT: N.J.A.C. 14:4-2.3 should be clarified to make it clear that all enrollments, whether by written signature, electronic signature, or by telephone, must comply with the Retail Choice Consumer Protection rules at N.J.A.C. 14:4-7. N.J.S.A. 48:3-86 permits the Board to eliminate the third-party verification requirement for telephonic enrollments initiated by the TPS only after consultation with the Division of Consumer Affairs. Assuming such consultation has occurred, we support the proposed changes, and agree that verification by an independent third party is not necessary given the proposed additions to the information required to be recorded to

verify a telephonic enrollment. The additional requirements also will help to assure that customers are better informed of the details of an energy supply offer before agreeing to take electric generation service or gas supply service from a TPS. (RC)

RESPONSE: The phone verification process is designed to confirm that the customer understands the key terms of the contract. The contract provides the customer with additional information, such as the fact that customers should call the LDC in the event of an electric/gas-related emergency. The Board does not believe that all of the information that is included in the contract needs to be described in the phone verification process, and therefore, has determined that the commenter's suggested clarification is not necessary. The Board has consulted with the Division of Consumer Affairs and Director Thomas R. Calcagni notified the Board on December 6, 2011 that the Division has no objection to the readoption of N.J.A.C. 14:4-2.

8. COMMENT: We are highly concerned with the proposed rule's new requirement that, for purposes of telephonic verification, the TPS or third-party shall "include a recording of the entire duration of the call, from the first contact with a customer to the disconnection of the call." Many TPSs and other energy agents do not currently have the equipment or storage capacity necessary to record the entire sales call and archive all sales calls for a period of not less than six months. Purchasing and maintaining such technology can be prohibitively expensive and time-consuming. The scope of work required to implement such a rule is enormous. For example, the rules would require not only outbound calls to be recorded, but also inbound calls to a customer care center as well. Certainly, a New Jersey energy consumer could contact

a customer call center or the TPS's or energy agent's main line, and ultimately decide to enroll with the TPS, or modify a current agreement. TPSs and energy agents that allow for third-party verifications (TPVs) would effectively have to record all calls "from first contact with the customer." Today, many TPSs and energy agents operate in multiple jurisdictions and have significant call volumes, both inbound and outbound. A TPS would have to record all calls, as there is no way of knowing with 100 percent certainty if the call is originating from a New Jersey end user, or if it will or will not result in an enrollment verified through telephonic verification. Accordingly, including a requirement to record the entire duration of the call not only poses more costs upon TPSs, energy agents, and ultimately, customers, but also potentially may have a deleterious impact on the competitive marketplace by making change orders more difficult. Additionally, the drafted energy rules presuppose that only telemarketing methods utilize telephonic or TPVs, which is simply untrue. Retailers that utilize door-to-door marketing may also utilize TPVs. Given both the draft language, which specifies the recording of a "call," and the impracticality of recording an in-person oral sales presentation, we assume this requirement is limited to telemarketing. As a general matter, it is inappropriate for the BPU to apply significant burdens to one marketing method, and not another. In this case, a requirement to record the sales presentation only under a telemarketing scenario will bias TPSs and energy agents away from telemarketing methods and towards door-to-door marketing. Moreover, such a requirement is unnecessary, because a customer's verification is ample confirmation of his or her consent for the purposes of BPU review. We are unaware of a requirement to record the entire telephonic marketing call in any other

retail electric market. Board staff's stated intent in proposing such a rule was to be able to better "address complaints alleging deceptive marketing practices." Staff's intent is better and more effectively served if a requirement to record all sales and marketing calls that potentially result in a TPV be implemented only as a remedy to address alleged bad practices of a specific TPS or energy agent, and not be applied to the entire market. Moreover, N.J.A.C. 14:4-2.8, Enforcement of the energy competition rules, provides the Board with the oversight and enforcement mechanisms necessary to effectively mitigate any pattern of deceptive or abusive marketing practice by a TPS or an energy agent. Therefore, we respectfully request that the BPU modify this requirement to only require TPSs to record the customer's verification of the change order, rather than the entire duration of the call. (RESA)

RESPONSE: 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 during the sales portion of the call rather than the verification portion of the call. The Board acknowledges that this provision of the rules may increase the costs for some TPSs. However, the Board believes that the benefits achieved by recording the entire call outweigh the increased cost of this provision. Therefore, the commenter's suggested revision has not been made.

9. COMMENT: The mandated independent third-party verification requirement for telephonic enrollments should be modified to also permit a supplier to perform that function in-house. Some suppliers may want to utilize a third party and some may

perform this function more effectively in-house and both should be permitted to do so consistent with their business model. However, mandating third-party verification without also allowing other methods to verify the telephonic enrollment unnecessarily imposed an additional expense in the choice process that ultimately increased the cost of rendering energy service to consumers. The Board has now proposed to modify N.J.A.C. 14:4-2.3(c)2 to allow audio verification of a customer switch to be performed by a competitive supplier OR by an independent third party. For the foregoing reasons, we support this change. (NEM)

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

10. COMMENT: In N.J.A.C. 14:4-2.3(c)2vi, in the audio recording it is necessary to indicate the customer's LDC account number. However, at the time the recording is made which is usually the original solicitation, it is likely that neither the customer nor the TPS may have the specific account number available. Therefore including this specific requirement at this point in the process could be problematical and unnecessarily hinder the enrollment and marketing process. A more considered approach is either for the customer to indicate the account number or authorize the TPS to obtain the account number from the utility. The Board may also want to consider allowing for the provision of pre-enrollment customer account information like account numbers, similar to what Pennsylvania has provided for years quite successfully and without "slamming" problems. Account numbers facilitate the enrollment process by eliminating processing errors and preventing enrollment delays

and customer frustration over lost savings. Our experience indicates that successful enrollments increase about 15-20 percent when customer account numbers are provided to suppliers prior to enrollment. (DOM)

RESPONSE: The Board agrees that account numbers facilitate the enrollment process by eliminating processing errors. However, the release of a customer's account number to a TPS without the customer's consent would violate N.J.S.A. 48:3-85, which prohibits the release by the utility of propriety information to a third party, other than a government aggregator, without the customer's consent. TPSs may obtain a customer's account number with the customer's consent by following the procedures set forth in the Board's Order, *In The Matter of Account Look-Up For Third Party Suppliers and Clean Power Marketers*, Docket No. EA07110885, dated August 19, 2008.

<http://www.state.nj.us/bpu/pdf/boardorders/5-8-08-8D.pdf>

11. COMMENT: In N.J.A.C. 14:4-2.3(c)2viii, the audio recording must include the amount of any cancellation fee. This requirement is too restrictive. For commercial customers, especially, the exact amount of such fee may not be known as it could depend upon market conditions as of the date of cancellation, which could affect hedges that were obtained to support the retail offering. As an alternative it is suggested that the TPS provide the specific amount of the fee or the "methodology" used to calculate the cancellation fee. This ensures that the customer is apprised of the existence of such a fee, while recognizing that the exact amount of the fee may not be known at the time of the initial solicitation. (DOM)

RESPONSE: The Board believes that this provision provides the customer with the

information necessary to choose a supplier. Therefore, the proposed revision has not been made.

12. COMMENT: In N.J.A.C. 14:4-2.3(c)2ix, the entire duration of the call must be recorded. This is overly cumbersome as not all of the verbal interplay during the call is crucial in verifying the critical aspects of the customer's decision to go with the TPS. It is recommended that the TPS maintain a recording of the entire call or those elements identified N.J.A.C. 14:4-2.3(c)2i through ix. (DOM)

RESPONSE: The Board thanks the commenter and notes that the issues raised here are addressed in the Responses to Comment 8.

13. COMMENT: The Board has proposed that suppliers now be required to tape the entire marketing portion of call, not just the verification of enrollment. N.J.A.C. 14:4-2.3(c)2ix. N.J.A.C. 14:4-2.5(c) would require that telephone verifications be retained by suppliers for six months. We oppose the requirement that the entire marketing portion of the call be taped. A requirement for suppliers to tape all calls, all the time would be extremely expensive to comply with coupled with the burden and expense of retaining these voluminous records for six months. The Board has not justified the imposition of this costly new recordkeeping burden on the competitive industry. Indeed, the rules specify in N.J.A.C. 14:4-2.3(c)2 that the required elements for the script for verification of a consumer enrollment. The supplier's recordation of the verification portion of the call should therefore be sufficient. 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 consumer's intent to switch providers. But, requiring suppliers to tape the entire marketing call significantly undermines the cost effectiveness of telephonic enrollment as a means to acquire customers. Other jurisdictions rely on the script questions to satisfy potential concerns about marketing practices. Coupled with this, suppliers are subject to the enforcement provisions of the rules in proposed N.J.A.C. 14:4-2.8 for non-compliance with the switching requirements, which acts as a strong deterrent. (NEM)

RESPONSE: The Board thanks the commenter and notes that the issues raised here are addressed in the Response to Comment 8.

14. COMMENT: The proposed rules contain many anti-slamming revisions, yet none address a situation in which an LDC, rather than a TPS, slams a customer. Such slamming most often occurs when a change in a TPS customer's account number forces the customer to revert to utility service without his or her consent. This "reverse slamming" action compels the customer back to utility Basic Generation Service (BGS), typically delaying customer enrollment and resulting in lost energy savings to the customer. Moreover, the TPS is concomitantly impacted by the delayed enrollment process, resulting in lost revenues. This type of unwarranted utility interference needs to be addressed to protect customers and TPSs alike. (RESA)

RESPONSE: The chapter being readopted (N.J.A.C. 14:4) deals with energy competition. 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. Therefore, the commenter's suggested amendment has not been made.

15. COMMENT: No changes were proposed to N.J.A.C. 14:4-2.3(b)2. However, the current language could be read to require that documentation of a customer's agreement to take service from a TPS must be submitted to an LDC as part of a change order. We understand that the intent of the rule is merely to require TPSs to document the verification process in case of a dispute, not to send the documentation to the LDC along with a change order. Therefore, N.J.A.C. 14:4-2.3(b)2 should be modified to read: "No change order shall be submitted to an LDC unless the TPS has complied with the verification procedures at (c) below." (RC)

RESPONSE: The commenter is correct that the intent of the rule is to require TPSs to document the verification process in case of a dispute, not to send the documentation to the LDC along with a change order. The Board is not aware of any TPS misinterpreting the current language and sending the documentation to the LDC along with the change order. Therefore, the Board has determined that current rules sufficiently address the issue and the commenter's suggested revisions are not necessary.

