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

January 28, 2005

Honorable Wendell Holland, Chairman
Pennsylvania Public Utility Commission
Keystone Building, 3rd Floor
400 North Street
Harrisburg, PA 17105

Re: Regulation #57-236 (IRRC #2441)
Pennsylvania Public Utility Commission
Practice and Procedure Before the Commission

Dear Chairman Holland:

Enclosed are the Commission's comments for consideration when you prepare the final version of this regulation. These comments are not a formal approval or disapproval of the regulation. However, they specify the regulatory review criteria that have not been met.

The comments will be available on our website at www.irrc.state.pa.us. If you would like to discuss them, please contact my office at 783-5417.

Sincerely,

Mary S. Wyatt, Esq.

Acting Executive Director/Chief Counsel

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Enclosure

cc: Honorable Robert M. Tomlinson, Chairman, Senate Consumer Protection and Professional Licensure Committee
Honorable Lisa M. Boscola, Minority Chairman, Senate Consumer Protection and Professional Licensure Committee
Honorable Robert J. Flick, Majority Chairman, House Consumer Affairs Committee
Honorable Joseph Preston, Jr., Democratic Chairman, House Consumer Affairs Committee

Comments of the Independent Regulatory Review Commission

on

Pennsylvania Public Utility Commission Regulation #57-236 (IRRC #2441)

Practice and Procedure Before the Commission

January 28, 2005

We submit for your consideration the following comments that include references to the criteria in the Regulatory Review Act (71 P.S. § 745.5b) which have not been met. The Pennsylvania Public Utility Commission (PUC) must respond to these comments when it submits the final-form regulation. The public comment period for this regulation closed on December 29, 2004. If the final-form regulation is not delivered within two years of the close of the public comment period, the regulation will be deemed withdrawn.

1. **Electronic filing. – Need; Reasonableness.**

The PUC is proposing to add requirements related to electronic filing of documents, but is not authorizing the use of electronic filing. We question the need for and reasonableness of imposing requirements prior to implementing an electronic filing system.

The Office of Small Business Advocate (OSBA) and the Practitioners' Group (representing six utility practice law firms) have also raised concerns regarding electronic filing. The commentators note that technical aspects of an electronic filing system, such as the ability of parties to open and process large files, the handling of signature requirements and the establishment of a "tamper-proof" format, would need to be addressed before implementing electronic filing.

We agree that the proposed addition of electronic filing requirements is premature. We recommend that the PUC delete proposed electronic filing requirements until it is ready to put an electronic filing system in place. We have identified the following sections of the proposed regulation that relate to electronic filing:

- Section 1.11(a)(4)
- Section 1.24(b)(2)(i)(A)
- Section 1.25(a)
- Section 1.32(d)
- Section 1.35(a)(2)
- Section 1.37(c)
- Section 1.53(b)(3)
- Section 1.54(b)(3)
- Section 1.56(a)(5)
- Section 1.59(b)(1)(ii)
- Section 5.306

These sections should be deleted or amended, as appropriate, to eliminate implicit or explicit references to electronic filing.

2. Filing by fax. – Reasonableness.

The regulation precludes parties from filing documents by facsimile (fax) transmission. Other agencies allow filing by fax to meet the filing deadline, provided that an original is filed within a reasonable time thereafter. Has the PUC considered this approach?

3. Section 1.8. Definitions. – Clarity.

The following terms are used in the regulation, but are not defined: adversarial proceedings; nonadversarial proceedings; informal proceedings; agency; political subdivision; and government entity. Clarity would be improved by defining these terms in the final-form regulation. For any of these terms that are defined elsewhere in statute or regulations, the PUC could cross-reference those existing definitions.

4. Section 1.11. Date of filing. – Reasonableness; Clarity.

Under Subsection (a)(3), the PUC is deleting the date “shown by the United States Postal Service [USPS] stamp on the envelope” as a means of determining the date a document is filed with the PUC. Instead the date on a USPS Form 3817 certificate of mailing will be used. The impact of this change could be significant for consumers who file individual complaints and may not be familiar with Form 3817. As a result of this provision, consumer complaints may be filed incorrectly resulting in the need to re-file. We suggest the PUC retain the USPS stamp on the envelope as a means of determining the filing date.

Also under Subsection (a)(4), the PUC refers to “4:30 p.m. local time.” For clarity, the reference to “local time” should be changed to “Eastern Standard Time.”

5. Section 1.33. Incorporation by reference. – Reasonableness.

In Subsection (b), the PUC is deleting the 20-year time frame for documents that cannot be incorporated by reference without ascertaining that the PUC has the document in its files. As a result of this deletion, a party would have to determine the status of a referenced document in every instance. OSBA commented that it would be burdensome to make this determination for every referenced document. We agree and suggest that the PUC continue to provide a time period during which parties can assume a document is still in the PUC files. If 20 years is too long, a shorter time frame may be established.

