INDEPENDENT REGULATORY REVIEW COMMISSION
PUBLIC MEETING MINUTES
10:00 A.M.
Thursday, March 10, 2016
14th Floor Conference Room
333 Market Street

I. CALL OF THE MEETING

The March 10, 2016 public meeting of the Independent Regulatory Review Commission (Commission) was called to order by Vice Chairman Bedwick at 10:00 a.m. in the 14th Floor Conference Room, 333 Market Street, Harrisburg, PA.

Commissioners Present:	George D. Bedwick, Vice Chairman W. Russell Faber Dennis A. Watson, Esq.
Telephone:	John F. Mizner, Esq., Chairman Murray Ufberg, Esq.

II. APPROVAL OF THE JANUARY 21, 2016 PUBLIC MEETING MINUTES

Vice Chairman Bedwick made the motion for approval of the January 21, 2016 public meeting minutes, as submitted. Commissioner Faber seconded, and the motion passed 5-0.

III. NEW BUSINESS

A. ACTION ITEMS

1. No. 3091 Board of Finance and Revenue #64-5: General Provisions; Tax and Other Appeal Proceedings

Scott Schalles, Regulatory Analyst, offered a brief explanation of the regulation and reported a joint comment was submitted last week from the Pennsylvania Chamber and Pennsylvania Institute of Certified Public Accountants (PICPA) in support. He said comments from two other parties have been submitted outlining concerns with the proposal; one from an attorney with Reed Smith practicing before the Board of Finance and Revenue (Board) concerning the language of requests for reconsideration, and one from the Department of Revenue (DOR), who was present to explain DOR's concerns. He also noted the Pennsylvania Bankers Association (PBA) submitted comments that were embargoed until the beginning of the meeting. He said the House and Senate standing committees have deemed the regulation approved.

Jacqueline Cook, Chairman, and Jennifer Langan, Deputy Chief Counsel, were present from the Board to answer any questions.

Chairman Cook explained Act 52 of 2013 (Act) in large part was a reaction to concerns from the regulated community over the independence of the Board. She said among other things the Act removed the DOR from voting membership on the Board and made them a party to the tax appeal process. Chairman Cook reported the Treasury Department has been preparing for the implementation of the Act and laying groundwork since 2013. She reported a working group has been meeting regularly and has conducted various outreach for the regulation, including issuing newsletters to hundreds of practitioners to garner input. Chairman Cook said the feedback was used in developing the proposed regulation, and remarked that coming to a consensus was a challenging but rewarding process. She said the Board serves a wide range of constituents and two and a half years of meaningful collaboration has resulted in striking an appropriate balance.

Commissioner Faber discussed one of the comments received from DOR regarding *Quest Diagnostics v. Commonwealth*. He asked whether the Board does not feel it is an issue because the statute does not preclude any other form of delivery, but rather provides one way for it to be accomplished. Chairman Cook confirmed this rationale and said the statute was written in 1929 before other forms of delivery existed.

Commissioner Faber cited another comment from DOR which he indicated had since been withdrawn, dealing with the issue of compromise requests and the related filing deadline. Chairman Cook clarified DOR did not necessarily withdraw the comment but rather recommended working together to reconcile the issue. She said the Board asked that compromises be communicated within 30 days of filing a petition with the Board, and said the Board allows compromises right up to the point of the hearing. Chairman Cook said notifications are needed to better inform the Board when compromises are indeed being negotiated. She added they are working on technological solutions to better show if a compromise is in progress.

Commission Faber asked the Board to address the comments submitted by the PBA. Chairman Cook stated their first comment was regarding the DOR not being required to submit comments or positions. She said the Board's language says they may present additional evidence. Chairman Cook explained the way the procedure works is an individual is assessed or files for a refund, which is then either approved or denied on appeal, at which point it goes to the Board. She said in some cases it may not be necessary for the DOR to issue another statement on their position on a matter, but if they do choose to provide additional information, regulations indicate both parties must have them within 60 days of petition filing unless extra time is requested and allowed. Chairman Cook said both parties are allowed to make points at a legal hearing. On that point, Chairman Cook suggested the concerns are covered under current practice.