16. COMMENT: The Board is proposing to allow TPSs to verify their own telephonic enrollments if the TPS initiated the phone call, while adding to the

information required to be recorded to document a telephonic enrollment. The current rule requires the TPS to maintain only the portion of the call containing identifying information about the customer and the TPS, and reflecting the customer's authorization to implement a switch. The proposed new rule would require the recording of the entire telephone call, including the description of the TPS's energy supply offer. We support this change. (RC)

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

17. COMMENT: Proposed new N.J.A.C. 14:4-2.3(c)2vii and viii should be modified to be consistent with N.J.A.C. 14:4-7.6, Contracts. The proposed new subparagraphs require disclosure of the price at which energy supply is being offered, as well as the amounts of any cancellation fees or other charges. While these two items are important, other terms and conditions are also important to the customer's understanding of a TPS's offer, including the duration of the contract, the applicable pricing formula if the contract is not for a fixed price, and the customer's right to rescind the contract. N.J.A.C. 14:4-7.6(b) already includes a list of the terms that are required to be conspicuously disclosed in a TPS contract. N.J.A.C. 14:4-2.3(c) should simply require disclosure of the terms and conditions specified in N.J.A.C. 14:4-7.6(b). (RC)

RESPONSE: The Board thanks the commenter and notes that the issues raised here are addressed in the Response to Comments 7.

18. COMMENT: Proposed new N.J.A.C. 14:4-2.3(c)2ix should be modified to

eliminate language that would allow the new documentation requirements to be “waived with the customer’s consent.” The Board’s notice of proposal Summary recognizes that documentation of a TPS’s communication of proposed terms and conditions of service is essential to determining whether a customer has knowingly assented to those terms and conditions. The Board’s notice of proposal Summary does not state any justification for permitting this requirement to be waived. The language permitting this should be deleted. (RC)

RESPONSE: While the rule allows the customer the opportunity to decline having the entire call recorded, the remaining provisions of the phone verification process are required in order to qualify as the necessary verification. The Board notes that the Federal Telemarketing Sales Rule (TSR) requires that the seller get "Express Verifiable Authorization" (EVA) to bill the customer: 1) in writing before the call; 2) by written confirmation after the call; or 3) through an audio recording confirming the order. The TSR does not provide any "waiver" of an oral authorization and still allow the call alone to act as the EVA. New Jersey has enacted N.J.S.A. 2A:156A-1 et seq. to mirror the Federal Electronic Protection Act , 18 U.S.C.§ 2511, requiring at least one party to consent to the recording of a conversation. Therefore, the Board believes the rule as proposed protects customers while respecting their privacy and their right to choose not to have the entire call recorded.

19. COMMENT: N.J.A.C. 14:4-2.3(c)5 should be deleted. This paragraph currently allows verification of a switch resulting from a customer-initiated telephone call by means of an audio recording of the telephone call. This provision allows

verification of customer-initiated telephonic enrollment by means of a recording of the telephone call, but does not specify the information that needs to be recorded. The Board's proposed amendments to N.J.A.C. 14:4-2.3(c)2 state that the requirements to record additional information apply to telephone calls "made by an independent third party or by a TPS." If the above-quoted provision is allowed to remain in N.J.A.C. 14:4-2.3(c), it could be read as allowing a TPS to record incomplete information in the case of a telephonic enrollment resulting from a customer-initiated call. This paragraph should be deleted to assure that the proposed new verification requirements apply to all telephonic enrollments. (RC)

RESPONSE: The phrase, "made by an independent third party or by a TPS" in proposed N.J.A.C. 14:4-2.3(c)2 was intended to refer to the recording, not the call itself.

Therefore, the requirement for a recording refers to calls made to and from customers. However, this will be clarified in a future notice of proposal that the Board anticipates appearing in the May 21, 2012 issue of the New Jersey Register (companion proposal) by moving this phrase to after the words, "An audio recording" in the same sentence. The Board also agrees with the commenter that N.J.A.C. 14:4-2.3(c)5 should be deleted to make it clear that all phone change orders must comply with N.J.A.C. 14:4-2.3(c)2. Therefore, the Board will propose the deletion of N.J.A.C. 14:4-2.3(c)5 in the companion proposal.

20. COMMENT: Existing N.J.A.C. 14:3-2.3(c)3 provides that a customer's written consent to a switch can be verified by means of a writing containing identifying information about the customer and the TPS and reflecting the customer's consent to

switch. The rule appears to contemplate a document that is separate from the customer's signed contract with the TPS. The Board is now proposing to add a new regulation to require this document to "Include a statement that the customer acknowledges receipt of a copy of the terms and conditions of service." A simpler approach would be to require the TPS to maintain a copy of the signed contract, which could include the information needed to document the customer's authorization for the switch. This could be accomplished by deleting new N.J.A.C. 14:3-2.3(c)3vii and amending the introductory language in N.J.A.C. 14:4-2.3(c) to read as follows: "The customer's signature on a contract, which shall include, in addition to the minimum contract terms specified in N.J.A.C. 14:4-7.6(b), the following information indicating the customer voluntarily authorized the switch:" (RC)

RESPONSE: The Board does not agree that the commenter's suggested method represents a simpler approach. This rule details the different methods by which a TPS may obtain an authorization from a customer. The commenter's method would eliminate the TPS's option to verify a customer's change order with written documents other than the contract, which is not the Board's intent.

21. COMMENT: We support the proposed change to N.J.A.C. 14:4-2.3(c)2, which allows for verification to be made by either an independent third party or by the TPS. Independent third-party verification (TPV) is an unnecessary and expensive requirement while there are other ways to provide adequate assurances that the customers are provided the appropriate information for enrollment by a TPS or its representative. First, TPV increases the amount of time a customer is on the phone

while a more streamlined switch process is more agreeable to the customer. Second, the need to transfer the customer to the TPV phone line can result in accidentally dropped calls, which frustrate consumers and may discourage them from seeking an alternative supplier. Finally, removal of the TPV requirement will reduce TPS expenses. While it is often not prohibitively expensive, TPV does represent an additional expense that a TPS must recover in the rates they offer customers. By eliminating the requirement, a TPS will be able to offer even more competitive rates in New Jersey. (FES)

RESPONSE: The Board appreciates the commenter's support of the Board's adopted amendments to eliminate the requirement to use TPV while maintaining the option to use TPV.

22. COMMENT: We recommend the removal of the negative verification process for internet enrollments in N.J.A.C. 14:4-2.3(f). In many cases, more information rather than less is provided to the customer through internet enrollments making the requirement extraneous. By removing it, TPS expenses for enrolling customers through the internet will be reduced, which enables better pricing from TPS. Streamlining this process through the avoidance of duplicative information will also make the switching process less burdensome for customers. (FES)

RESPONSE: The Board believes that the LDC notice requirements are necessary to adequately protect consumers and ensure the integrity of the energy market place.

Therefore, while the Board has adopted the proposed elimination the requirement in N.J.A.C. 14:4-2.3(f), the Board has adopted the proposed addition of provision N.J.A.C.

14:4-2.4(e) stating that a switch requested by a customer through the internet is subject to the LDC notice requirements at N.J.A.C. 14:4-2.6, as well as all other applicable provisions of this subchapter.

23. COMMENT: N.J.A.C. 14:4-2.3(g)5 requires the TPS to provide the customer's meter number with any change order if "a LDC requires this to complete enrollment." For the majority of customer accounts, we do not see a legitimate reason why a meter number would be required by an LDC. Most customers have a single account number along with a single meter associated with that account. It is already a challenge to assist a customer in finding their bill to provide the account number for enrollment. By requiring this additional piece of data, with which most customers are unfamiliar, the enrollment process is made unnecessarily complicated. In cases where the meter number is not provided on the customer's billing statement, the requirement is an even greater impediment and most customers will be discouraged from switching to a TPS if they have to locate their meter number on their meter in order to complete their enrollment. They are likely to be similarly discouraged if they must call their LDC to get the number in order to complete the enrollment process. While we are not currently aware of any LDCs that require the meter number under this paragraph, there are cases where an account number may have several meter numbers associated with it. More often than not, such accounts are held by larger energy consumers who are consequently more sophisticated energy buyers. To the extent these customers desire that the TPS supply only to select meters, they will know to specify which ones. Under these circumstances, the TPS will provide meter numbers to an LDC as a result of its

agreement with the customer. In the rarer case of a smaller, less sophisticated customer with multiple meters under a single account number, it is likely that if there are benefits to switching only certain meters that the customer will be aware of those benefits. We, therefore, recommend removing the requirement at N.J.A.C. 14:4-2.3(g)5 as it creates an unnecessary impediment to retail competition in New Jersey.

(FES)

RESPONSE: The Board does not agree with the commenter's suggestion to eliminate the requirement at N.J.A.C. 14:4-2.3(g)5. The Board believes that it could be necessary for an LDC to obtain the meter number in instances where there are multiple meters associated with a customer's account number to ensure that the correct account is switched to the TPS.

24. COMMENT: N.J.A.C. 14:4-2.4(b) requires the TPS to comply with the Federal Signatures in Global and National Commerce Act, 15 U.S.C. §§ 7001 through 7006. The Federal statute provides that provisions of 15 U.S.C. § 7001 may be modified, limited, or superseded if a State enacts the Uniform Electronic Transactions Act. 15 U.S.C. § 7002(a)(1). New Jersey adopted the Uniform Electronic Transaction Act in 2001. Thus, the reference to the Federal statute can be replaced with a reference to the New Jersey statute, N.J.S.A. 12A:12-1 through 26. (RC)

RESPONSE: To the extent that the State statute referenced in the comment as applicable to these transactions mirrors the Federal statute, the Board agrees with the commenter and has made the change upon adoption to reflect the State statutory authority.

25. COMMENT: Customers switching gas or electric suppliers are contracting for an essential service and the right to a copy of the terms and conditions of the contract for service is a very important protection in a competitive energy market. N.J.A.C. 14:4-2.4(d) requires the process of signing up for, renewing, or switching TPS service to include an opportunity to read the contract terms and conditions. However, there is no requirement to furnish a copy of the contract. Customers cannot reasonably be expected to retain by memory alone the contract details, so providing a copy of the contract is necessary for the customer to decide whether to rescind or not and to be informed of their rights. Simply requiring the TPS to maintain a copy of the contract that is available upon request by the customer does not provide any safeguards that the TPS disclosed all material terms and conditions to the customer or that information the TPS retains on the customer is accurate. The TPS could easily provide a copy in electronic form along with the electronic message required in N.J.A.C. 14:4-2.4(f) to acknowledge receipt of the customer's enrollment, renewal, or change. N.J.A.C. 14:4-2.4(f) should be modified to read as follows: "The TPS shall provide the customer with a separate electronic message from the TPS, acknowledging receipt of the enrollment, renewal, or change and shall also provide the customer with an electronic copy of the contract assented to by the customer." (RC)

RESPONSE: The Board agrees that customers signing up through the internet should not be expected to retain by memory alone the contract details. However, N.J.A.C. 14:4-2.4(d)4 provides that the website must provide a prompt to the customer to print or save the terms and conditions to which the customer assents. Therefore, customers have the opportunity to obtain a copy of the terms and conditions when they sign up and the

commenter's suggested amendment has not been made.

