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INDEPENDENT REGULATORY REVIEW COMMISSION

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

August 11, 2010

Honorable James H. Cawley, Chairman
Pennsylvania Public Utility Commission
Keystone Building, 3rd Floor
400 North Street
Harrisburg, PA 17105

Re: Regulation #57-273 (IRRC #2837)
Pennsylvania Public Utility Commission
Default Service Regulations

Dear Chairman Cawley:

On July 15, 2010, IRRC issued comments on the above-referenced regulation. It has come to our attention that a word was inadvertently omitted from a sentence in the last paragraph at the bottom of page 2 of our comments. The sentence should read as follows:

Since this proposed rulemaking uses, to a large degree, verbatim language from Act 129, we do **not** see the value of promulgating the regulation in this form and at this time.
(Emphasis added).

The omission of the word "not" in this sentence does not alter the substance of our recommendation in the following sentence that the Public Utility Commission withdraw the regulation to evaluate the feedback from the regulated community and reintroduce the rulemaking as a new proposed regulation.

If you have any questions, please feel free to contact me at 783-5417 or kkaufman@irrc.state.pa.us.

Best regards,

Kim Kaufman
Executive Director

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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 Joseph Preston, Jr., Majority Chairman, House Consumer Affairs Committee
Honorable Robert W. Godshall, Minority Chairman, House Consumer Affairs Committee
Robert A. Mulle, Esq., Office of Attorney General
Andrew Clark, Esq., Office of General Counsel
Sherry Del Biondo, PUC
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Comments of the Independent Regulatory Review Commission



Pennsylvania Public Utility Commission Regulation #57-273 (IRRC #2837)

Default Service Regulations

July 15, 2010

We submit for your consideration the following comments on the proposed rulemaking published in the May 1, 2010 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (RRA) (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) directs the Pennsylvania Public Utility Commission (Commission) to respond to all comments received from us or any other source.

1. Need for the regulation.

This proposed rulemaking amends the Commission's existing default service regulations found at 52 Pa. Code §§ 54.181-54.189. The Commission contends that the rulemaking is needed to align the existing regulations with Act 129 of 2008 (Act 129). Act 129 amended Pennsylvania's Electric Generation Customer Choice and Competition Act (Competition Act) (66 Pa. C.S.A. §§ 2801, *et seq.*) and the manner in which default service providers must purchase electricity for non-shopping customers.

In the Preamble to this proposal, the Commission notes that "the proposed regulations generally adopt Act 129 procurement requirements verbatim." In addition, the Commission is seeking comment on 16 questions and how Act 129 should be interpreted "to ensure adequate and reliable service at the least cost to customers over time, and on how the proposed regulations should be revised to reflect the interpretation recommended by the person filing the comments." The Office of Consumer Advocate has noted that "the Commission's questions identify the critical issues that must be answered before finalizing any changes to the existing regulation." Listed below are examples of the questions:

- What is meant by "least cost to customers over time?"
- What time frame should the Commission use when evaluating whether a DSP's procurement plan produces the least cost to customers over time?

- Which approach to supply procurement—a managed portfolio approach or a full requirements approach—is more likely to produce the least cost to customers over time?
- What is a "prudent mix" of spot, long-term, and short-term contracts?
- Does a "prudent mix" mean that the contracts are diversified and accumulated over time?
- Should there be qualified parameters on the prudent mix? For instance, should the regulations preclude a DSP from entering into all of its long-term contracts in one year?
- Should the DSP be restricted to entering into a certain percentage of contracts per year?
- Is the "prudent mix" standard a different standard for each different customer class?

We note that extensive comments and reply comments were filed on the proposed rulemaking and the vast majority of the comments and reply comments focused on the 16 questions, not the text of the rulemaking.

We are concerned with the approach the Commission has taken for the promulgation of this rulemaking. We believe the Commission should have posed the 16 questions to the regulated community, accepted comments on those questions, drafted a proposed rulemaking based on the feedback received, and then commenced the formal rulemaking process. Under the approach taken by the Commission, the regulated community, the designated standing committees and the Independent Regulatory Review Commission (IRRC) will not have an opportunity to see or provide comment on the Commission's interpretation of Act 129 and the procurement of electricity for non-shopping customers.

Act 129 does not require the Commission to promulgate revised default service regulations within a specific time period. In addition, the statutory language of the Competition Act and Act 129 would take precedence over the Commission's existing default service regulations. We acknowledge that some commentators support the Commission's approach to promulgating this rulemaking because it provides flexibility to the Commission and electric distribution companies as they work to implement procurement plans. However, we believe the purpose of a regulation is for an agency to exercise its delegated legislative authority to create a mandatory standard of conduct to fill in the gaps that are often present in statutes.

Since this proposed rulemaking uses, to a large degree, verbatim language from Act 129, we do see the value of promulgating the regulation in this form and at this time. We recommend the Commission withdraw the proposed rulemaking, evaluate the feedback provided by the various segments of the regulated community on the 16 questions, in order to draft a proposed regulation that

does more than simply recite the Act 129 revisions, and reintroduce the rulemaking to the regulatory review process as a new proposed rulemaking. This would allow all parties involved with the rulemaking the opportunity to review the Commission's interpretation of Act 129 and to provide feedback on that language. If the Commission proceeds with its current approach for promulgating this rulemaking, interested parties will not see meaningful regulatory language until the rulemaking is submitted in final-form.