To the PBA's second comment, Chairman Cook remarked if someone requests a compromise it will automatically extend to a second six months. In this case she said the Board is stating a request for compromise also counts as a request for a continuance as a way of covering against an expiration and resulting denial.

Commissioner Watson spoke to the compromise issue and questioned whether maintaining the original deadline would actually help the parties reach a settlement. Chairman Cook acknowledged that chance but said part of the purpose for the Act was to be more taxpayer-friendly and reduce appeals to Commonwealth Court. She added the Board feels strongly about favoring compromises when possible. Chairman Cook added she would like to see some mechanism in place for keeping the process moving too.

Commissioner Watson asked what happens if they are still working on settlement in the second six-month period. Chairman Cook said they are "very stingy" with extensions and will tell people they will decide a case on its merits if a compromise is not forthcoming by a given deadline.

With respect to comments regarding parsing out what is subject to a reconsideration motion, Commissioner Watson said in his experience a judge can be asked to reconsider anything, and questioned why the Board would want to limit that. Chairman Cook said the main component for parsing out is whether or not a taxpayer met their burden of proof. She said the Board, as the finder of facts, is tasked with determining that. Commissioner Watson said in his reading of the particular language it does not appear to him as though it will slow down motions for reconsideration, and remarked he thinks it is unclear as to what will or will not be listened to. He said he thinks practitioners will come up with arguments that a request falls within acceptable guidelines, and trying to restrict what can be appealed will in fact encourage appeals. Commissioner Watson said he is concerned about the clarity of the regulations, and questioned how practitioners will know the Board's position is binding. Chairman Cook said the Board does not publish denials of reconsideration, and if they do grant a reconsideration, they publish the associated order with its procedural history. She indicated part of the concern is that they are a small administrative Board with a lot of new duties, and serve as a second level of appeals following the Board of Appeals. Chairman Cook said arguments should be well hashed-out by the time they reach the Board. She acknowledged the regulatory language will not stop attorneys from requesting reconsiderations, but they are trying to limit when it is proper to do so.

Commissioner Watson asked how a practitioner will know the Board's position from its letter in reply to a particular submitted comment. Chairman Cook suggested they will add it to their website. Commissioner Watson reiterated his concern that people may not be familiar with it.

Vice Chairman Bedwick, acknowledging it would address perhaps only the procedural issues related to the problem and not anything substantive, suggested it might be helpful to provide on the specific form related to requesting a compromise a block for requesting an extension.

Vice Chairman Bedwick said it appears that in terms of the notification issue, the Board's position is that there was not a need to provide notice of what had been raised or used as evidence prior to the Board hearing, but the regulation does require notification for anything new provided regarding the appeal. Chairman Cook said the regulation requires new evidence to be submitted within 60 days. She confirmed all parties get that 60-day notice. Chairman Cook indicated both parties are already aware of evidence already submitted.

Vice Chairman Bedwick advised one of the issues raised by DOR is new and not properly before the Commission. He questioned whether it is something the Board is willing to work with the DOR on. Chairman Cook confirmed it is. Ms. Langan commented one of the problems relative to a hesitancy to change anything at this point is because they do not yet know the "lay of the land" with respect to an ongoing appeal to the Supreme Court. Vice Chairman Bedwick acknowledged that is often an issue.

Doug Berguson, Deputy Chief Counsel, DOR, confirmed they are not withdrawing their comments per se but said DOR would not recommend disapproval based on them. He said the Treasury Department has indicated a willingness to work on the issue. With regard to filings and the *Quest Diagnostics v. Commonwealth* decision issues, he said they do acknowledge the Commission's limitations. Mr. Berguson added staff from the various agencies have good working relationships. He acknowledged *Quest Diagnostics v. Commonwealth* is on appeal at the Supreme Court. Vice Chairman Bedwick reiterated that the issue is beyond the Commission's scope of review.