26. COMMENT: We support the clarifying changes made to N.J.A.C. 14:4-2.4(d)1, but for the same reasons stated in our comments on N.J.A.C. 14:4-2.3(g)5 in a prior comment, we recommend removal of the requirement that the TPS collect the customer's meter number. This requirement appears at the very end of N.J.A.C. 14:4-2.4(d)1. We recommend deleting "meter number" from that paragraph. (FES)

RESPONSE: The Board thanks the commenter and notes that the issues raised here are addressed in the Response to Comment 23.

27. COMMENT: N.J.A.C. 14:4-2.5 enumerates the recordkeeping requirements of the TPS and directs that the TPS "shall maintain a record ..." The language does not specifically identify the permissible formats by which the recordkeeping requirement can be achieved. It is now common practice for businesses to maintain documents in an electronic form that does not permit alteration such as PDF. This approach is more cost effective and secure than holding on to paper documents. Consequently, this section should affirmatively authorize the use of maintaining records in an electronic format. (DOM)

RESPONSE: The Board believes that the current language is clear and therefore, the commenter's recommended modifications have not been made. This section of the chapter sets forth that it is the TPS's responsibility to maintain the record so that it can be produced upon request of Board staff. Identifying permissible formats, such as "pdf" as suggested by the commenter could render this section of the chapter out of date as

computer technology and software changes.

28. COMMENT: N.J.A.C. 14:4-2.6 is too vague because it fails to define any limit to “as soon as possible” and “unreasonable delay.” Instead, the rule should specify a number of days for the LDC to complete the “change order.” Seven days should be sufficient. (RESA)

RESPONSE: The effective date of a switch is dependent on when the switch order is received through electronic data interchange (EDI) by the utility relative to the next meter read date. Thus, it is reasonable to continue with the existing language since the effective date of the switch will depend upon the utility’s receipt of the switch order.

29. COMMENT: N.J.A.C. 14:4-2.6 should require the LDCs to establish reasonable procedures to ensure that customers are not reverted to BGS service in a variety of circumstances, including when they establish service at a new location, update the names on their accounts, consolidate numerous meters, change usage, or enter a new rate class. Under the existing rules, which contain no proposed modifications, when such customers are “dropped” to BGS service, they cannot receive service with their chosen suppliers until, at the earliest, the next meter read date. Moreover, the rules continue to enable LDCs to cancel a customer’s existing bill and re-bill that customer as if he or she had been served on BGS for the past month despite the fact that the customer may have already paid the TPS for the same month’s service. A mature and efficient competitive marketplace requires a much more customer-service oriented process for establishing and maintaining service with a TPS.

The BPU should modify the rules to make the enrollment process more standardized and convenient for customers. Furthermore, the BPU should require the LDCs to establish mechanisms to restore customers to their chosen energy suppliers without a gap in service. (RESA)

RESPONSE: The LDCs are the suppliers of last resort and therefore, are responsible for serving customers who have not chosen a TPS. The situations mentioned by the commenter 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 customer would select the same supplier as the prior customer. Further, when residential customers move to a new home, their usage will be different and their utility and supplier choices may be different. It is reasonable for them to review their supplier choices at that time. Therefore, the commenter’s suggested amendments have not been made.

30. COMMENT: The anti-slamming rules N.J.A.C. 14:4-2.8 should require a finding that a TPS has met a level of intent before being subjected to severe slamming penalties, which include substantial fines and license suspension or revocation. As currently proposed, a TPS is subject to the full range of BPU penalties for unintentional clerical errors that may inadvertently lead to a customer switch. While such inadvertent errors are technical violations of the rules, in practice they pose little or no harm to customers. Thus, this rule is in conflict with both the flexible nature of the BPU’s discretion, as well as its clear policy of promoting energy competition as reflected in the Electric Discount Energy Competition Act (EDECA). The BPU

should consider the appropriate level of enforcement pertaining to the anti-slamming rules, based on the TPS's intent, practice, and pattern. Given these factors and the BPU's increasing expertise in TPS licensing and enforcement issues as the competitive marketplace continues to mature, this rule should include that a TPS meet a level of intent before being subject to penalty. In addition, the rule should be modified to better calibrate the customer switching incident with the appropriate form of punishment. (RESA)

RESPONSE: The anti-slamming rules do not conflict with the flexible nature of the BPU's discretion or its policy of promoting energy competition as reflected in EDECA. N.J.A.C. 14:4-2.8(b) states that a violator shall be subject to these penalties upon a determination by the Board, after notice and hearing. Therefore, the violator is free to present any and all facts and arguments (including lack of intent) for the Board's consideration, and the Board is free to exercise its discretion. Further, providing integrity and stability in the marketplace, by maintaining and enforcing rules that protect customers, promotes energy competition that is fair and equitable. Therefore, the commenter's proposed modifications have not been made.

Subchapter 3. Affiliate Relations

31. COMMENT: N.J.A.C. 14:4-3.1(b) refers to "... transactions between the electric and/or public utility ..." The word "gas" appears to have been unintentionally omitted. The word "gas" should be inserted immediately following "and/or." (RC)

RESPONSE: The Board agrees with the commenter's suggestion and has made a

technical amendment on adoption to insert the word “gas” immediately following the words “and/or.” This is consistent with the N.J.A.C. 14:4-3.1(a)1 and elsewhere in N.J.A.C. 14:4-3.1(b) and thus is not a material change since other sections of this subchapter require both the electric and gas LDC to comply.

32. COMMENT: In the definition of “existing products and services,” the language including products and services being offered as of May 19, 2008 should be deleted, as it appears to be inconsistent with the relevant portions of EDECA. (RC)

33. COMMENT: The definition of “existing products and services” appears intended to implement the provisions of EDECA that provide for automatic approval for a utility to continue offering competitive services that had been offered by the utility prior to January 1, 1993, or that had been approved by the Board prior to the effective date of EDECA, February 9, 1999. N.J.S.A. 48:3-55f(3) and 58b(3). EDECA does not provide for expansion of the scope of these provisions to include services that were not offered or approved subsequent to the dates specified in the statute. The financial reporting of each public utility’s competitive services, required by N.J.A.C. 14:4-3.6(b), is consistent with the above-referenced provisions of EDECA. However, the current version of the definition of “existing products and/or services” at N.J.A.C. 14:4-3.2 could result in confusion. The words “or an electric and/or gas public utility is offering on May 19, 2008” should be deleted from the definition to make it consistent with the related statutory provisions of EDECA. (RC)

RESPONSE TO COMMENTS 32 AND 33: N.J.S.A. 48:3-55f(3) (EDECA) lists the following as a competitive service that may be provided by an electric public utility or a

related competitive business segment of that electric public utility: “Competitive services that have been offered by any electric public utility or gas public utility prior to January 1, 1993 or that have been approved by the board prior to the effective date of this act to be offered by any electric public utility or gas public utility.” The effective date of the EDECA was February 9, 1999. EDECA does not mention a May 19, 2008 date; therefore, the Board agrees with the commenter and will propose the deletion of the language in companion proposal.

34. COMMENT: We understand that the intent of N.J.A.C. 14:4-3.4(a) is to assure that utilities follow the same procedures for releasing individual customer information to unaffiliated companies as they follow for releasing such information to affiliates. However, this provision could be interpreted to mean that if a customer provides written consent to release individual proprietary information to the utility affiliate, that very same information must be disseminated to unaffiliated entities as well, with or without the customer’s consent. To avoid confusion, N.J.A.C. 14:4-3.4(a) should be modified. In addition, “PUHC” should replace “public utility holding company” for consistency with the earlier reference to this term in N.J.A.C. 14:4-3.2. (RC)

RESPONSE: The Board concurs with the commenter’s recommended modification with respect to when utility known customer proprietary information can be disseminated. Pursuant to N.J.S.A. 48:3-85b(1): “Except as provided in paragraph (2) of this subsection, an electric power supplier, a gas supplier, an electric public utility, and a gas public utility shall not disclose, sell or transfer individual proprietary information, including, but not limited to, a customer’s name, address, telephone number, energy usage and electric power payment history, to a third party without the consent of the

customer.” Thus, if a customer consents to the release of proprietary information to a public utility’s PUHC or a related competitive business segment of its PUHC, that same proprietary information cannot be provided to an unaffiliated entity without customer consent to the additional release. Thus, the Board will propose to amend N.J.A.C. 14:4-3.4(a) in the companion proposal.

35. COMMENT: In N.J.A.C. 14:4-3.5(p)1, it appears that the language following the final comma was intended to read as follows: “... and the competitive services shall be provided utilizing separate assets than those utilized to provide non-competitive and safety services.” (RC)

RESPONSE: The Board concurs with the commenter’s recommended modification.

The word “shall” is used earlier within that sentence and thus it would be consistent to conclude that the words “shall be” should have been used as opposed to the word “are.”

Therefore, the commenter’s suggested change has been made as a technical change upon adoption.

36. COMMENT: N.J.A.C. 14:4-3.5(u)1, as originally adopted in 2000, included the words, “as determined by the Board” at the end. These words were eliminated without explanation with the adoption of the current affiliate standards in 2008. 39 N.J.R. 1405(a); 2526 (a). The current version allows the utility and the affiliate, rather than the Board, to determine the compensation ratepayers should receive for utility assets when they are transferred to an unregulated affiliate. N.J.A.C. 14:4-3.5(u)2, which addresses transfers of assets to a utility from an unregulated affiliate, requires the

transaction to be “recorded at the lesser of book value or fair market value.” Thus, the current regulations do not permit the utility and the affiliate to determine the amount charged to ratepayers for transfers to the utility from an unregulated affiliate. With the current version of N.J.A.C. 14:4-3.5(u)1, the Board has ceded its jurisdiction to determine the proper compensation to ratepayers when utility assets are transferred from the utility to an unregulated affiliate. This paragraph should state that such transactions: “... shall be recorded at the greater of fair market value or book value.” The proposed language would apply the same concept to transfers from the utility as now applies to transfers to a utility: such transactions should be recorded at a value that assures that the affiliate is not receiving an unfair advantage at ratepayer expense. In the alternative, the Board should at least restore the original language quoted above.

(RC)

RESPONSE: The Board concurs with the commenter’s proposed recommendation. The suggested change is also consistent with N.J.A.C. 14:4-3.5(u)2, which originally included and currently includes the word “lesser” in the reverse financial transactional situation where assets from a related competitive business segment of the public utility holding company are going to the electric and/or gas public utility. The suggested change will also be consistent with the Board’s jurisdictional authority and represents how the electric and/or public utility operates today. Therefore, the Board will propose to amend N.J.A.C. 14:4-3.5(u)1 in the companion proposal.

