

**INDEPENDENT REGULATORY REVIEW COMMISSION
DISAPPROVAL ORDER**

Commissioners Voting:

Public Meeting Held November 3, 2011

Silvan B. Lutkewitte, III, Chairman, recused
George D. Bedwick, Vice Chairman
John F. Mizner, Esq.
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. At its August 25, 2011 public meeting, the Commission voted to disapprove the final-form regulation. On October 13, 2011, the PUC resubmitted the regulation under Section 7(b) of the Regulatory Review Act, exercising the option to resubmit its regulation without revision but with a report responding to our disapproval order.

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. 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.

In our August 25, 2011 disapproval order, we found that the final-form regulation at 52 Pa. Code § 62.223 (relating to PTC), did not meet the criteria of legislative intent and adverse effects on competition. 71 P.S. §§ 745.5b (a) and (b)(1)(i).

The Act addresses Supplier Of Last Resort (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 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.” 66 Pa. C.S.A. § 2203(5).

Our findings were 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. 66 Pa.C.S.A. §§ 2207(a)(2)(i), (ii) and (iii). Second, SOLR is a singular and unique function assigned to only one entity for the customer. 66 Pa. C.S.A. § 2207(a)(2). 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 approving the the June 24, 2011 final-form submittal, recognizing the dissenting opinions of PUC Commissioners Gardner and Christy, the PUC outlined the positions of the commentators and expressed the intent to include SOLR costs in the PTC.

By including SOLR costs in the PTC, non-shopping customers will incur the cost of the SOLR. However, the PUC will establish 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 protects against cross-subsidization. 66 Pa.C.S.A. § 2203(5). As such, based on the statute, we found that the intent of the PUC to include SOLR costs in the PTC was contrary to the statute 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 considered whether this regulation was in the public interest. In making that determination, we had 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 contemplated designating an alternative SOLR if rates do not support the costs of the NGDC's SOLR function. We found 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 questioned whether the rate paying customer would receive the full benefit of market based competition. We asked 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 questioned if the PUC's determination to include SOLR costs in the PTC in the order accompanying the regulation was 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 would 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 questioned why the PUC would not defer judgment on PTC issues until quantifiable facts are presented in the NGDC's § 1308(a) proceedings.

The PUC responded to our disapproval by resubmitting the regulation under Section 7(b) of the Regulatory Review Act, exercising the option to resubmit its regulation without revision and submit a report responding to our disapproval order. In regard to concerns with cross-

subsidization of customer classes that we raised in our order, the PUC states that we may have “overlooked the fact that the SOLR costs that are incurred on behalf of both shopping and non-shopping customers are not included in the PTC.” The PUC states that it has removed NGDC SOLR costs related to storage and transportation capacity procurement costs from the PTC. The PUC concludes that there is no unreasonable discrimination or cross-subsidization of SOLR costs by non-shopping customers. The PUC states that it appreciates our suggestion to consider PTC costs in the rate filings that will follow implementation of the regulation, and on the basis of specific facts, the PUC can ensure there is no unreasonable discrimination or cross-subsidization.

We received four public comments on the resubmitted final-form regulation by the Office of Consumer Advocate, the Energy Association of Pennsylvania, a joint comment filed by Columbia Gas of Pennsylvania and National Fuel Gas, and PECO Energy Company. All of these comments contradict the PUC’s position. Consistent with their respective positions throughout this proceeding, the commentators restate that no SOLR costs should be in the PTC. We find these public comments persuasive that the implementation of this regulation as envisioned by the PUC would inappropriately include SOLR costs in the PTC. Therefore, we reaffirm our finding from the August 25, 2011 public meeting and subsequent disapproval order.

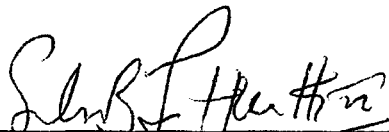
We have determined this regulation is not consistent with the statutory authority of the PUC (66 Pa.C.S. §§ 2204(a)) and the intention of the General Assembly. Having considered all of the other criteria of the Regulatory Review Act, we find promulgation of this regulation is not in the public interest.

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
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was disapproved on November 3, 2011.



Silvan B. Lutkewitte, III, Chairman