Mr. Berguson explained the Board was a "very informal process" originally, whose purpose was to accommodate and resolve issues without taxpayer expense. He said there are still rules to be followed but said not everyone is represented by an attorney and it is not a formal tax court.

Raymond Pepe, Counsel for PBA, commended the Board for putting together "an excellent rule." He noted there are at least two areas, however, where it needs improvement. First he related the issue of whether or not a taxpayer gets notice of arguments that DOR is going to make at a hearing. Mr. Pepe explained the way the process works and argued often the first time any detail surrounding DOR's position is provided is upon receipt of an order from the Board of Appeals. He said then an individual puts together an argument to reasons he may never have seen before. If expecting to set forth a position in detail, Mr. Pepe said there ought to be some advance notice of arguments that will be made.

With respect to offers of compromise and the six-month extension, Mr. Pepe said he believes it is important to have an expeditious reconciliation of tax issues. He said frequently assessments are not issued in two or three years. Mr. Pepe acknowledged it is a good thing to submit a compromise proposal and if any serious negotiation it is appropriate to extend the deadline, but remarked in his experience most of the time an offer of compromise is ignored. In those circumstances when there is no request for extension, it is a bad idea to drag out the process another six months, he said.

Commissioner Faber asked for clarification as to which level of appeal the issues with lack of information are presenting. Mr. Pepe said the notice of assessment will not usually give much detail, and the opportunity for a hearing before the Board of Appeals and only after that is over does a person find out exactly what the department's position may be, which can be rebutted in a petition to the Board. He said it is reasonable that a taxpayer should have notice of the arguments or any new evidence. Commissioner Faber questioned whether a person would be aware of the issues prior to the Board hearing. Mr. Pepe said it is only when the decision is

rendered by the Board of Appeals, before getting to the Board. Commissioner Faber said the issue is really with DOR and the Board of Appeals, and by the time the case reaches the Board a person is aware of the details. Mr. Pepe said DOR may still raise new arguments following the petition to the Board.

Commissioner Watson asked how long petitions to the Board may be. Mr. Pepe said practitioners vary a great deal in how they do petitions. He acknowledged some do not provide a lot of detail and prefer to "blow through the procedure." Mr. Pepe said in his practice he always takes the Board of Appeals and the Board seriously. Commissioner Watson asked how far in advance of a hearing is a petition filed. Mr. Pepe said that typically a hearing is held four and a half months after a filing petition.

Chairman Cook and Ms. Langan returned to answer further questions from the Commissioners.

Commissioner Faber asked if it is true that new issues can be raised at the Board that were not raised at the prior appeal. Chairman Cook explained they are an appellate Board so it cannot address issues that were not first raised at the Board of Appeals. She acknowledged new issues can be raised and will be heard, but they are not addressed. Chairman Cook remarked the Board takes the position that if such an issue is raised they will then preserve it for Commonwealth Court. She noted at a Board hearing both DOR and the taxpayer can make new arguments. Chairman Cook added no one submits written copies of comments. She addressed other issues brought up, and noted that in cases of appeals, at least half are refund questions initiated by a taxpayer. Chairman Cook also acknowledged it is a very long process overall and confirmed they schedule hearings generally four months following the petition filing. She said she does not think the regulation should be denied because the process is long over before it ever gets to the Board.

Commissioner Watson asked for clarification that facts are determined below the Board but either side can raise legal arguments at the Board level. Chairman Cook said the statute requires the Board to determine whether the Board of Appeals "got it right."

Commissioner Watson remarked the sense he gets is there is concern over possible "trial by ambush," and questioned whether proceedings work better if everyone was fully prepared before they walked in. Chairman Cook opined the current procedure works very well now. She emphasized the Board is very cognizant of the newness of the protocols and said if there's an unresolved issue they are interested in working together to reconcile them. Ms. Langan remarked a tremendous number of people who come before the Board are unrepresented, and they cannot say to them they cannot listen to issues they raise. She said they feel they have to hear all sides.