37. COMMENT: We agree that the Board should, at a minimum, conduct an affiliate relations audit every two years (see N.J.A.C. 14:4-3.7(e)). We further

recommend that any audit prepared by the Board's auditors be released to Rate Counsel for its review and comment. N.J.S.A. 48:3-56f(3) explicitly provides that "[t]he public utility or an intervener shall have the right to contest the methodology and rebut the findings of an audit performed pursuant to this subsection, in a filing with the board." A similar provision concerning audits of gas utilities is found in N.J.S.A. 48:3-58k(3). Since Rate Counsel is a statutory intervener in matters involving the regulatory oversight of utilities, N.J.S.A. 52:27EE-48(a), Rate Counsel's input is an essential component of the audit process and the Board should, therefore, continue its practice of releasing audit reports for review and comment by Rate Counsel. (RC)

RESPONSE: Rate Counsel does have the opportunity to review and comment on the results of the Board's independent affiliate relations audits. After the independent audit has been accepted by the Board for filing purposes, it is released to the public, the utility and Rate Counsel for their review and comments. Thereafter, the Board considers the comments and adopts, modifies, or rejects the audit based upon those comments.

Subchapter 4. Public Utility Holding Company (PUHC) Standards

38. COMMENT: N.J.A.C. 14:4-4.4(c) has been modified to require notice to Board staff only when a public utility or its holding company receives notice of a pending investigation or audit by a state or Federal agency. N.J.A.C. 14:4-4.4(d) has been modified to require only the holding company or the public utility to provide to the Board and Board staff copies of documents/reports resulting from the investigation/audit only if those documents/reports could reasonably be expected to

have a material impact on the financial condition or the operations of the holding company system. Thus, under the proposed amendments, any notice of a state or Federal agency audit/investigation received by other entities within the public utility holding company system will no longer be subject to mandatory reporting to the Board. The proposed modifications were intended to “address concerns raised by utilities that the existing rules may cause reporting of multiple insignificant events.” 43 N.J.R. 1150(a) at 1153. This justification for the rule change is speculative and is not supported by record evidence. The proposed change unnecessarily lessens the ratepayer protections the Board felt were necessary in 2009 when this regulation was enacted. At that time, in response to the Joint Utilities comment, the Board said:

“The aim of the amendments and new rules is not only to fill the gaps left by the repeal of PUHCA, but to address the challenges posed by the recent cases of public holding company abuse, such as those involving Enron, WorldCom and New Jersey’s Elizabethtown Gas utility. To prevent abuses and to protect the public interest by taking measures as early as possible, it is necessary to establish a broader and more regular flow of information between the Board and the public utility holding company.” 41 N.J.R. 1500(a)

The Board further opined that “restricting the scope” of the regulation, as proposed by the Joint Utilities, would “undermine the purpose of the rule.” The Board noted that information regarding “FERC audits and investigations is essential for the Board to conduct appropriate monitoring” and concluded that the “rules are narrowly tailored and reasonably structured so as to minimize any unnecessary or burdensome reporting requirements.” *Id.*

The BPU’s currently effective Public Utility Holding Company Standards were adopted by

the Board after notice and public hearing with an opportunity for parties to comment. Since the adoption there has been no showing that the regulation is providing the Board with useless and duplicative information. Until the utilities make a convincing case that the existing regulation is unduly burdensome and not useful to the BPU, the proposed modification should not be adopted by the Board. (RC)

RESPONSE: The Board believes that it is the PUHC's obligation as managing multiple companies under its control to be aware of any and all investigations or audits involving its affiliated/subsidiary companies. The intent was not to extend our rules to companies not within our jurisdictional purview but for the Board to be made aware of investigations/audits that could have a direct or indirect impact on the public utility. It was intended to capture every investigation/audit that would rise to the importance of being brought to the attention of either the public utility or its PUHC. It is their obligation to provide notice and provide all documents and reports related to the investigation/audit to the Board Staff. The Board further believes that the proposed language will continue to prevent abuses and protect the public interest, and allow for a broader and more regular flow of information between the Board and the PUHC without imposing burdensome and unnecessary reporting requirements that could impede timely compliance.

Subchapter 5. Energy Licensing and Registration

39. COMMENT: There are four different credit requirements in the New Jersey utility third-party supplier programs for electricity. First, the Board requires in the rules that suppliers post a surety bond as part of the initial licensing process and that

the supplier then maintain that bond going forward. See N.J.A.C. 14:4-5.4(f) through (i) and 5.5(e). Second, PJM Interconnection, LLC (PJM) has a credit requirement based on the supplier's load served and the billing/payment schedule. The utilities impose two additional credit requirements: one is based on the customer receivable in the case that the TPS is the consolidated billing party and the second is based on capacity obligation. The PJM credit requirement covers electricity supply costs in the event of non-payment by the TPS. The Board credit requirement covers the State utility tax (SUT) due in the event of non-payment by the TPS. The utility collateral requirement for TPS consolidated billing at 60 days of estimated receivables is rarely employed since the utility consolidated billing option is overwhelmingly selected by suppliers. Of these four requirements, we are specifically concerned about the utility credit requirement based on capacity obligation. It requires \$9,000 of collateral per MW of residential and \$6,000 per MW of commercial capacity obligation. It may start at \$15,000 or so for a TPS at market entry, but would grow to about \$450,000 to \$600,000 for a group of 20,000 to 25,000 residential equivalent customers. There is no financial basis for this utility capacity obligation requirement. An event of TPS default does not pose a financial risk to a utility in any way. In fact, under utility consolidated billing the utility is always in possession of TPS receivables. The parties at risk in the event of a TPS default are only PJM (electricity supplied not paid) and the State of New Jersey (SUT billed by the TPS and not yet remitted to the State). It is illogical for a party (the utility) to demand collateral from another party (the marketer) who can never owe them money. The electricity marketers who entered the State in 1999 when the market opened had sufficient balance sheet strength or affiliate backing

to absorb this unsubstantiated credit requirement without difficulty. Today, under improved market conditions there is a renewed opportunity to bring the price, service, and technology benefits of retail competition to consumers in New Jersey, but this opportunity may be lost because the utilities are requiring suppliers to secure unnecessary credit or post unnecessary cash. Accordingly, we request that the Board require the utilities to eliminate the \$9,000 and \$6,000 per MW credit requirement in the interest of competition and choice for consumers. A similar situation exists on the gas side as well. The utilities require credit for pipeline capacity, even though marketers are also posting such credit to the pipeline itself. This is another unnecessarily duplicative credit requirement based on capacity obligation. Capacity assets should be made available on an equitable and non-discriminatory basis, both in terms of allocation and utilization rights. In other words, assets should follow the customer. This ensures that customers have equal access to the assets for which they pay. In a retail choice environment, utilities need only retain those assets sufficient to meet their remaining firm commodity customer needs and to assure distribution system integrity on peak days and through the design winter period. Gas marketers should be able to use the combination of pipeline and storage assets to lower costs and thereby deliver the full benefits of competition to New Jersey gas customers. The rules should ensure that useable capacity is released to marketers at fair and equitable rates, not the most expensive and least useable capacity. In sum, we recommend an examination of appropriate electric and natural gas utility credit requirements be undertaken. (NEM)

RESPONSE: Proposed N.J.A.C. 14:4-5.4(f) through (i) and 5.5(f) are consistent with

N.J.S.A. 48:3-78c(4) and 48:3-79c(4), which require that a surety bond be maintained under terms and conditions as determined by the Board. The bond maintained by the licensee ensures against its failure to pay taxes or assessments. The Board has previously determined that the minimum amount for a surety bond should be \$250,000 and continues to believe that this amount is not unnecessarily burdensome to third-party suppliers.

The credit requirements of the utilities under the Third-Party Supplier Agreements are outside the scope of this proceeding and they are separate and independent of the \$250,000 surety bond required for a third-party supplier license. Further, the Board believes that public utility credit requirements are appropriate. In May of 2003, the Board set in motion a process to examine TPS credit requirements in light of the then new basic generation supply (BGS) auction and the resulting shift in TPS default risk from the EDCs onto the winning BGS suppliers. In December of 2004, the Board approved the TPS credit requirements in the TPS agreements before the Board, and found that these requirements would help protect ratepayers from TPS default and provide integrity and stability to the marketplace by allowing entry to only creditworthy participants. The Board continues to believe that residential customers, who may lack the sophistication or resources to do their own creditworthiness checks, will assume that some entity, such as the Board and/or the EDC will have provided safeguards to protect them from doing business with TPSs that lack financial viability.

40. COMMENT: We generally support the amendments to N.J.A.C. 14:4-5.5(e) requiring that a TPS provide certain information about its residential customers to the

BPU within five days of its request. However, one problematic issue with this subsection is that a TPS is required to provide the information “(sorted by zip + 4 code).” Many TPSs, and even many utilities, do not maintain the “+ 4 codes” for customers in their databases. Adding this requirement could require expensive re-coding and data entry, or a time consuming manual process to add the +4 code following a BPU request. If New Jersey LDCs routinely keep this data, the BPU could, under its current authority, request corroborating information from them should it need this level of detail. There are also other ways of determining the geographic location of listed customers without the zip + 4 code, such as a geographic information system (GIS). Because there are less costly and less time consuming ways for the BPU to get this information, we recommend that the + 4 requirement for summaries provided under N.J.A.C. 14:4-5.5(e) be dropped. (FES)

RESPONSE: The zip plus 4 requirement is not a new requirement. The rule currently requires under N.J.A.C. 14:4-5.7(d)3 that “an application for renewal of an electric power supplier, gas supplier, or clean power marketer license shall include the following types of information: ... 3. Information regarding the number, types, and locations (by zip + 4 code) of residential customers being served by the licensee as of the date the renewal application is submitted.” In response to stakeholder input, the Board is modifying the rules to ease the burden on the third-party suppliers so that the zip plus 4 information will not be required for all renewals but rather be required only upon request. Therefore, the Board is satisfied that its rules are reasonable given its objective to ensure that retail choice is offered on a non-discriminatory basis, bringing the benefits of competition to all New Jersey consumers.

41. COMMENT: N.J.A.C. 14:4-5.5 delineates various on-going obligations of the TPS after the license is issued. Pursuant to N.J.A.C. 14:4-5.5(d), the TPS is obligated to transmit records to the Board staff within “48 hours” after a request is made. This time period is most problematical as it is difficult to measure elapsed time in hours and could be impossible to comply with if the request is made on a Thursday or a Friday. It is recommended that the TPS be provided with five business days to comply with a document request. (DOM)

RESPONSE: The Board appreciates the comment but believes that the current 48-hour requirement is reasonable and appropriate as these are records that the company is required to maintain.

42. COMMENT: Pursuant to N.J.A.C. 14:4-5.5(g), if a licensee undergoes a “reorganization” or “restructuring,” various filings and/or approvals are then required. The terms “reorganization” and “restructuring” are very broad and can seemingly implicate basic staff or organizational changes at a TPS. Thus, for example, a TPS may decide to implement changes to the reporting structure or bureaucratic structure of the company, none of which have any material bearing upon the concerns of the Board. This would be extremely burdensome for the TPS and BPU staff as companies are often implementing various forms of restructurings or reorganizations that will not implicate the efficacy of providing TPS service. Accordingly, these terms should be eliminated or only apply to the extent that such reorganization or restructuring results in modification to information previously provided by the TPS in its original application or subsequent renewal. (DOM)

RESPONSE: No approval as to an existing TPS is required for a change in corporate structure from or between a limited liability corporation and/or a limited partnership, or similar corporate structure change, where the new corporate structure is recognized in the state of incorporation or residence as being a continuation of the existing TPS business entity. This change in corporate identity shall not include a change in the company’s name that is limited to what is necessary to accurately indicate a revised corporate structure (that is, LLC to LP). Therefore, the commenter’s suggested amendment will not be made.

