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INDEPENDENT REGULATORY REVIEW COMMISSION

333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

September 12, 2011

Honorable Robert F. Powelson, Chairman
Pennsylvania Public Utility Commission
Keystone Building, 3rd Floor
400 North Street
Harrisburg, PA 17105

Re: Regulation #57-269 (IRRC #2772)
Pennsylvania Public Utility Commission
Natural Gas Distribution Companies and the Promotion of Competitive Retail Markets

Dear Chairman Powelson:

The Independent Regulatory Review Commission disapproved your regulation on August 25, 2011. Our order is enclosed and will be available on our website at www.irrc.state.pa.us.

Within 40 days of receipt of our order, Section 7(a) of the Regulatory Review Act requires you to select one of the following options: (1) proceed with promulgation under Section 7(b); (2) proceed with promulgation under Section 7(c); or (3) withdraw the regulation. If you do not take any action within this period, the regulation is deemed withdrawn.

If you or your staff have any questions, please contact me, at 783-5417.

Sincerely,

Fiona Wilmarth
Acting Executive Director
sfh
Enclosure

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

**INDEPENDENT REGULATORY REVIEW COMMISSION
DISAPPROVAL ORDER**

Commissioners Voting:

Public Meeting Held August 25, 2011

Silvan B. Lutkewitte, III, Chairman, recused
George D. Bedwick, Vice Chairman
Arthur Coccodrilli, dissenting
Lawrence J. Tabas, Esq.

Regulation No. 57-269 (#2772)
Pennsylvania Public Utility Commission
Natural Gas Distribution Companies and the
Promotion of Competitive Retail Markets

On June 26, 2009, the Independent Regulatory Review Commission (Commission) received this proposed regulation from the Pennsylvania Public Utility Commission (PUC). This rulemaking establishes 52 Pa. Code §§ 62.221 to 62.225. The proposed regulation was published in the July 11, 2009, *Pennsylvania Bulletin* with a 45-day public comment period. The final-form regulation was submitted to the Commission on June 24, 2011.

This final-form regulation is intended to foster more competition for gas customers as envisioned in the Natural Gas Choice and Competition Act of 1999 (Act) (66 Pa.C.S. §§ 2201 - 2212). The regulation establishes a mechanism for the local Natural Gas Distribution Company (NGDC) to reallocate costs and develop a "Price To Compare" (PTC) so that customers can compare gas prices between their NGDC and competitive Natural Gas Suppliers (NGS). The regulation directs the NGDC to file a revenue neutral reallocation of costs with the PUC for an on-the-record proceeding to determine the NGDC's PTC after this regulation takes effect. The regulation also establishes rules for Purchase of Receivables Programs and other provisions relating to release, assignment or transfer of capacity.

We recognize that the PUC took extensive public comment in its development of this final-form regulation. However, we find this final-form regulation is not in the public interest. As explained further below, we find that the final-form regulation at 52 Pa. Code § 62.223 (relating to PTC), on its face, does not meet the criteria of legislative intent and it would cause adverse effects on competition and clarity. 71 P.S. §§ 745.5b (a), (b)(1)(i) and (b)(3).

Supplier Of Last Resort (SOLR)

The Act addresses SOLR at 66 Pa.C.S.A. § 2207(a), which states:

(a) SUPPLIER OF LAST RESORT.—

- (1) After the effective date of this chapter, the natural gas distribution company shall serve as the supplier of last resort for residential, small commercial, small industrial and essential human needs customers and any other customer classes determined by the commission in the natural gas distribution company's restructuring proceeding until such time as the commission, pursuant to this section, approves an alternative supplier or suppliers to provide such services to any or all of the natural gas distribution company's customers.

(2) For purposes of this section, a supplier of last resort is a natural gas distribution company or natural gas supplier which is designated by the commission to provide natural gas supply service with respect to one or more of the following services:

- (i) natural gas supply services to those **customers who have not chosen an alternative natural gas supplier or who choose to be served by their supplier of last resort;**
- (ii) natural gas supply services to those **customers who are refused supply service from a natural gas supplier;** or
- (iii) natural gas supply services to those **customers whose natural gas supplier has failed to deliver its requirements.**

No customer shall have more than one supplier of last resort designated for any of the services set forth in this paragraph.
(Emphasis added.)