6. Section 1.38. Rejection of filings. – Statutory authority; Legislative intent; Clarity; Reasonableness; Need; Feasibility

This section provides that the PUC may reject the filing if the filing utility is “otherwise delinquent in its regulatory obligations.” We have three concerns.

First, this provision appears to preclude a utility from bringing or defending an action before the PUC if it has failed to satisfy any obligation imposed by regulation. We question the statutory authority for this provision.

Second, we believe that this provision is contrary to legislative intent. Subchapter A of the Public Utility Code explicitly outlines the procedures to be followed in bringing matters before the PUC. There is no indication that the legislature intended to foreclose these channels for obtaining relief to utilities who may not be in full compliance with regulations.

Third, we question the meaning of “delinquent in its regulatory obligations.” If the PUC believes it has the statutory authority for this provision, and that this provision is consistent with legislative intent, it should explain what is meant by this phrase.

7. Section 1.42. Mode of payment of fees. – Clarity.

Subsection (a) states, in part, “The Secretary’s Bureau **should** be contacted prior to submitting payment in a form other than money order or check.” (Emphasis added.) The term “should” is nonregulatory language which indicates that this provision is optional. If the PUC intends to require a party to contact the Secretary’s Bureau when submitting payment in an alternate form, the final-form regulation should replace the term “should” with “shall.”

8. Section 3.501. Certificate of public convenience as a water supplier or wastewater collection, treatment or disposal provider. – Reasonableness; Need; Feasibility; Protection of public health; Consistency with existing regulations.

Subsection (a) currently provides a list of requirements which an applicant for a certificate of public compliance must satisfy. The PUC is deleting this list. In lieu of retaining these requirements in the regulation, the PUC will include them on the forms which applicants must complete.

The Department of Environmental Protection (DEP) has objected to the deletion of application requirements from this provision. The basis for DEP’s objection is that by transferring the requirements from the regulation to forms, they will no longer constitute binding norms with the full force and effect of law.

We share DEP’s concern. Forms are subject to change at the discretion of the PUC, with no opportunity for notice and regulatory oversight. Therefore, the requirements for applications should remain in the regulation.

9. Section 5.14. Applications requiring notice. – Reasonableness; Clarity.

Existing Subsection (b), lists the applications for which notice will be published. PUC is proposing to delete this list and retain only a general reference to applications for authority under the act.

The Practitioners’ Group believes that the existing list of applications which require notice provides certainty and consistency and should be retained. We agree and suggest the PUC retain the list in Subsection (b).

We have an additional concern. A new Paragraph (c) provides that the deadline for filing protests to applications is governed by Section 5.53. This section provides that the time for filing a protest shall be as stated in the application. If no deadline is specified, the time will be 60 days. We recommend that, for consistency, the PUC establish a standard time for the filing of protests which will be followed in all cases, unless there is good cause to allow a different time frame.

10. Section 5.24. Satisfaction of formal complaints. – Clarity.

Subsection (b) allows a respondent to certify to the PUC that is has satisfied a complaint if the complainant has either acknowledged satisfaction to the respondent or if the complainant no longer wishes to pursue the complaint. We recommend that the certification be in writing.

11. Section 5.53. Time of filing. – Reasonableness; Feasibility; Clarity.

This section states that a protest must be filed within the time specified in the published notice of the application. If the published notice does not contain a specified time, a party has 60 days to file a protest. We have two concerns.

First, as noted above, this section lacks consistency because the regulated community does not have a reasonable expectation of when a protest must be filed. The final-form regulation should be amended to establish a uniform time period for filing a protest.

Second, this section does not specify how or where the notice must be published. To be consistent with other provisions of this rulemaking, we recommend that publication must be in the *Pennsylvania Bulletin*.

12. Section 5.62. Answers seeking affirmative relief or raising new matter. – Clarity.

Subsection (b) provides that an answer may raise new matter. The PUC should specify whether a notice to plead must be included in new matter. This may be important in view of the fact that Section 5.63(b) provides that failure to file a timely reply to new matter may be deemed an admission of the facts raised.

13. Section 5.74. Filing of petitions to intervene. – Clarity; Reasonableness; Feasibility.

The Office of Consumer Advocate expressed the concern that Subsection (b)(1) would create a default deadline for statutory notices of intervention in consumer complaint cases. This would result in dramatic departure from current practice and would work to the detriment of customers in need of assistance. The PUC should clarify its intent in this section.

14. Section 5.101. Preliminary objections. – Need; Clarity; Feasibility.

Subsection (a) substitutes the phrase “preliminary motion” with “preliminary objection,” as the latter phrase is more commonly used. Subsection (b) deletes the requirements that a preliminary objection be filed with an answer and that all preliminary objections be raised together.