43. COMMENT: N.J.A.C. 14:4-5.5(g)2 ((h)2 as recodified) requires that a TPS apply for a completely new license in cases where, as a result of a reorganization,

restructuring, merger, or acquisition, the licensed TPS undergoes a name change. The requirements under N.J.A.C. 14:4-5.5(g)1 provide the BPU sufficient information to determine whether the merger will have a substantial effect on a TPS customer. A name change in and of itself is only superficial, and we see no reason why that base would trigger the requirement to apply for a completely new license. We recommend changing recodified N.J.A.C. 14:4-5.5(h)2 to a requirement to update the BPU if there is a name change so that the BPU can update its records. Otherwise, the Board's review of any material changes to the licensee as a result of a change in its corporate structure under N.J.A.C. 14:4-5.5(g)1 is sufficient to allow it to adequately address any concerns that might result from a reorganization, restructuring, merger, or acquisition.

(FES)

RESPONSE: The Board thanks the commenter and notes that the issues raised here are addressed in the Response to Comment 42.

44. COMMENT: We generally support the rule that a TPS must provide a summary of the number, type, and location of all residential customers served by the TPS, sorted by zip code, upon request by BPU staff. The BPU may need such information pursuant to an investigation and notes that it was previously required to provide such information under N.J.A.C. 14:4-5.7. However, we are concerned with the requirement that this information must be supplied within five days of the BPU's request, rather than a more workable 10-day time period. TPSs generally have limited staff and gathering this information is both time-consuming and cumbersome. Yet, failure to comply with this new section subjects a licensee to penalties and potential

BPU proceedings for revocation, suspension, or denial of license renewal. Accordingly, we request that the rule be modified to allow for a more realistic 10- day response time. (RESA)

RESPONSE: The Board believes that it is reasonable to require the TPSs to provide this information within five days of a request by the BPU staff. The rule as adopted no longer requires TPSs to provide this information with their license renewal applications. TPSs are now required to provide this information only upon the request of BPU staff. The Board believes the rule as adopted reduces the administrative burden to the TPS of having to include this information with their license renewal applications, while allowing BPU staff access to this information, if needed, within a reasonable time frame.

45. COMMENT: We have no objection to the proposed updated website reference, but recommend that the Board define the term “EDI” consistently. The Board cross-references a Board Order in Docket Nos. EX94120585Y et al., which defines an “EDI” as an “electronic data exchange”; however, N.J.A.C. 14:4-5.11(f) and several other references in the existing regulations (N.J.A.C. 14:4-1.2, 2.3(b)1 and 5.11(f)) refer to an “EDI” as an “electronic data interchange.” The Board should define “EDI” as an “electronic data interchange” and use that definition consistently. (RC)

RESPONSE: The rules as proposed correctly and consistently utilize the term electronic data interchange (EDI) throughout. The Board reiterates that EDI stands for electronic data interchange. The rules refer to the aforementioned order for direction regarding how an LDC shall provide a registered energy consultant with access to customer usage data.

Subchapter 6. Government Energy Aggregation Programs

46. COMMENT: Since the enactment of EDECA, we have supported government aggregation as a tool by which counties, municipalities, small businesses, and residential customers could achieve energy savings. Due to the complexity of the aggregation section of EDECA and corresponding regulations, government aggregation has had limited success. The government energy aggregation rules will not provide the catalyst needed to stimulate aggregation. The Board needs to adopt a new mechanism to truly realize the potential of energy savings that aggregation can achieve. (RC)

RESPONSE: The Board's government energy aggregation program rules were developed as a result of N.J.S.A. 48:3-92 through 95. The Board believes that its adopted rules appropriately comply with the statute.

47. COMMENT: We do not support the addition of N.J.A.C. 14:4-6.3(k), which allows a residential consumer the right to opt-out at any time after the program starts upon 30 days notice and makes no mention of termination fees. The addition of this subsection renders the requirement for an initial opt-out or opt-in period almost meaningless. This amendment also erodes some of the more fundamental benefits that arise from aggregated buying. Aggregation is only a benefit to the extent a supplier knows it has the opportunity to secure a significant amount of load at one time and that this load is reasonably certain to remain with the supplier. Allowing customers to opt out of aggregation groups, even before any particular offer is before the customer, presents significant risk that a sufficiently large pool of customers will not remain to

encourage suppliers to market to that group. If an individual member of an aggregation were to contract for supply from the same TPS on its own, it would almost invariably pay a higher price. Typically a TPS is willing to earn a lower per customer profit when it has an assurance of a larger overall load level and known level of revenue over the term. If customers can exit aggregations with relative ease as contemplated by N.J.A.C. 14:4-6.3(k), then a TPS would include that risk in the pricing. N.J.A.C. 14:4-6.3(k) will drastically limit the pricing benefits customers may realize through aggregated buying. (FES)

48. COMMENT: If N.J.A.C. 14:4-6.3(k) is not removed, the section should allow a TPS to charge reasonable termination fees to customers who “opt-out” after the initial opt-in or opt-out period has elapsed. This will compensate the TPS for risks assumed, and the level of the fees can be evaluated against other proposals in the bid selection process. We are less concerned with allowing a customer to opt-out after their initial opportunity, so long as the customer who changes its initial decision bears some of the economic consequences. If termination fees are not allowed under N.J.A.C. 14:4-6.3(k), all customers will end up subsidizing an option that is likely to be exercised by only a few, and the lower rates often associated with aggregated buying may not be fully realized in New Jersey. (FES)

RESPONSE TO COMMENTS 47 AND 48: N.J.S.A. 48:3-94k recognizes that residential customers who did not affirmatively decline to participate in a government energy aggregation program may switch to another supplier. The Board believes that because residential customers are included in the program without affirmatively opting in, they

should be able to leave the program without penalty after providing 30 days' notice.

Therefore, the commenter's suggested change has not been made.

49. COMMENT: We generally support not imposing exit fees on residential customers who opt-out of an aggregation program and switch to another supplier, and believes the rule intends to prohibit such imposition when it states, “[a] residential customer may opt-out of an aggregation program at any time and switch to another energy supplier, upon 30 days notice to the lead agency and the appropriate LDC.” However, to avoid confusion among TPSs and customers, the rule should contain an explicit prohibition on exit fees when a residential customer opts-out of an aggregation program. We recommend modified language, which states, “[a] residential customer may opt-out of an aggregation program at any time, without a fee, and switch to another energy supplier, upon 30 days notice to the lead agency and the appropriate LDC.” (RESA)

RESPONSE: N.J.S.A. 48:3-94 k states: “Nothing in this section shall preclude a residential customer who did not affirmatively decline to participate in government energy aggregation program from switching electric service to another electric power supplier or to basic generation service pursuant to regulations adopted by the Board.” Pursuant to N.J.A.C. 14:4-6.3(k), a customer may “opt-out of an aggregation program at any time and switch to another energy supplier, upon 30 days notice to the lead agency and the appropriate LDC.” Therefore, as the Board's rules subject the customer's ability to opt-out of an aggregation program to only one requirement, that it be done “upon 30 days notice to the lead agency and the appropriate LDC,” the customer's ability to opt-

out may not be restricted by exit fees. However, while the commenter interpreted the proposed rules in this manner, we do agree that this can be made clearer. Therefore, the Board will propose a new N.J.A.C. 14:4-6.3(l) in the companion proposal to clarify that a residential customer may not be charged an exit fee for leaving an aggregation program

50. COMMENT: The opt-out period coupled with the contract review should be shortened to the extent reasonably possible. After selecting a TPS as the winning bidder, there are several steps that must be completed, all while the TPS holds its price open and is subject to the risk of market fluctuations. The first step after bid acceptance for an aggregation program under Option 2 (N.J.A.C. 14:4-6.6) is the 30-day opt-out period. This period is followed by an additional 15- to 20-day review period after the Board receives a copy of the contract. Only after these two steps are complete will a TPS receive any customer level data. Thereafter, it will take some time after its receipt of that data to fully enroll the customers. This makes for a very long lead time, and exposes the TPS to a great degree of market risk. For example, if a TPS bids a fixed price for electricity to an aggregation on a given day and is certain the bid will be accepted at a reasonably certain load level, it can lock-in the supply costs at wholesale. In many cases, locking in that supply involves contracting for a certain quantity of the commodity used to produce the electricity, like natural gas, over the term of the agreement with the aggregation. On the other hand, under the Option 2 aggregation rules, that same TPS must either lock in its price with its bid, or leave the bid open and subject to changes in the wholesale markets for electricity and underlying commodities. If a TPS locks in before full acceptance, the TPS risks that it will be

rejected at the contract review stage, or that a substantially higher than anticipated number of people will choose to opt-out. The other choice for the TPS is to leave itself open to the day-to-day volatility of the markets. Regardless of how the TPS chooses to deal with the long lead time it would likely include a substantial risk premium in the prices it bids. The Board should consider shortening the timeframes between bidding and enrollment under an Option 2 aggregation to minimize the pricing risk to the TPS, and consequently to minimize the risk premiums that a TPS must pass on to customers. This will help aggregation programs more fully realize the beneficial pricing aggregated buying can offer, and make aggregations a more viable competitive supply option in New Jersey. (FES)

RESPONSE: The 30 days for residential customers to opt-out was established pursuant to N.J.S.A. 48:3-94e. The 15 days for the Board and the Division of Rate Counsel to review and provide comment to the governing body is based upon N.J.S.A. 48:3-94c. Therefore, the commenter's suggested change has not been made.

51. COMMENT: We are encouraged that the new rule requires LDCs to post and update information regarding the "benchmark price" for each rate class in the government energy aggregation program on their websites within 24 hours of change. However, the rule should specifically require LDCs to include all by-passable components, such as sales and use tax, in the "benchmark price," such that customers have the opportunity to more accurately compare the prices among LDCs and TPSs. In order to foster a more robust retail marketplace, the LDC "benchmark price" should be transparent and inclusive of the by-passable pricing elements, which will allow

energy consumers to make accurate and informed buying decisions. (RESA)

RESPONSE: N.J.S.A. 48:3-94 provides that a governing body shall only award a government aggregation contract for service to residential customers where the rate meets certain criteria that are based upon comparing the rate to a defined price. The modifications that the Board is making to the rules will ensure that the LDCs post this defined price, that is, the “benchmark” price, to assist in the formation of government aggregation programs. The benchmark price is not designed to be used to compare prices among the LDCs and TPSs. Therefore, the commenter’s suggested change has not been made.

