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COMMONWEALTH OF PENNSYLVANIA



OFFICE OF SMALL BUSINESS ADVOCATE

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INDEPENDENT REGULATORY
REVIEW COMMISSION

William R. Lloyd, Jr.
Small Business Advocate

December 1, 2009

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HAND DELIVERED

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

**Re: Proposed Rulemaking: Natural Gas Distribution Company Business
Practices; 52 Pa. Code §§62.181-62.185
Docket No. L-2009-2069117**

Dear Secretary McNulty:

I am delivering for filing the original plus fifteen copies of the Comments on behalf of the Office of Small Business Advocate on the Proposed Rulemaking.

Copies of the comments have been served on Patricia Krise Burket, Annunciata Marino, and Cyndi Page, via electronic mail. If you have any questions, please contact me.

Sincerely,

William R. Lloyd, Jr.
Small Business Advocate
Attorney ID #16452

Enclosures

cc: Patricia Krise Burket
Annunciata Marino
Cyndi Page

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BEFORE THE
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INDEPENDENT REGULATORY
REVIEW COMMISSION

Proposed Rulemaking: Natural Gas :
Distribution Company Business Practices; : **Docket No. L-2009-2069117**
52 Pa. Code §§62.181-62.185 :

**COMMENTS ON BEHALF OF THE
OFFICE OF SMALL BUSINESS ADVOCATE**

I. Background

By Order entered May 1, 2009, the Pennsylvania Public Utility Commission ("Commission") initiated a proposed rulemaking intended to help promote the development of competition in the retail markets for natural gas supply. The specific focus of the proposed rulemaking is the promotion of competition by standardizing natural gas distribution company ("NGDC") business practices, operating rules, and supplier coordination tariffs.

Ordering Paragraph No. 5 specifies that comments of interested parties are due within 45 days of publication of the proposed rulemaking in the *Pennsylvania Bulletin*. That publication occurred on October 17, 2009, at 39 Pa.B. 6078.

The Office of Small Business Advocate ("OSBA") submits the following comments in response to the Commission's invitation.

II. Comments on the Order

**Section 62.184. Natural Gas Distribution Company Costs of Competition
Related Activities**

The reasonableness of allowing an NGDC to recover "costs of competition related activities" depends upon a clear definition of the costs which would be recoverable and

on adequate incentives for the NGDC to control those costs. As currently drafted, proposed Section 62.184 is a guarantee of ongoing litigation.

Proposed Section 62.184 is the same as proposed Section 62.226 in the Commission's proposed rulemaking at *Natural Gas Distribution Companies and the Promotion of Competitive Retail Markets*, Docket No. L-2008-2069114. The OSBA's comments herein parallel the comments submitted by the OSBA at L-2008-2069114.

a. **Potential Subsidization**

Throughout the regulatory review of electric default service regulations, some shopping advocates argued that an Electric Distribution Company ("EDC") should not be permitted to promote its own default service product. Shopping advocates presumably believe that same principle should apply to natural gas default service. Unfortunately, the Commission's proposal to allow an NGDC to recover "costs of competition related activities" could open the door to requiring the NGDC to incur costs to promote shopping. Costs related to the promotion of shopping are properly borne by Natural Gas Suppliers ("NGSs") and not by NGDCs. Promotion of shopping at the expense of non-shopping customers is inconsistent with the Natural Gas Choice and Competition Act ("Choice Act") and with the principle that an NGDC should not promote default service.

First, Section 2203(2) of the Public Utility Code, 66 Pa. C.S. §2203(2), provides that "the commission shall *allow* retail gas customers to choose among natural gas suppliers and natural gas distribution customers." (emphasis added) Nothing in Section 2203(2) authorizes the Commission to *encourage* customers to choose to shop or to choose not to shop.

Second, Section 2204(a) of the Public Utility Code, 66 Pa. C.S. §2204(a), specifies that “[t]he choice of natural gas suppliers shall rest with the retail gas customer.” Nothing in Section 2204(a) provides for the NGDC to *encourage* customers to choose to shop or to choose not to shop.

Third, although Section 2206 of the Public Utility Code, 66 Pa. C.S. §2206, provides for consumer education and the recovery of related costs, Section 2206 is not authority for requiring non-shopping customers to pay costs incurred to induce customers to shop. Specifically, Section 2206(d) required an NGDC to establish a consumer education program prior to the implementation of the NGDC’s restructuring plan. Section 2206(e) provided for recovery of the related costs. However, the stated purpose of the consumer education program required by Section 2206(d) was “to inform customers of the *changes in the natural gas industry.*” (emphasis added) The reasonable inference is that the program was to educate consumers during the initial transition to competition rather than to promote competition ten years after enactment of the Choice Act.

Fourth, Section 2206(c) authorizes the Commission to require NGDCs and NGSs to provide consumer education on an ongoing basis. Significantly, however, Section 2206(c) authorizes the Commission to “establish requirements that *each [NGDC] and [NGS]* 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.*” (emphasis added) In other words, Section 2206(c) stipulates that the NGDC is to pay for costs related to the information about the default service product it is

offering and that the NGS is to pay for costs related to information about the product or products it is offering.

b. Recovery Mechanism

According to the Commission, the NGDC's "costs of competition related activities" are not to be included in the Price To Compare and their recovery is to be through a competitively-neutral mechanism. Because this category of costs is so amorphous and because the reasonableness and prudence of any NGDC's claimed costs would be expensive to litigate in a surcharge case, these costs should be recovered through base rates rather than through a surcharge. Recovery through base rates would offer the added advantage of using regulatory lag as an incentive for the NGDC to control these costs.

III. Comments on Annex A

In addition to the policy comments outlined above, the OSBA submits the following comments regarding the specific proposed regulatory language set forth in Annex A to the Order.

§62.184. NGDC cost recovery.

Proposed Section 62.184(a) authorizes the recovery of "the reasonable and prudently incurred costs of implementing and promoting natural gas competition." To reduce litigation, the OSBA recommends the addition of a definition of "costs of implementing and promoting natural gas competition."

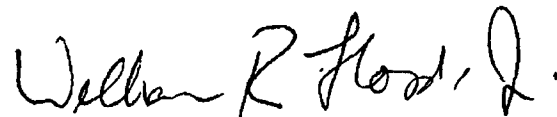
Proposed Section 62.184(c) requires the recovery of "costs of implementing and promoting natural gas competition" strictly on a volumetric basis and without regard to customer class. However, by providing for the use of a fully allocated cost of service

study to remove these costs from base rates, proposed Section 62.184(e) recognizes that these costs may be embedded in base rates on a customer class basis and may currently be recovered through customer charges, volumetric charges, or both. Accordingly, the OSBA recommends that proposed Section 62.184(c) be amended to require recovery of these costs in accordance with cost of service principles rather than strictly on the basis of volume.

IV. Conclusion

In view of the foregoing, the OSBA respectfully requests that the Commission revise the proposed regulations in accordance with the OSBA's comments.

Respectfully submitted,



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Dated: December 1, 2009