In addition, the Act states at 66 Pa. C.S.A. § 2203(5) that the PUC must “require that restructuring of the natural gas industry be implemented in a manner that does not unreasonably discriminate against one customer class for the benefit of another.”

Our finding is based on three points in the statute. First, a SOLR must perform its function for both shopping and non-shopping customers within the service territory of the NGDC, as stated in 66 Pa.C.S.A. §§ 2207(a)(2)(i), (ii) and (iii). Second, under 66 Pa. C.S.A. § 2207(a)(2), SOLR is a singular and unique function assigned to only one entity for the customer. Third, the statute also protects against cross-subsidization between customer classes.

Based on these statutory provisions, on page 2 of our comments on the proposed regulation we stated:

. . . it is not clear how the regulation protects against cross-subsidization between shopping and non-shopping customers in general, and particularly in regard to the supplier of last resort . . . the PUC should explain how the provisions . . . will properly separate costs in compliance with 66 Pa.C.S.A. § 2203(5) which protects customers from unreasonable discrimination against one customer class for the benefit of another.

Also, citing 66 Pa.C.S.A. § 2207, we stated on page 6 of our comments:

It is not clear in the regulation that all customers will share in the cost of a SOLR, even though a SOLR would have to be available to most customers. The PUC should explain how this proposed regulation will insure that procurement costs for SOLR are distributed equitably among all customers who may have to rely on a SOLR.

On pages 15 to 25 of the PUC’s Order accompanying the final-form submittal, recognizing the dissenting opinions of PUC Commissioners Gardner and Christy, the PUC

outlines the positions of the commentators and expresses the intent to include SOLR costs in the PTC. The PUC intends for the PTC to include SOLR costs.

By including SOLR costs in the PTC, non-shopping customers will incur the cost of the SOLR. However, the PUC is establishing that the class of customers who shop and use the alternative services of the NGS will not be subject to the PTC costs and, therefore, would not share in the unique cost burden of the SOLR. Again, 66 Pa.C.S.A. § 2207(a)(2) specifies SOLR is for the services of both shopping and non-shopping customers, and it further provides that there will be only one SOLR designated for these services. Also, the statute at 66 Pa.C.S.A. § 2203(5) protects against cross-subsidization. As such, based on the statute, we find that the intent of the PUC to include SOLR costs in the PTC is contrary to the statute both at 66 Pa.C.S.A. § 2207(a) and § 2203(5).

As required by the criterion at 71 P.S. § 745.5b(b)(1)(ii), we must determine whether this regulation is in the public interest, and in making that determination, we have to consider whether the regulation would cause “adverse effects on prices of goods and services . . . or competition.” Pages 22 to 23 of the PUC’s Order contemplate designating an alternative SOLR if rates do not support the costs of the NGDC’s SOLR function. We find this point instructive. If the PUC did designate a third party alternate SOLR under 66 Pa.C.S.A. § 2207(a), the PTC for the NGDC would be lowered. However, in the absence of an alternate SOLR, the inclusion of SOLR in the NGDC’s PTC pushes the PTC higher. With that higher PTC, the NGS may compete with the higher PTC, rather than offer the rate paying customer the lowest price of gas the NGS can offer from the market. By including SOLR in the PTC, there may be more competitive NGS offers, but we question whether the rate paying customer would receive the full benefit of market based competition. We ask the PUC to explain how inclusion of SOLR costs in the NGDC’s PTC would not violate the criterion at 71 P.S. § 745.5b(b)(1)(ii).

Finally, we also question if the PUC’s determination to include SOLR costs in the PTC in the order accompanying the regulation is premature. Under the final-form regulation (52 Pa. Code 62.223(b)), “An NGDC shall file a tariff change under 66 Pa.C.S. § 1308(a) . . . to identify the natural gas procurement costs included in its base rate and shall propose tariff revisions designed to remove those costs from its base rate and to recover those annual costs as part of the PTC (the GPC portion) on a revenue neutral basis.” Also, the PUC’s Order at Paragraph 7 directs “that NGDCs shall file, within 90 days of the effective date of these regulations, the tariff revisions required by Section 62.223 . . . in accordance with a filing schedule to be issued by the Commission [PUC].” The PUC will soon have a filing under § 1308(a) that will present a full record of the magnitude and effect of many costs on the PTC for each individual NGDC. With all due respect to the positions expressed in the PUC’s Order, dissenting opinions and the extensive public comments filed on this regulation, we question why the PUC would not defer judgement on PTC issues until quantifiable facts are presented in the NGDC’s § 1308(a) proceedings.