Commissioner Watson asked if there is any process in regulation whereby the appellate can ask DOR for additional explanation of their position. Chairman Cook said both parties, DOR and the taxpayer, may ask for a pre-hearing conference to discuss issues.

Commissioner Ufberg asked if it is right then that the opportunities are equivalent both for petitioners and for DOR in assessing points that had originally been raised. Chairman Cook confirmed it happens on both sides.

Commissioner Faber made a motion for approval. Commissioner Ufberg seconded.

Commissioner Watson explained why he was going to vote "no" and said despite the wide variety of people who may come before the Board, getting it right entitles everybody to know what the other is going to say in the hearing room. He said a summary should be possible to generate of the department's position in the four-month period leading up to a hearing. Commissioner Watson also expressed concern about both the compromise and reconsideration issues, and said the regulations could still be further fine-tuned.

Commissioner Bedwick explained he voted "yes" so something is in place and requested the Board works closely with commenters to resolve outstanding issues.

The motion passed 3-1, with Commissioner Watson dissenting and Chairman Mizner not voting.

2. No. 3052 Environmental Quality Board #7-485: Additional RACT Requirements for Major Sources of NOx and VOCs

James Smith, Regulatory Analyst, explained that the regulation adopts reasonably available control technology (RACT) requirements and emission limitations for certain major stationary sources of nitric oxide and nitrogen dioxide (NOx) and volatile organic compounds (VOC) emissions. He noted the regulation will be submitted to the Environmental Protection Agency (EPA) for approval following promulgation. Mr. Smith said there were 133 comments submitted on the proposed regulation, and one on final form from the Sierra Club. He said the House and Senate standing committees have deemed the regulation approved.

Joyce Epps, Director, Bureau of Air Quality, and Robert Reiley, Counsel, Bureau of Regulatory Counsel, Department of Environmental Protection (DEP), were present to answer any questions.

Ms. Epps said the regulation, mandated by the federal Clean Air Act, is required every time the EPA promulgates a new standard. She said it will impact 810 stationary sources and requires January 1, 2017, implementation. Ms. Epps addressed allegations that the rulemaking contains a loophole for the Brunner Island facility. She contended it does not, and said every facility subject to RACT must establish a RACT limit. Ms. Epps said what has become an issue is whether a facility that does not have selective catalytic reduction (SCR) controls installed should be required to do so to comply with RACT. She said that decision includes a technological and economic feasibility component. Ms. Epps said with respect to Brunner Island it is technologically feasible but not economically so, with a projected cost of $250 million. She said the facility has gotten approval to establish the ability to fire on natural gas, and when they elect to do so will have to comply with even more stringent limits.

Vice Chairman Bedwick asked what the repercussions are for not meeting the EPA deadlines. Ms. Epps said once there is a failure to submit finding issued by EPA, it triggers a mandatory sanctions clock under the Clean Air Act. The sanctions include a 2:1 emission offsets in nonattainment areas subject to requirements for major sources. If a new major source is to be installed, the owner operator would be required to offset emissions at a 2:1 ratio as opposed to 1.15:1. Six months later there would be a loss of federal highway funds. She said EPA reserves the right to reverse the order of sanctions and can also withhold certain grant funds.

Commissioner Ufberg noted a number of comments suggesting the regulation is too lax, and asked whether that is based on the situation Ms. Epps had described. She acknowledged the complaints pertain to Brunner Island, which she said is one of the few remaining coal-fired plants without SCR installed. Ms. Epps said she is not aware of any owner-operator that has installed SCR in order to comply with RACT. She emphasized the need to consider that when Brunner Island operates on natural gas, its restrictions will be even stricter.

Commissioner Watson asked for clarification on whether Brunner Island is definitely going to be gas-fired. Ms. Epps said it is currently installing pipelines to add the capability to burn natural gas. She indicated it will then have the option, and added they will see a reduction in emissions while it still burns coal too. Ms. Epps pointed out Brunner Island is not out of compliance currently, and said their cap applies and how they choose to meet it is a business decision.

