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INDEPENDENT REGULATORY REVIEW COMMISSION
333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

November 18, 1999

Honorable Robert A. Judge, Sr., Secretary
Department of Revenue
Strawberry Square, 11th Floor
Harrisburg, PA 17128

Re: IRRC Regulation #15-410 (#2061)
Department of Revenue
Utility Gross Receipts Tax

Dear Secretary Judge:

Enclosed are our Comments on the subject regulation. They are also available on our website at <http://www.irrc.state.pa.us>.

Our Comments list objections and suggestions for consideration when you prepare the final version of this regulation. We have also specified the regulatory criteria which have not been met. These Comments are not a formal approval or disapproval of the proposed version of this regulation.

If you would like to discuss these Comments, please Chris Markham at 772-3455.

Sincerely,

A handwritten signature in black ink that reads "Robert E. Nyce".

Robert E. Nyce
Executive Director

REN:wbg
Enclosure

cc: Anita Doucette
Douglas Berguson
Office of General Counsel
Office of Attorney General
Lee Ann Labecki

COMMENTS OF THE INDEPENDENT REGULATORY REVIEW COMMISSION

ON

DEPARTMENT OF REVENUE REGULATION NO. 15-410

UTILITY GROSS RECEIPTS TAX

NOVEMBER 18, 1999

We have reviewed this proposed regulation from the Department of Revenue (Department) and submit for your consideration the following objections and recommendations. Subsections 5.1(h) and 5.1(i) of the Regulatory Review Act (71 P.S. § 745.5a(h) and (i)) specify the criteria the Commission must employ to determine whether a regulation is in the public interest. In applying these criteria, our Comments address issues that relate to statutory authority, consistency with the statute, legislative intent, reasonableness, need and clarity. We recommend that these Comments be carefully considered as you prepare the final-form regulation.

1. Section 160.21. Scope. – Consistency With Statute and Clarity.

This section appears to accurately describe the Department's scope. However, portions of the regulation give the impression that the Department is responsible for areas beyond this scope.

The regulation appears to address Electric Generation Supplier (EGS) licensing in Section 160.41, and the possibility of double taxation of customers in Section 160.31. Pursuant to Section 2809 of the Electricity Generation Customer Choice and Competition Act (Act) (66 Pa.C.S.A. § 2809), the Public Utility Commission (PUC) is authorized to handle these issues. The PUC has authority over the EGS' license and the associated bond ensuring financial responsibility. Section 2809(c)(2) of the Act allows an Electric Distribution Company (EDC) that had to pay an EGS' tax to "collect or seek reimbursement of the tax so paid from the electricity provider [EGS] or any other appropriate party that used the electricity in this Commonwealth." (Emphasis added.) While the potential exists for a double tax, this would occur in ratemaking proceedings under the PUC's jurisdiction, not collection proceedings undertaken by the Department.

Therefore, the Department should clarify the scope of the regulation both within this section and in other sections as stated later in these comments.

2. Section 160.22. Definitions. - Consistency With Statute, Legislative Intent, Reasonableness, Need and Clarity.

Failure to otherwise comply.

The Department should explain the intent of the definition for "failure to otherwise comply." What is the meaning of the phrase "all applicable taxes under the TRC [Tax Reform Code]?" (Emphasis added.) Section 2809(c) of the Act directs an EGS to certify to the PUC payment of

taxes imposed by Articles II and XI of the TRC. Does the Department intend this phrase to apply to all taxes or just to the gross receipts tax?

The definition should also clarify the meaning of the phrase “within the time period and in the manner provided by law” by citing the appropriate statute. Additionally, how was the compliance standard “paying less than 75%” derived?

Related services.

The definition of “related services” is vague. Further, it appears this term is used only in the definition of “sales of electric energy.” The Department should explain the need for this term. If it’s needed, the Department should clarify the meaning of the term by incorporating its substance in the definition of “sales of electric energy.”

Retail electric customer.

This regulation refers to the statutory definition of “retail electric customer.” However, the Department uses terms such as “end-use customer” and “end-user” in different parts of the regulation. Since terms such as end-user are included in the statutory definition of “retail electric customer,” we recommend consistent use of that term.

Sales of electric energy.

The regulation’s definition of “sales of electric energy” appears to be broader than Subsection 2810(j) of the Act. The regulation’s definition includes items such as “capacity charges,” “demand charges” and “related services” not mentioned in the Act. What is the basis for including these additional items and expanding the statutory term in the regulation?

State tax information.

This term is defined as “the information maintained by the Department that is necessary for the administration of 66 Pa.C.S. §§ 2806 and 2809” Since it is only used in Subsection 160.41(d), it may be clearer to define the specific information in Subsection 160.41(d).

3. Section 160.31. Tax on the use of electricity. – Statutory Authority, Reasonableness, Need and Clarity.

Subsection (a) Tax imposed.

The Preamble states that Subsection (a) describes when the tax on the use of electricity will be imposed on an EDC under Sections 2806(g)(3)(iii) and 2809(c)(2) of the Act. As written, Subsection (a) is confusing. It rephrases the statute and uses terms not found in Sections 2806(g)(3)(iii) and 2809(c)(2). Since the statute provides a clear description of the circumstances under which an EDC must remit the unpaid tax of an EGS, language is not needed beyond the statutory citations.

Subsection (b) Failure of electricity supplier to report and pay tax on gross receipts.