Subchapter 7. Retail Choice Consumer Protection

52. COMMENT: We have participated in the Purchase of Receivables/Price to Compare (POR) working group. The issues being addressed by the POR working group include the allocation of retail customer partial payments between LDCs and authorized third-party suppliers. We recommend that the Board adopt, in its retail choice consumer protection rules, our recommendations in the POR working group filed May 11, 2011. (RC)

RESPONSE: As noted by the commenter, the POR working group is analyzing these issues. The Board will address issues emanating from the group at a later date. Therefore, the commenter’s suggested amendments will not be addressed at this time.

53. COMMENT: N.J.A.C. 14:4-7.3 and 7.4(b), pertaining to the content of

marketer advertisements and marketing materials, are problematic in the singular focus on “savings” as the only, or predominant, value proposition to be derived by the consumer. As currently written, by focusing on savings as the manner in which to communicate product value, the rules discourage marketer offerings of innovative products and services. Certain modifications were made to these sections in the Board’s last readoption of the rules. These changes clarified in N.J.A.C. 14:4-7.4(c), the ability of a marketer to petition the Board to utilize different information to describe its product offering and also added to N.J.A.C. 14:4-7.4(a)1, the requirement to provide a toll free number to disclose the average price of energy over the term of a contract. This was intended to better accommodate variable price offerings whose absolute value could not be determined at the start of a contract. In practice these rule changes are cumbersome for a supplier to utilize and have not materially improved the underlying problem. N.J.A.C. 14:4-7.4(b) could be further improved to allow marketers to provide consumers with the price transparency and accuracy that they deserve. The alternatives in N.J.A.C. 14:4-7.4(b) for describing products in marketing materials do not satisfactorily accomplish the goal of communicating the value of energy choices in a clear and understandable manner. For example, the requirement to provide the marketer rate, the utility commodity rate, and an all-in comparison with the utility delivery rate to compute consumer savings can mislead consumers. By providing a savings calculation that includes the utility delivery rate it acts to artificially dilute the commodity savings the consumer would realize. And, since the only portion of the bill the consumer can shop for is commodity, it is misleading to require an all-in rate computation that includes utility delivery. We also request Board

clarification of the instances when a marketer should employ N.J.A.C. 14:4-7.4(b)1 versus (b)2. (NEM)

RESPONSE: While many factors can go into a customer's decision to switch suppliers, potential savings is often the predominant factor. Therefore, the Board believes that the requirements in this section provide useful information to shopping customers. To the extent that TPSs offer innovative products and services to customers that are not savings related, TPSs may offer information about these products and services to shopping customers in addition to the information required by this section of the rules. Further, the Board believes that it is more useful to customers to be presented with savings as a percentage of their total bill than of only a portion of their bill. Therefore, the commenter's suggested changes have not been made. Regarding the commenter's request for clarification regarding when a marketer should employ N.J.A.C. 14:4-7.4(b)1 versus (b)2, a marketer should employ N.J.A.C. 14:4-7.4(b)1 when it offers a fixed rate product and N.J.A.C. 14:4-7.4(b)2 when it does not offer a fixed price or guaranteed price.

54. COMMENT: As the Board's rulemaking contemplates reducing residential consumer protections, it remains even more critical that these customers be provided with the most accurate pricing information reasonably available at the start of a TPS contract. Accordingly, a requirement should be included in the "marketing standards" that would require a TPS to clearly disclose any right of the TPS to modify pricing terms of their contract with residential customers, including rights to modify prices that are characterized as "fixed" or "firm." As the Board is aware, recently enacted

N.J.S.A. 52:14B-4.10 specifically allows substantial changes such as this to agency rule-making upon adoption. Such a provision would 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 customers are made aware that a TPS offer includes 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. (LDCs)

RESPONSE: The Board agrees with the commenter that the customer should be provided with clear information regarding whether a rate is fixed or variable. The Board will propose new N.J.A.C. 14:4-7.6(l) and 7.12 in the companion proposal to provide clarity on fixed rates and therefore, will not utilize the procedure available under N.J.S.A. 52:14B-4.10.

55. COMMENT: We recommend modifying the requirement at N.J.A.C. 14:4-7.4(f) that a TPS “clearly state in its solicitations to the customer, and in its marketing materials, whether in hardcopy, electronically, or via an internet website, that switching to a competitive third-party supplier is not mandatory, and the customer has the option of remaining with the LDC for basic generation service or basic gas supply service.” We understand the desire to prevent slamming, but suggest that this requirement borders on the anti-competitive and may inadvertently discourage some customers from shopping. In particular, identifying the LDC as a competitive option is too specific in educating a customer of their choice; the above statement is akin to identifying by name another competitor in a TPS’s marketing materials. Instead, a

statement indicating that customer has a choice of who it can purchase electricity from satisfies the anti-slamming policy goals. We, therefore, recommend that N.J.A.C. 14:4-7.4(f) be modified as expressed above. (FES)

56. COMMENT: N.J.A.C. 14:4-7.4(f) should be reworded in a more competitively neutral manner. As currently set forth, this subsection requires suppliers' consumer solicitations and marketing materials to include a statement that, "switching to a competitive third-party supplier is not mandatory, and the customer has the option of remaining with the LDC for basic generation service or basic gas supply service." This subsection should be reworded to the effect that, "all consumers have the choice of switching to a competitive energy supplier, and the reliability of your delivery service will in no way be affected by your choice of a new energy supplier ..." When expressed in this fashion, the rule does not have the potential negative connotation that the current language carries and also does not require the supplier to, in effect, promote the utilities' commodity service in the supplier's own marketing materials. (NEM)

RESPONSE TO COMMENTS 55 AND 56: Since switching to a TPS is not mandatory, customers should be made aware that they do not need to switch suppliers. Thus, the rule is designed to avoid the incorrect impression that customers must switch to a competitive supplier. N.J.A.C. 14:4-7.4(f) as currently written is consistent with N.J.S.A. 48:3-51, which specifically states that customers may opt to remain on basic generation service or basic gas supply service if they do not choose a TPS. The Board believes that the benefits of including this statement in marketing materials warrant its continued inclusion. Therefore, the

commenter's suggested change has not been made.

57. COMMENT: Current Board rules require a TPS to disclose all prices, charges, fees, penalties, and interest that it may charge a customer, and the specific conditions under which it may impose each, only in its contract. Current rules do not expressly require the TPS to provide a copy of the contract to every customer, such as those who initiate, switch, or renew TPS service by telephone, by e-mail, through the TPS' website, or through other electronic media. N.J.A.C. 14:4-2.4(i), which requires the TPS to provide a copy of the contract only "upon request by the customer" after execution of the contract, is not sufficient since it does not ensure full written disclosure of all terms and conditions. Transparent access to adequate information about price and other material terms is essential to the efficiency of a free market, and provides an important protection for consumers in a competitive energy market. A reliable gas and electric supply is an essential service and customers are entitled to receive a copy of the contract to which they are parties. Accordingly, we recommend adding the following language to N.J.A.C. 14:4-7.6(a):

The TPS shall provide to every customer within 24 hours a copy of the contract the customer has signed or agreed. For customers who initiate, switch, or renew service by signature on a paper (hard copy) document, the TPS shall comply with N.J.A.C. 14:4-2.3 and 2.4 and shall send a copy of the contract to the customer either by an electronic method or by regular mail, at the option of the customer.

For customers who initiate, renew, or switch service by an electronic method (such as by e-mail or through the TPS's website), the TPS shall comply with N.J.A.C. 14:4-2.3 and 2.4 and shall send a copy of the contract to the customer by an electronic method or by regular mail, at the option of the customer. For customers who initiate, renew, or switch service by telephone, the TPS shall comply with N.J.A.C. 14:4-2.3 and 2.4 and shall send a copy of the contract to the customer by an electronic method or by regular mail, at the option of the customer.

RESPONSE: The Board agrees that the TPS should provide the customer with a copy of the contract. Therefore, the Board will propose to amend N.J.A.C. 14:4-7.6(a) in the companion proposal.

58. COMMENT: We object to the proposed amendment to N.J.A.C. 14:4-7.6(b)4 that would reduce, to seven calendar days from the current 14 calendar days, the amount of time allowed to a residential customer to rescind his or her decision to initiate, renew, or switch service with a TPS. The Board justifies this rescission period, which it has applied for some time, by reference to rescission periods in other states. TPSs have been able to adjust their business practices to the rescission period in New Jersey, as evidenced by the dozens of TPSs who have chosen to solicit customers here. Accordingly, the TPSs cannot show that the current rescission period prevents their conducting business in New Jersey. Consumers are potentially subject to charges, fees, penalties, and interest, for early termination of a contract with a TPS,

as well as the significant inconvenience and difficulty of changing to a different TPS or back to the default service. A 14-day rescission period allows for delays or other problems with regular mail, e-mail, and other forms of delivery. This is especially important in light of the fact that the rules as proposed do not require TPSs to provide a copy of the contract (hard copy or electronic version) to every customer. Accordingly, an adequate post-enrollment rescission period is necessary for a customer to receive and read the contract, and to evaluate the merits of the transaction.

(RC)

59. COMMENT: N.J.A.C. 14:4-7.6(b)4 proposes to reduce the residential customer's rescission rights from 14 days to seven days without providing an explanation of the reasons behind this change. Admittedly, an agency need not make record findings to promulgate a reasonable rule in conformity with the Administrative Procedure Act. However, it is the responsibility of the agency to collect whatever information is necessary to support the rulemaking. An agency may have to show evidence or reasoned support in the rulemaking record in order to justify a regulation. It is premature to arbitrarily modify the rescission period as there has been no showing of the necessity for such a change, or even an explanation of the rationale behind it. In fact, the 14-day rescission period, which was codified subsequent to the outcome of comprehensive settlement discussions that took place during the planning stages of New Jersey's energy restructuring initiatives, has been successful in protecting residential utility consumers without -- as shown by the level of switching now occurring -- imposing an undue burden on the unregulated community. It should be

noted that little has changed with respect to this issue since the Board reached this exact conclusion in its 2008 rule readoption (see 40 N.J.R. 2526(a), Response to Comment 32). Additionally, it might be helpful for the Board to understand that changing the residential rescind period from 14 calendar days to seven calendar days is essentially moving from 10 business days to five business days. Moreover, considering that local mail from the LDC to the customer can take four calendar days, if a weekend/holiday is involved the customer has only three days to rescind to avoid any contractual cancellation fees. Further, some LDCs often receive rescissions via US mail in reply to the LDC's welcome letter. Maintaining the existing 14 calendar days allows ample time for uncontrollable delays in mail delivery and gives newly enrolled customers time to respond. Lastly, the proposed changes fail to consider what, if any, implementation costs would be imposed that would ultimately be passed on to all customers. Given the introduction of new marketing techniques and the fact that many customers are receiving service from TPSs for the first time, the Board should act cautiously before relaxing rescission rules or other rules designed to protect consumers. Fourteen calendar days appropriately balances TPS desires to aggressively market their products with ensuring the best interest of customers. As New Jersey is seeing the first real signs of residential energy competition since the passage of EDECA over a decade ago, a record proceeding would likely show that now is precisely the time to allow the regulatory construct to work, and not the time to relax the marketing and consumer protection standards in ways that could unintentionally and inappropriately shift costs and risks. Accordingly, we strongly recommend that the Board not move forward with this proposed change and instead maintain the existing

14-day rescission period for residential customers at least until a record has been developed that would support such a change. (LDCs)

RESPONSE TO COMMENTS 58 AND 59: The Board believes that shortening the time from 14 calendar days to seven calendar days will benefit customers while still providing them with necessary protections. Shortening the time period will benefit shopping customers by lessening the overall amount of time between when customers authorize a switch in their suppliers and when the customers actually begin receiving service from their chosen suppliers. The Board believes that reducing this to seven days will still provide customers with a reasonable amount of time to rescind their decisions. Therefore, the commenter's change has not been made.

