

Comments of the Independent Regulatory Review Commission



Pennsylvania Public Utility Commission Regulation #57-288 (IRRC #2938)

Licensing Requirements for Natural Gas Suppliers

July 13, 2012

We submit for your consideration the following comments on the proposed rulemaking published in the April 14, 2012 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (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 (PUC) to respond to all comments received from us or any other source.

1. Information provided in the Regulatory Analysis Form and Preamble. – Need for the regulation; Economic impact; Compliance with the provisions of the Regulatory Review Act.

Under 71 P.S. § 745.5(a), an agency is required to submit a Regulatory Analysis Form (RAF) which includes information listed in that provision of the Regulatory Review Act (Act). The Act requires, in part, the following:

- A statement of the need for the regulation.
- Estimates of the direct and indirect costs to the Commonwealth, to its political subdivisions and to the private sector.
- An identification of the types of persons, businesses and organizations which would be affected by the regulation.

See 71 P.S. §§ 745.5(a)(3), (4) and (9).

As explained below, the PUC did not provide substantive information to support these requirements.

Need for the regulation

The RAF responses do not describe complaints, enforcement actions or direct problems that the amendments will address. Instead, there are questions surrounding some entities that have exceeded the regulatory requirements by voluntarily seeking licensure from the PUC. In particular, the response to RAF Question 10, relating to why the regulation is needed, includes the statement that “. . . the instant proposed rulemaking is to determine whether the exemption of these two groups from licensing requirements should continue or should be eliminated . . .” This

response indicates that the PUC itself has not yet resolved the fundamental question of whether the amendments are needed and in the public interest.

Identification of the affected regulated community and estimates of the direct and indirect costs imposed

The response to RAF Question 14 states that the number of entities which might lose their exemption is not known and that the PUC is seeking comments on the costs and savings to affected parties. We are concerned that the PUC has not convincingly identified the regulated community or the cost impact of the proposed amendments. Absent this fundamental information, we do not believe the proposed regulation complies with the Act.

Process to reach consensus and resolve concerns

Further, we are concerned that without the fundamental information needed to determine how to best amend the regulation, the PUC may impose unintended consequences on the competitive market. Based on the comments received, we believe that the PUC may need to add definitions to identify what activities require a license and what activities do not. Additional language may also be needed to accommodate the nature of those entities not addressed by the proposed amendments, which, for example, may be able to operate with lesser financial assurance than a typical large natural gas supplier (NGS).

For these reasons, we recommend that the PUC withdraw this regulation and conduct an investigation with stakeholders to determine who is using the current exemption, what the cost impact is to them and how to best regulate the competitive marketplace. After these determinations are made, the PUC can craft language to implement those findings and subsequently submit a new proposed regulation for review by the public, standing committees and IRRC.

If the PUC chooses to proceed with this rulemaking, we strongly recommend that the PUC provide convincing supporting information, as required by the Act and RAF, and carefully consider its responses to the following comments. Additionally, we strongly recommend that the PUC publish an advance notice of final rulemaking to allow the public and standing committees the opportunity to review the PUC's revised regulatory language before submittal of a final-form regulation.

2. Questions posed by the PUC in the proposed rulemaking. – Statutory authority; Need; Implementation procedures; Timetables for compliance.

Statutory authority

In its Preamble, the PUC solicited comments on the following questions:

1. Whether the exemption from NGS licensing of marketing services consultants and non-traditional marketers should be discontinued; and
2. Whether all natural gas aggregators, marketers and brokers should be required to be licensed as NGSs in order to offer natural gas supply services to retail customers.