In Subsection (b)(2), the Department uses the EDC's "shopping credit provided to customers" to estimate unpaid taxes. The PUC commented that shopping credits are a transition device that will cease to exist when the transition to competition is completed. The PUC believes a better surrogate for estimating gross receipts is the "Provider of Last Resort" generation rate. Therefore, the Department should use a reasonable rate that will continue to exist after the transition to competition is complete.

Subsection (c) Indemnification of electric distribution company that has paid use tax.

There are three concerns with this subsection.

First, Subsection (c) is confusing. This subsection addresses problems that occur after the Department has collected the tax. The resolution of these problems is under the PUC's jurisdiction. Therefore, Subsection (c) is not needed or appropriate.

Second, the phrase "may collect or seek indemnification or reimbursement" is vague. For clarity, the Department should explain the difference between these terms. If there is no difference, the Department should eliminate one of the terms.

Finally, the phrase "or from the end-user of the electricity in this Commonwealth" is vague. Why would an EDC file with the Department when seeking reimbursement from an end-user? Additionally, as noted above, the term "end user" should be replaced with "retail electric customer."

Subsection (d) Duplicate payments.

Subsection (d) doesn't describe how and when the Department will refund an over-collection of tax. Also, it doesn't require notification to the PUC, which may have separate ongoing proceedings involving the EGS and EDC. The Department should add procedures for reimbursement to the EDC when duplicate payments are made and explain how notice of the outcome of these procedures would be given to the PUC.

Subsections (d)(2) and (d)(3) specify how an EDC must reflect taxes on the customer's bill. Billing is under the PUC's jurisdiction. Therefore the Department should delete Subsections (d)(2) and (d)(3).

Subsection (e) Effect on unpaid gross receipts tax.

Subsection (e) states that the liability of the EGS for unpaid tax, interest or penalties is not extinguished when the EDC is forced to pay the EGS' tax. This subsection should also specify that the EDC is not responsible for penalties or interest assessed against the EGS.

4. Section 160.41. Electric generation license procedures. – Statutory Authority, Reasonableness, Need and Clarity.

Licensing.

Naming this section “Licensing” is unclear. This section relates to actions the Department, with the cooperation of the PUC, may initiate against an EGS that hasn’t settled its tax liability. The title of this section could also cause confusion with the actual licensing procedures contained in the PUC’s regulations. For clarity, the Department should consider renaming this section “Electric Generation Supplier Tax Liability.”

Coordination of information.

Subsection (a) states “Upon request from the Commission, the Department will confirm that an applicant has no tax liabilities” Subsection (b) requires that “the Commission shall provide the Department with a list of licensed electric generation suppliers” Subsection (d) states that “the Commission may request the state tax information necessary to ascertain compliance with the requirements for licensure or to institute licensure revocation proceedings.”

The PUC objects to being directed by the Department to provide information. However, in the same comments, the PUC affirms it will continue its practice of cooperating with the Department. Clearly, the Department and the PUC must coordinate information. However, this information could be exchanged by means other than directives in regulation, such as through a Memoranda of Understanding. The Department should explain the need and authority for placing this requirement on the PUC in this regulation.

Subsection (a) License application.

Subsection (a) uses the phrase “an applicant has no liabilities not subject to appeal.” The use of a double negative affects the clarity of this sentence. The Department should rewrite Subsection (a).

Subsection (b) Licensed electric generation suppliers.

We have four questions on this subsection. First, Subsection (b) requires the PUC to provide the Department with specific information about any EGS. This directive does not appear in the Act. Therefore, we request the Department provide the statutory basis for this provision. As an alternative, the language could state the Department will “request” the information from the PUC.

Second, among the information the PUC shall provide the Department is “similar identification numbers.” We are unsure as to the meaning of this phrase. The Department should define or clarify “similar identification numbers.”

Third, the Department asks for “any other information the Department will require.” This phrase is vague. Is this information related to the gross receipts tax status of an EGS or other tax liability? The Department should revise this phrase to state what other information the PUC will be required to submit.

Finally, we question the inclusion of the dates, May 1, 1998, and July 30, 1998, in this subsection. We understand that these dates are specifically stated in the Act. However, using "1998" is confusing, as these dates have passed. To improve clarity, the Department should consider using solely "May 1" and "July 30."

Subsection (c) Procedures.

Subsection (c)(1) uses the terms "applicant," "EGS" and "entity." For clarity, the Department should replace "entity" with "applicant or EGS."

Additionally, Subsections (c)(2) and (c)(3) outline the timeline for actions the Department may take to correct the failure to otherwise comply for an "entity." The Department should insert "applicant or EGS" in these two subsections.

In Subsections (c)(1) and (c)(2), the Department uses a 45-day compliance period. How did the Department arrive at this 45-day period? For clarity, the Department should cite where the 45-day period is found or explain why this time period is appropriate.

Subsection (c)(3) states the Department will make a recommendation to the PUC to "deny an application for licensure or institute license revocation proceedings, as applicable." The Department should notify the PUC when an EGS has not paid its taxes. However, what is the purpose of the recommendation, since the PUC makes the final determination? The Department should explain the need for, and usefulness of, its recommendations relating to licensure.

Subsection (d) State tax information.

This subsection states "The Commission may request the State tax information necessary to ascertain compliance" We have two concerns with this subsection.

First, does the "State tax information" consist of information on all taxes as outlined in the TRC, or just gross receipts taxes? The regulation should clarify this.

Second, the Department should explain why the regulation directs the PUC to ask the Department for State tax information in the instance of a licensure revocation proceeding. Why wouldn't the Department disclose this information in the notice to the PUC as proposed in Subsection (c)(3)?