60. COMMENT: We support the change to N.J.A.C. 14:4-7.6(b)4, which shortens the rescission period from 14 to seven days. This length of time offers an appropriate balance between consumer protection and customer choice. The shorter time period provides more certainty to suppliers by eliminating some of the market risk involved in holding that customer's price open for a period of time. Additionally, lowering the market risk for a TPS will allow it to reduce risk premiums in its pricing to New Jersey consumers. This change has a positive impact on customers, and still provides them with ample time to reconsider their decision to switch. In Ohio, where the rescission window is set to seven days, we have experienced very few customer complaints and no difficulty in administering and implementing the rescission process with that state's utilities. (see Ohio Administrative Code 4901:1-21-06). Customers will also receive the benefits of choice more quickly with the shorter enrollment window. (FES)

RESPONSE: The Board appreciates the commenter's support of the Board's proposed rule modifications.

61. COMMENT: In N.J.A.C. 14:4-7.4(a)4, the TPS is required to provide the average price per kWh or therm that the LDC will on a prospective basis charge for basic generation or gas supply service. This is a highly problematic standard as it essentially compels the TPS to predict what the LDC commodity rate will be over the life of the TPS commodity supply offer. Thus, for example, if the TPS residential offer covers a 12-month period, the TPS would need to accurately predict what the LDC commodity price will be for the next 12 months. This may not be possible as the LDC rate is subject to change on a prospective basis in accordance with applicable rate regulations applicable to the LDCs. The regulations presume that the TPS somehow is endowed with the ability to predict the future course of LDC commodity and delivery rates. This is an unreasonable assumption, and therefore the regulations should be modified to eliminate these requirements. (DOM)

62. COMMENT: In N.J.A.C. 14:4-7.4(b)1, the TPS must provide the estimated percentage savings on the "total bill" that the customer will realize under the advertised price relative to the customer taking service from the LDC. This raises a similar problem (to that noted in Comment 61). To provide estimated savings over the term of the RPS on the "total bill," the energy service company (ESCO) will need to estimate the exact commodity and delivery rates that the LDC will charge on a prospective basis over the term of the TPS offer. Although the TPS can provide

information concerning the previous rates of the LDC, it is not reasonable to assume that the TPS can accurately predict what the LDC's rates will be in the future. The regulations presume that the TPS somehow is endowed with the ability to predict the future course of LDC commodity and delivery rates. This is an unreasonable assumption, and therefore the regulations should be modified to eliminate these requirements. (DOM)

63. COMMENT: In N.J.A.C. 14:4-7.4(b)2, if the TPS does not offer a fixed or guaranteed price, the TPS must provide a bill comparison at various levels of usage of the residential customer's total bill under the TPS contract with the customer's total bill at the same usage levels for each month of the year if the customer stayed with the LDC. This is a highly problematic and counter-productive requirement. At its core, it expects the TPS to accurately predict the LDC's future commodity and delivery rates. However, neither the TPS nor any other party has the ability to accurately and reliably prognosticate as to the exact utility rates that will be in place over any time period. All utility commodity and delivery rates are subject to change on a prospective basis, and the TPS cannot be expected to predict what those changes may be. Further, estimating delivery rates presents an additional problem, because such rates may have a declining or multi-level block rate structure. Consequently, the customer's total delivery charges will not be subject to a single rate, but will change in relation to the customer's actual usage during the billing cycle. The TPS cannot predict the exact level of the customer's usage over any prospective period. The regulations presume that the TPS somehow is endowed with the ability to predict the future course of LDC

commodity and delivery rates. This is an unreasonable assumption, and therefore the regulations should be modified to eliminate these requirements. (DOM)

64. COMMENT: N.J.A.C. 14:4-7.4(b)1 and 2 fail to accommodate the variegated nature of commodity offerings made by a TPS. It is fairly common for a TPS to offer an index based product under which the price during the term of the contract will vary monthly on the basis of the performance of a particular index. Thus, on the gas side the index price may reflect the price at Henry Hub plus a set factor or on the electric side may reflect the PJM price in a particular zone plus/minus a certain level of mills. In the end, the TPS cannot predict how those indexes will perform on a going forward basis, and therefore it is extremely difficult if not impossible for a TPS to provide the type of forecasted prospective information set forth in the proposed amendments. The regulations presume that the TPS somehow is endowed with the ability to predict the future course of LDC commodity and delivery rates. This is an unreasonable assumption, and therefore the regulations should be modified to eliminate these requirements. (DOM)

RESPONSE TO COMMENTS 61, 62, 63, AND 64: N.J.A.C. 14:4-7.4(a)1 requires the TPS to provide a telephone number at which a customer can obtain detailed information regarding the average price of energy over the term of a contract. This will provide the customer with the most accurate pricing information possible at the start of the contract. N.J.A.C. 14:4-7.4(a)4 requires the TPS to provide the average LDC price for energy over the term of the TPS contract. The Board agrees with the commenter that this may not be possible in some cases, due to the possibility that LDC rates will change during the contract term. However,

in a case where this is not possible, the TPS can, under N.J.A.C. 14:4-7.4(c), petition the Board to authorize the TPS to provide other information that would provide customers with a more accurate understanding of potential savings. Again, this alternative information might be a formula rather than a dollar amount, if necessary to accurately convey pricing to customers. This option to provide alternative information also applies to the requirement at N.J.A.C. 14:4-7.4(b) to provide an estimated percentage savings or a detailed formula for comparison with predicted LDC prices. If the TPS can demonstrate to the Board under N.J.A.C. 14:4-7.4(c) that other information will provide customers with a more accurate understanding of likely pricing conditions, the TPS can obtain Board approval to use that other information in lieu of the information required under N.J.A.C. 14:4-7.4(b).

65. COMMENT: Pursuant to N.J.A.C. 14:4-7.6(j), a contract can only be renewed for more than a month-to-month period where the TPS has obtained a written or electronic signature. In this context the Board should consider allowing renewal where an audio recording following the provisions of N.J.A.C. 14:4-2.3(c)2 has been obtained by the TPS. If such audio recording is acceptable for the initial contract it should be acceptable for a subsequent renewal.

66. COMMENT: We recommend that N.J.A.C. 14:4-7.6(j) be modified to allow for auto-renewal without an affirmative written signature for a specified term rather than only for a month-to-month term. This modification will allow a TPS to offer a better rate to the customer in any renewal term, and will avoid some of the time and expense involved in negotiating a new supply agreement. This is especially true in cases where the terms and conditions (other than price) of the initial term will remain the same for

the renewal term. In other jurisdictions, we have found that rules requiring adequate notice provisions work well to protect and inform customers of their right to terminate prior to renewal. The restriction in the rule of renewal periods to month-to-month terms should be removed and that the following requirements be added: (1) the automatic renewal be conspicuously disclosed in the terms and conditions agreed to by a customer; and (2) that notice of the renewal, including any modifications to the price or other provisions of the supply agreement, be provided to customers not more than 90 and not less than 45 days from the renewal date with a clear description of how the customer may cancel the agreement. In some jurisdictions, a follow-up notice is also required nearer in time to the renewal date. (see the Ohio Administrative Code 4901:1-21-11(F)). While we assert that a follow-up notice is unnecessary if the initial notice requirement is sufficiently detailed, this could also be added as an extra measure of consumer protection. For many customers, the added convenience of not having to affirmatively re-enroll with a TPS is of substantial value, but, without the added certainty for a TPS of a fixed term, customers may not receive the best rate. Detailed notice requirements address this concern as customers will be fully apprised of their cancellation rights but need not do anything if they are satisfied with their TPS and the pricing it offers for a renewal term. (FES)

67. COMMENT: The Board has proposed a modification to N.J.A.C. 14:4-7.6(j), which currently requires a customer's affirmative written signature for renewal of a residential contract or the contract will continue on a month-to-month basis under the current terms and conditions and pricing, to also include an electronic signature as a means to obtain the consumer's consent to the renewal. While permitting electronic

signatures as a means of obtaining consumer consent to contract renewal is an improvement, we are still fundamentally concerned with this rule. For example, when a customer signs up for marketer service on a fixed rate they cannot renew at a new fixed rate without affirmative consent to an entirely new contract. This is problematic because if the new contract is not obtained and the original fixed rate contract continues on a month-to-month basis “under the current terms and condition and pricing” the customer may be paying at the original fixed rate that could be higher than the current rate. As a general rule a consumer should not be required to provide affirmative consent to a contract renewal with a rate change when they have received prior notice. This methodology comports with consumer expectations of notice of service terms and changes and likewise provides the consumer with adequate protection. Indeed, the consumer will receive prior notice of the impending price change from the supplier and has given implicit acceptance of the renewal by not making further inquiry with the supplier. This is common practice for the renewal of consumer goods and services. Similarly, by limiting the situations when affirmative consent is required, it does not unnecessarily impose burdensome and expensive renewal processes on marketers. (NEM)

RESPONSE TO COMMENTS 65, 66, AND 67: The Board believes that TPSs should not be able to increase rates for customers who sign up for a fixed price contract without the customer’s authorization. The Board does not agree with the commenter who stated that a consumer who receives prior notice of an impending price change has given implicit acceptance of the renewal by not making further inquiry with the supplier. However, the TPS can renew a contract with a customer or enter into a new contract with the customer

using the same methods that are acceptable for switching to a TPS pursuant to N.J.A.C. 14:4-2.3(c). The Board will propose amendments to N.J.A.C. 14:4-7.6(j) in the companion proposal to provide this clarification.

68. COMMENT: The Board should require TPSs to include more specific information in customer bills. Transparent access to information is one of the safeguards of a competitive free market system, characterized by full disclosure that allows like-for-like comparison of all material terms of a proposed transaction. The following information, in addition to that already required in the rules, should be required on customer bills:

1. The due date for payment to keep the account current.
Such a due date shall be consistent with that provided by the LDC for its charges, which must in no event be any shorter than the minimum of 15 days applicable to LDCs in N.J.A.C. 14:3-3A.3(b);
2. The applicable billing determinants, including beginning meter reading(s), ending meter reading(s), multiplier(s), and any other consumption(s) adjustments;
3. If the bill includes any early termination penalties, late payment fees or interest charges, or other penalties, fees or charges by the TPS, a separate itemization of these charges;
4. The amount billed for the current period, any unpaid amounts due from previous periods, any payments or

credits applied to the customer's account during the current period, any late payment charges or gross and net charges, if applicable, and the total amount due and payable;

5. Current balance of the account, if a residential customer is billed according to a budget plan;
6. Options and instructions on how customers may make their payments; and
7. An explanation of any codes and abbreviations used.