In our determination of whether a regulation is in the public interest, IRRC is required to “. . . first and foremost, determine whether the agency has the statutory authority to promulgate the regulation and whether the regulation conforms to the intention of the General Assembly . . .” 71 P.S. § 745.5b(a). In regard to questions of whether or not to regulate certain entities, we will consider the PUC’s enabling statutory authority. There are three provisions in the statute that appear to be key to determining who must be licensed:

- **“Licensure requirements** – No entity shall engage in the business of a **natural gas supplier** unless it holds a license issued by the commission [PUC] . . .” 66 Pa. C.S. § 2208(a). (Emphasis added.)
 - “Natural Gas Supplier” (NGS) is defined in statute as “an entity . . . which provides **natural gas supply services** to retail gas customers . . .” 66 Pa. C.S. § 2202. (Emphasis added.)
 - “Natural gas supply services” are defined as:
 - (1) The term includes:
 - (i) the sale or arrangement of the sale of natural gas to retail gas customers . . .
- 66 Pa. C.S. § 2202.

It appears that any entity who engages in the “sale or arrangement of sale of natural gas to retail gas customers” must be licensed as an NGS by the PUC. We strongly recommend that the PUC explain its interpretation of its statutory authority in deciding which entities must be licensed, which entities do not need to be licensed and provide an explanation of how the final-form regulation meets the requirements of the Natural Gas Choice and Competition Act.

Determination of whether the amendments are in the public interest

In addition to the questions above, the Preamble also states that “we [PUC] are particularly interested in receiving comments on the costs that would be incurred, and any savings that might be realized, by affected parties as the result of these proposed amendments. Affected parties would include marketing service consultants, nontraditional marketers, NGSSs, NGDCs [Natural Gas Distribution Companies] and customers.” The Statement of PUC Commissioner Cawley posed four additional questions for public comment.

We encourage the exploration and resolution of all of these relevant issues. However, in regard to all of the questions posed in the proposed regulation and the information provided by the PUC, it is clear that the PUC itself has not yet resolved the fundamental question of whether the amendments are needed, their cost impact, who is affected and, ultimately, whether the amendments are in the public interest. Again, absent these fundamental determinations by the PUC, we believe it is premature to file a proposed regulation, and the result is that entities, including IRRC, are precluded from providing timely and effective review of new regulatory language within the context of this rulemaking.

3. Concerns raised by the public commentators. – Need; Economic impact; Adverse effects on competition; Protection of the public health, safety and welfare; Implementation procedures.

The public commentators provided input ranging from there is no need for amendments at this time to providing suggested changes in addition to the amendments proposed. The public comments include the following issues and positions:

- At this stage of market development it is appropriate to revisit the definitions of the parties involved in competition. A threat to the public interest should be proven with respect to each additional business model proposed to be subject to additional regulation or oversight.
- Relating to aggregators, brokers and marketers:
 - Prior to making a determination as to whether gas aggregators, brokers or marketers need to be licensed, the PUC should engage in a rulemaking process to develop definitions and a common understanding of the terms. Only then can a proper evaluation of the need for and extent of regulation and oversight for each of these entities be made.
 - An aggregator, broker or marketer should be licensed and held responsible for their marketing practices.
 - Lesser bonding requirements should be considered for an aggregator, broker or marketer so as not to create a barrier to these entities participating in the market.
- There is not a pressing need for revisions at this time because there is no identifiable problem with the existing regulation in the marketplace.
- There has been a proliferation of energy consultants in the marketplace that interject themselves between the consumer and NGS. These energy consultants may not have a sufficient degree of knowledge about energy choice, may not be disclosing their fees and may not have accountability for their analysis of the customer's energy needs. The NGS has no idea what an energy consultant represented to the customer.
- The PUC should be careful to not create an excessive administrative burden for itself with the licensing of the parties involved in competition.
- Several of the commentators believe the PUC should retain the exemption of nontraditional marketers.

We make two related observations based on the public comments. First, the specific proposed amendments and supporting information in the proposed regulation appear to be insufficient to provide guidance to the regulated community regarding who would or would not need to be licensed. Second, the PUC should thoroughly review and consider the appropriate regulation of all of the entities involved in competition. In regard to these observations, the statute needs to be considered in implementing the competition envisioned in the Natural Gas Choice and Competition Act.

The public comments demonstrate that there are many more issues to be considered than what is reflected in this proposed regulation. These issues need to be carefully resolved and crafted into regulatory language before the PUC files a proposed regulation.