Information presented in an understandable format to enable retail gas customers to make informed choices

On pages 1 and 2 of our comments on the proposed regulation, we stated:

Under the Natural Gas Choice and Competition Act (Act) (66 Pa. C.S.A. § 2203(3)), the PUC is directed, in part, to “require natural gas distribution companies to unbundle natural gas supply services such that separate charges for services can be set forth in tariffs and on retail customers’ bills.” We believe the simplicity of how this is presented to customers will ultimately affect the participation of customers in competition. Ideally, this could be accomplished by a separation of total cost into distribution cost and supply cost. Hence, a customer could shop and compare the supply cost.

This [proposed] regulation presents a complex regulatory scheme that might be incomprehensible to most customers and as a result discourage them from participating in competition . . . While we recognize this is an attempt to separate costs, this method is confusing, even if it is technically correct . . . **We recommend that the PUC reconsider the complexity of this regulation and the effect of that complexity on customer participation in competition. We also recommend that the PUC produce an example of a bill or pricing comparison that would be presented to the customer to illustrate the result of the final-form regulation and how it would foster competition.** (Emphasis added.)

The PUC made substantial amendments to the proposed regulation, as shown in the final-form regulation. However, our concern lies with the statutory directive found in 66 Pa.C.S.A. § 2206(c) which directs the PUC to:

. . . by order or regulation, establish requirements that **each natural gas distribution company and natural gas supplier provide adequate, accurate customer information to enable retail gas customers to make informed choices** regarding the purchase of **all natural gas services** offered by that provider. Information shall be provided to retail gas customers in an **understandable format** that enables retail gas customers to compare prices and services on a uniform basis. (Emphasis added.)

We believe that the competitive process is enhanced and encouraged by presenting information to the customers in a clear and readily understandable manner so that the customer can make an informed decision with respect to the economic benefits of the competitive choices, which is the direct intent of the statute. We find that the PUC has not demonstrated that the provisions in this regulation establish compliance with the directives in 66 Pa.C.S.A. § 2206(c).

The regulation will establish a PTC from the NGDC, which a customer can use to compare NGDC and NGS prices for natural gas. However, this is only a portion of the amount the customer will be billed by the NGDC. The customer will continue to pay NGDC distribution charges and possibly other residual billing, such as over and under collections. It is also not

clear what information the consumer will continue to receive after switching to an NGS to allow the consumer to evaluate whether or not to switch again to another NGS or back to the NGDC.

Without complete information on what will comprise the total bill, customers may get a false impression from the PTC that they are getting a good deal when there are other components of the total bill that are not considered. Additionally, it is not clear what information or protection the consumer would receive or could consider after the customer signs up with the NGS relating to the ability of the NGS to change the price.

We asked the PUC in our comments to produce an example of a bill or pricing comparison that would be presented to the customer to illustrate the result of the final-form regulation and how it would foster the competition intended by the statute. We continue to ask for a clear example of what will be presented to the retail gas customer. We ask the PUC to demonstrate in the resubmittal of this regulation that it has established, by order or regulation, requirements to meet 66 Pa.C.S.A. § 2206(c) so that a retail gas customer can “make informed choices regarding the purchase of all natural gas services offered by” the NGDC and NGS.

We have determined this regulation is not consistent with the statutory authority of the PUC and the intention of the General Assembly. In addition, upon consideration of all of the other criteria of the Regulatory Review Act discussed above, we find promulgation of this regulation is not in the public interest.

BY ORDER OF THE COMMISSION:

The regulation #57-269 (IRRC #2772) from the Pennsylvania Public Utility Commission: Natural Gas Distribution Companies and the Promotion of Competitive Retail Markets was disapproved on August 25, 2011 .



Silvan B. Lutkewitte, III, Chairman