If the Commission does not withdraw the proposed regulation as suggested, we suggest that an Advanced Notice of Final Rulemaking be developed and shared with the commentators. This would allow the interested parties to provide feedback on the language that may become a permanent regulation.

2. Determining whether the regulation is in the public interest.

Section 5.2 of RRA (71 P.S. § 745.5b) directs IRRC to determine whether a regulation is in the public interest. When making this determination, the Commission considers criteria such as economic or fiscal impact and reasonableness. The Commission also considers the information a promulgating agency is required to provide under §745.5(a) in the Regulatory Analysis Form (RAF).

The Commission has provided valuable information, such as the statutory and regulatory history of the Competition Act, Act 129 and the existing default service regulations in the Preamble to the proposed rulemaking. However, the Commission's responses to questions on the RAF are lacking and accordingly prevent IRRC from determining whether the regulation is in the public interest. For example, the RAF asks the following questions: "Describe who and how many people will be adversely affected by the regulation. How are they affected?" and "How does this regulation compare with those of other states?" The Commission answered the first question in the following manner: "No one should be adversely affected by the regulations" and did not respond to the second question. If the regulation is submitted in final-form, we ask the Commission to provide more detailed responses to all questions in the RAF, as required by § 745.5(a) of the RRA, and as provided by the Commission when the original default service regulations were promulgated several years ago.

3. Comments on Annex A of the proposed rulemaking. – Possible conflict or duplication of statutes or existing regulations; Reasonableness; Need; Clarity and lack of ambiguity.

If the Commission does not withdraw the proposal, we offer the following comments on the text of the rulemaking.

“Prevailing market prices” versus “least cost to customers over time”

As noted by the Commission in the Preamble to this proposal, “Act 129 explicitly repealed the prevailing market prices standard, and declared instead that the utilities’ generation service must be designed to ensure adequate and reliable service at the least cost to customers over time.” Some commentators have suggested that the phrase “prevailing market price” be replaced with the phrase “at the least cost to customers over time” throughout the entirety of the Commission’s default service regulations. Another commentator believes that replacing the prevailing market price standard with the least cost standard in every instance would not be appropriate. We ask the Commission to identify every section of its existing default service regulations that uses the phrase “prevailing market price” and explain why it decided to retain that phrase.

Section 54.184. Default service provider obligations.

We have two concerns with this section. First, a commentator has noted that the new language added to Subsection (a) does not acknowledge that other entities may be assigned to the default service provider role. The commentator is also concerned with new language that contemplates keeping the electric distribution company as the default service provider until 100 percent customer migration is reached. In the Preamble to the final-form regulation, we ask the Commission for a more detailed explanation of why this language was included in the rulemaking.

Second, to be consistent with 66 Pa.C.S.A §§ 2807(e)(3.1)(III)(A) and (B), the word “or” should be added at the end of Subsection (c)(3)(i).

Section 54.186. Default service procurement and implementation plans.

Subsection (e) pertains to the Commission’s evaluation of a default service provider’s procurement plan. A commentator believes that language should be added to Subsection (1) referencing the fact that the procurement process was competitive. They believe this language is needed to keep the procurement process open and transparent and consistent with the Competition Act. They raise a similar concern with § 54.188(d)(1). Has the Commission considered adding language to the rulemaking to reflect the fact that the procurement process must be competitive?

Section 54.187. Default service rate design and the recovery of reasonable costs.

We have four concerns with this section. First, to be consistent with 66 Pa.C.S.A § 2807 (e)(3.8), the word “or” should be included at the end of (a)(1).

Second, 66 Pa.C.S.A. § 2807(e)(3.9) states that a default service provider “shall” have the right to recover costs pursuant to a reconcilable automatic

adjustment clause. However, Subsection (b) states that costs “may” be recovered through those mechanisms. Commentators believe this change conflicts with the Competition Act. What is the reason for this deviation from the statutory language? We suggest that the final-form regulation be amended to be consistent with Competition Act.

Third, the proposed rulemaking amends Subsection (b) to incorporate the language of 66 Pa.C.S.A. § 2807(e)(3.9). A commentator has noted that some words appear to be missing before the phrase "all reasonable costs" in the first sentence. The missing words are, “on a full and current basis.” What is the reason for excluding these words from the rulemaking?

Fourth, Subsection (i) has been amended to state, in part, that “Default service rates shall be adjusted on a quarterly basis....” A commentator believes that this language should be amended to mirror 66 Pa.C.S.A. § 2807(e)(7) to state that “Default service rates shall be adjusted **no more frequently than** on a quarterly basis....” (Emphasis added). We agree with the commentator and suggest that the regulation be amended accordingly. The commentator has the same concern with § 54.188(f) of the existing regulation and suggests that a similar change be made to this section of the rulemaking.