(RC)

RESPONSE: The commenter's suggestions on the types of information that should be included on TPS' bills are very thorough and substantive, but most likely cost prohibitive as the LDCs do most of the billing and their computer systems are not presently designed to include this much TPS information. When an LDC provides consolidated billing many of these items are already on the bill since many of the utilities assume the receivables under their existing purchase of receivables programs.

69. COMMENT: We recommend that N.J.A.C. 14:4-7.10(b), which requires 30 days' notice before a TPS may terminate a residential contract for non-payment, be eliminated. The timeframe extends risk of non-payment to the supplier for a long period of time. In many cases, since the customer's non-payment triggering, the 30-day notice can only be sent after it is clear that the amount from the previous billing period will not be paid. This means that the TPS will already be in the midst of supplying the customer in the subsequent billing period. In the extreme case, the 30-

day notice may extend the TPS risk of non-payment to 3 months depending on the date of a customer's meter reading in relation to the beginning of the notice period. The risk to a non-paying residential customer is virtually non-existent when a TPS terminates for non-payment. In such cases, the customer will default to BGS rates and remain subject to the BPU's rules regarding disconnection of service. On the other hand, the risk to a TPS is quite large. Non-payment risk is one of the largest non-market factors included in TPS pricing for residential customers. Until reasonable and effective rules implementing an LDC's purchase of TPS receivables are in place, the elimination of N.J.A.C. 14:4-7.10(b) will enhance competition and improve the prices offered to residential customers by TPS. (FES)

70. COMMENT: N.J.A.C. 14:4-7.10 provides no clear guidance on the exact timing required for terminating a residential contract and moving a customer back to the relevant LDC. In addition, it is unclear whether a TPS may make such a notice concurrently with the 30-day notice it must provide to customers. Moreover, the rule is confusing because it bases the termination date on the date of the customer's next meter reading without specifying whether that next meter reading must be an actual meter read or whether an estimated meter reading will suffice. The lack of clarity surrounding this rule presents challenges for TPSs when trying to quantify the risks associated with customer default. Therefore, we suggest that the BPU include uniform requirements regarding the timing of termination, as well as whether an actual, and not estimated, meter reading is required to establish the termination date. (RESA)

71. COMMENT: Until utility non-recourse purchase of receivable (POR) programs are made available Statewide, we urge the Board to consider eliminating the requirement for a supplier to provide a consumer with 30 days written notice of termination. The requirement for 30 days written notice of termination is set forth in N.J.A.C. 14:4-7.6(b)5 and 7.10. This requirement is onerous for marketers to comply with, particularly in the case where the marketer seeks to terminate the customer for nonpayment. By the terms of N.J.A.C. 14:4-7.10, the marketer will have to retain the non-paying customer for an additional month, likely without payment for that period as well. It should constitute adequate notice from the marketer if the enrollment materials clearly state that service will be discontinued for nonpayment without requiring an additional month of exposure on the part of the marketer. Moreover, when TPS service ends, the consumer reverts back to utility service, and so there is no need for an additional layer of consumer protection. The burden of the 30-day-written notice requirement could be eliminated by the Statewide availability of utility non-recourse POR programs. BPU staff is currently conducting a stakeholder workgroup on utility POR programs. We strongly support POR as a means to facilitate retail market development. The 30-day-written notice requirement is but one of many retail market issues that would be resolved by adoption of nonrecourse utility POR programs. (NEM)

RESPONSE TO COMMENTS 69, 70, AND 71: As noted by the commenter, the purchase of receivables/price to compare (POR) working group is analyzing these issues. The Board will address issues emanating from the group at a later date and will propose amendments, new rules, and/or repeals to the rules as needed based on the findings of the

POR working group. Therefore, the commenter's suggested changes have not been made.

72. COMMENT: We generally support the proposed amendment N.J.A.C. 14:4-7.6(b)5 and 7.10 to the extent it eliminates a source of potential confusion in the pricing offered by various suppliers. However, we are concerned about the rules lack of clarity as to how a TPS may comply with the requirement with respect to variably priced products. Since the exact price is not known ahead of time, it is unclear if it is sufficient under the proposed amendment to note in the pricing formula that it is the resultant rate "plus the applicable New Jersey Sales and Use Tax." It is also unclear under the amended subsection as to how urban enterprise zones (UEZ) will affect compliance. For example, if a TPS markets a given price by advertising to a wide area that includes UEZ subject to special sales and use tax treatment, the taxes for the UEZ customers will not be accurately included in the advertised prices. The Board should add more detail to this subsection to provide more clarity with respect to variable pricing and special tax zones like UEZs. Finally, to further avoid confusing customers, this amendment should also be made applicable to LDCs' presentation of BGS rates for retail supply to customers. (FES)

RESPONSE: If a TPS offers a variable product and includes rates in the description of this variable product, for example an initial rate or a ceiling rate, these rates shall be shown inclusive of sales and use tax. If the TPS describes its variable product with a formula, the formula shall include the calculation to make the rate inclusive of sales and use tax. Pursuant to N.J.S.A. 52:27H-79, the statutory exemption for sales made to a

qualified business in an urban enterprise zone excludes sales of energy and utility service. While some customers in UEZs may qualify for an exemption pursuant to N.J.S.A. 52:27H-60, this is a customer-specific exemption. The modification to the rule does not apply to customer-specific exemptions. Therefore, the commenter's suggested change has not been made. The Board directs the commenter to the Response to Comment 73 regarding the LDC portion of this comment.

73. COMMENT: We support the requirement in the proposed rule that electricity prices be disclosed inclusive of sales and use tax, because it will help to reduce customer confusion and ensure more uniform and accurate presentation of competitive supply offers. In addition to TPS contracts and invoices, we strongly support the expansion of pricing to include sales and use tax in the presentation of customer advertisements, marketing materials, and related solicitations. However, for the sake of consistency and to enable customers to fully compare LDC and TPS pricing, this requirement should be explicitly imposed upon LDCs in the new rules, and not just upon TPSs, as the rule is currently proposed. (RESA)

RESPONSE: The Board appreciates the commenter's support of the Board's proposed rule modifications. Pursuant to N.J.S.A. 54:32B-14e, "all sellers of energy or utility service shall include the tax imposed by the 'Sales and Use Tax Act' within the purchase price of the tangible personal property or service." The Board's experience indicates that the LDCs have been including the sales and use tax within their rates. However, the Board has encountered instances where TPSs have distributed marketing materials with their rates shown exclusive of the sales and use tax. N.J.A.C. 14:4-7.11 was added to

alleviate this problem and ensure that customers have complete information. Since the LDCs do not market their supply service, the commenter's proposed change has not been made as part of this rulemaking.

Full text of the readopted rules can be found in the New Jersey Administrative Code at N.J.A.C. 14:4.

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

(Agency Note: The text of N.J.A.C. 14:4-5.1 below reflects administrative corrections effective August 1, 2011.)

14:4-2.3 Change order for switch

(a) (No change.)

(b) To comply with this subchapter, a change order shall meet all of the following requirements:

1. The change order shall be transmitted from the TPS to the LDC through an Electronic Data Interchange (EDI) transaction, or through another electronic information exchange system with equivalent speed and security. Information on EDI may be found at the Board's website at ***[<http://www.nj.gov/bpu/divisions/energy/edi.html>]***

***<http://www.nj.gov/bpu/about/divisions/energy/edi.html>*; and**

2. (No change.)

(c)- (g) (No change from proposal.)

14:4-2.4 Signing up or switching customers electronically

(a) (No change.)

(b) If a TPS uses electronic methods to sign up, renew*,* or switch customers, the TPS shall comply with *[the Federal Signatures in Global and National Commerce Act, 15 U.S.C. §§7001 through 7006, which is incorporated herein by reference as amended and supplemented and is available at <http://uscode.house.gov/download/pls.15C96.txt>]* ***the Uniform Electronic Transaction Act, N.J.S.A. 12A:12-1 through 26***.

(c) – (j) (No change from proposal.)

SUBCHAPTER 3 AFFILIATE RELATIONS

14:4-3.1 Scope

(a) (No change.)

(b) A New Jersey electric and/or gas public utility, which is also a multi-state electric and/or gas public utility and subject to the jurisdiction of other state or Federal regulatory commissions, may file an application, requesting a limited exemption from this subchapter or part(s) thereof, for transactions between the electric and/or ***gas*** public utility and its affiliate(s) solely in its role of serving its jurisdictional areas wholly outside of New Jersey. To obtain such an exception, the applicant shall meet the requirements of N.J.A.C. 14:1-1.2(b).

14:4-3.5 Separation

(a) - (o) (No change.)

(p) Except as permitted in (i) and (j) above, an electric and/or gas public utility and its PUHC or related competitive business segments of its public utility holding company, that are engaged in offering merchant functions and/or electric related services or gas related services shall not employ the same employees or otherwise retain, with or without compensation, as employees, independent contractors, consultants, or otherwise.

1. Other than shared administration and overheads, employees of the competitive services business unit of the public utility holding company shall not also be involved in the provision of non-competitive utility and safety services, and the competitive services **[are]** ***shall be*** provided utilizing separate assets than those utilized to provide non-competitive utility and safety services.

(q) - (u) (No change.)

14:4-5.1 Scope; general provisions

(a) - (i) (No change from proposal.)

(j) Applications, forms*,* and information relating to this subchapter may be obtained at:

New Jersey Board of Public Utilities

ATTN: Division of Audits/Licensing

44 South Clinton Avenue, 9th Floor

PO Box 350

Trenton, New Jersey 08625-0350

[www.bpu.state.nj.us] ****www.nj.gov/bpu/*)****

[(973) 648-4450] ****609-292-1681****

(k) - (m) (No change from proposal.)

14:4-5.8 Registration procedure--energy agent or private aggregator

(a) (No change.)

(b) A registration shall be submitted on forms provided by the BPU, available on the Board's website at [*\[www.bpu.state.nj.us\]*](http://www.bpu.state.nj.us) [*www.nj.gov/bpu/*](http://www.nj.gov/bpu). All registration forms shall be accompanied by the appropriate fee set forth at N.J.A.C. 14:4-5.12.

(c) - (i) (No change.)

14:4-5.11 Registration procedure--energy consultant

(a) (No change.)

(b) A registration shall be submitted on forms provided by the Board, available on the Board's website at [*\[www.bpu.state.nj.us\]*](http://www.bpu.state.nj.us) [*www.nj.gov/bpu/*](http://www.nj.gov/bpu). The registration form shall require all of the following:

1. - 3. (No change.)

(c) - (f) (No change from proposal.)