Thomas Schuster, Attorney, Sierra Club, said the chief remaining concern is with the "de facto exemption" for Brunner Island. He said the other remaining conventional coal-fired plants in Pennsylvania have installed controls, and Brunner Island would be the only one without any. Mr. Schuster indicated that is problematic because no written analysis has been provided showing it would not be cost effective to add SCR. He said their study indicates adoption would be within EPA's cost effectiveness threshold.

Mr. Schuster said if there are concerns about cost efficacy, Brunner Island should be subject to a case-specific RACT determination which requires a higher level of scrutiny. He remarked DEP ignored that concern. Mr. Schuster added the Sierra Club believes Brunner Island can achieve appropriate emission levels for zero additional capital cost through the use of natural gas, and could operate on that most of the time. He added it is not an academic argument as Brunner Island is the largest stationary NOx source in southeastern Pennsylvania.

Vice Chairman Bedwick asked whether Mr. Schuster agrees or disagrees with Ms. Epp's statement that Brunner Island is currently not out of compliance. Mr. Schuster conceded he does not disagree with that statement, but added current standards are "extremely lax."

Ms. Epps acknowledged the "zealous efforts" of the Sierra Club but her office stands by its determination that SCR at Brunner Island would not be cost effective. She said she believes they made sure that a definitive position was reached and the regulation will achieve significant NOx reductions.

Mr. Reiley contended they did respond to comments made by the Sierra Club.

Vice Chairman Bedwick emphasized the Commission is not a policy-making body and whether or not to require Brunner Island to install SCR is beyond its scope.

Vice Chairman Bedwick made a motion for approval. Commissioner Faber seconded, and the motion passed 5-0.

3. No. 3087 Pennsylvania Public Utility Commission #57-308: Paper Billing Fees

Corinne Brandt, Regulatory Analyst, said the regulation prohibits tariff provisions that charge customers a fee to receive a paper bill. She said said no public comments were received on the final regulation and the House and Senate standing committees have deemed it approved.

Terrence Buda, Assistant Counsel, Public Utility Commission (PUC), was present to answer any questions.

Mr. Buda offered a statement in support of the regulation. He said it is narrowly focused on prohibiting public utilities from charging a fee for customers for receiving a paper bill. Mr. Buda called it a "common-sense rulemaking," and added that costs for publishing bills have already been recovered through rates and are considered ordinary operating costs. He suggested charging for them would result in an over-recovery on the part of a utility.

Commissioner Watson questioned whether some sort of credit for opting for paperless billing is a relevant issue upon which the PUC has a stance. Mr. Buda indicated that was not an issue surrounding the regulation, and said the PUC is in favor of electronic billing but does not believe customers should be charged for paper ones.

Vice Chairman Bedwick said he was interested in how Pennsylvania compares with neighboring states on the issue. Mr. Buda said there were no statutes or regulations applying the prohibition in those states. New Jersey essentially implemented a policy position that they were not accepting tariffs with that kind of charge. He said the state's consumer advocate took the position that customers should not be charged a fee for paper bills, and utilities have complied.

Vice Chairman Bedwick said he has been amused by several utilities posing the issue in such a way that it comes across that they are doing customers a favor by letting them have electronic billing.

Chairman Mizner made a motion for approval. Commissioner Watson seconded, and the motion passed 5-0.

IV. OTHER BUSINESS

Approval of Vouchers

Commissioner Faber made motions to approve vouchers and expenses for the period December 11, 2015 through January 21, 2016. Commissioner Watson seconded, and the motions passed 5-0.

V. DATE AND PLACE OF SUBSEQUENT MEETING

Vice Chairman Bedwick announced the next public meeting is scheduled for Thursday, March 31, 2016, at 10:00 a.m. in the 14th Floor Conference Room, 333 Market Street, Harrisburg.

VI. EXECUTIVE SESSION ANNOUNCEMENTS

Vice Chairman Bedwick announced that no executive session would be held.

VII. ADJOURNMENT

Vice Chairman Bedwick announced the meeting adjourned at 11:32 a.m.