The Practitioners’ Group has raised the possibility that a party with substantial resources could use the new procedures to tie up a proceeding indefinitely. We share this concern, and request that the PUC revise this section to prevent that from happening.

We have an additional concern that the difference in the times for filing will result in confusion and missed deadlines. Subsection (c) states that a party may file an amended pleading within 20 days following service of preliminary objections. Subsection (d) states that an answer to a preliminary objection shall be filed within 10 days of the date of service. Subsection (f)(1) allows a party who files a stricken preliminary objection to file an amended pleading in 10 days. However, Subsection (f)(2) provides that a party who filed a preliminary objection which has been overruled has 20 days to plead over. The PUC should justify the difference in timelines or provided a standard time frame in most if not all instances.

15. Section 5.342. Answers or objections to written interrogatories by a party. – Clarity.

Subsection (d) provides timelines in which answers and objections must be served. The timelines contained in Subsection (d) and (d)(1) are contradictory. What timelines would a party be required to follow?

16. Miscellaneous clarity issues.

- The Practitioners' Group commented that the last sentence in Section 1.15(b) could be deleted if a revision is made to the first sentence in this subsection. Specifically, the phrase "timely filed with the Commission" should be replaced with "filed at least 5 days prior to the hearing date." We agree and suggest the PUC make this change.
- In Section 1.21(d)(2), the phrase "an appropriate individual" is unclear. The final-form regulation should more specifically identify the individuals who may represent parties in informal proceedings.
- In Section 1.36(a), the PUC should change the term "permitted" in the last sentence to "utilized."
- There is a typographical error in Section 1.53(b)(1). The word "by" should be inserted between "made" and "mailing."
- In Section 3.2, parallel construction should be employed. The codification of Subsection (a) should be restored. Proposed Paragraph (1) should be contained in Subsection (a). Proposed Paragraph (2) should be Subsection (b) and the Paragraphs (i) through (iv) should be codified (1) through (4). Subsequent subsections should be recodified accordingly.
- Section 3.502(b) requires a protest to be filed in "appropriate and legally sufficient form." This requirement is vague. The final-form regulation should contain cross-references to the applicable regulatory standards.
- Section 5.22(a)(7) references a "writing." The final-form regulation should either define this term in this subsection or delete the term and specifically identify what documents are subject to the requirements of this subsection.
- The first sentence of Section 5.22(c) references, "the act, a regulation or order of the Commission." The second sentence of this section states that the complaint must reference, "the regulation or order." To be consistent, the second sentence should also reference "the act."
- Section 5.41(c) requires copies to be served "in compliance with Commission direction." Clarity would be improved by cross-referencing specific service requirements contained in the regulations.
- In Section 5.52(a) the word "shall" should be shown in brackets.
- In Section 5.75(d), the word "permitted" should be replaced with "prohibited" to be consistent with the PUC's proposed wording changes in this subsection.
- In Section 5.91(a), the phrase "insofar as appropriate" is vague and unnecessary. It should be deleted.
- In Section 5.101(d), the word "motion" in the second sentence should be changed to "objection" to be consistent with the PUC's proposed terminology changes throughout Section 5.101.

- The phrase “in the public interest” is used in Section 5.232(d)(2). The PUC needs to clarify what this phrase means.
- In Section 5.235(a), the word “shall” in the second sentence should not be bracketed. The word “be,” immediately following “shall,” should be bracketed.
- Section 5.324(a) *allows* discovery of “facts known and opinions held by an expert.” However, Section 5.323(a) *precludes* disclosure of opinions as part of discovery. In the final-form regulation, this inconsistency between these two sections should be rectified.
- Based on discussions with the PUC, we understand that Section 5.245, relating to failure to appear, proceed or maintain order in proceedings, also applies to interveners. The final-form regulation should be amended to reflect this fact.
- Section 5.401(b)(2)(iii) contains a typographical error. The word “By” should be deleted.
- Under Section 5.502(d), two commentators questioned if the PUC intended to delete the language related to “initial briefs.” The PUC should clarify its intent in the final-form regulation.
- In the third sentence of Section 5.533(c), the existing word “shall” which appears after “exception” and before “exceptions shall” should be bracketed.
- In the last sentence of Section 5.535(a), the word “shall” should be bracketed, and the word “must” should be in bold type.

Facsimile Cover Sheet

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Pages: 8

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INDEPENDENT REGULATORY REVIEW COMMISSION

Comments: We are submitting the Independent Regulatory Review Commission's comments on the Pennsylvania Public Utility Commission's regulation #57-236 (IRRC #2441). Upon receipt, please sign below and return to me immediately at our fax number 783-2664. We have sent the original through interdepartmental mail. You should expect delivery in a few days. Thank you.

Accepted by: Sherril DelBiondo Date: 1-28-05

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