

COMMONWEALTH OF PENNSYLVANIA



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September 9, 2010

Rosemary Chiavetta
Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

RE: Natural Gas Distribution Companies and the
Promotion of Competitive Retail Markets
Docket No. L-2008-2069114

Dear Secretary Chiavetta:

Enclosed for filing are the Comments of the Office of Consumer Advocate, in the above-referenced proceeding.

Should you have any questions, please contact me at the number above.

Respectfully Submitted,

A handwritten signature in cursive script, appearing to read "James A. Mullins".

James A. Mullins
Assistant Consumer Advocate
PA Attorney I.D. # 77066

Enclosures

cc: David E. Screven, Law Bureau
Richard Wallace, Bureau of Audits

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Natural Gas Distribution Companies :
and the Promotion of Competitive : Docket No. L-2008-2069114
Retail Markets :

COMMENTS OF THE
OFFICE OF CONSUMER ADVOCATE

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Dated: September 9, 2010

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	COMMENTS BY INDIVIDUAL SECTION	5
A.	Section 62.223: Price to Compare (PTC).....	5
1.	Introduction	5
2.	The Commission’s Proposal To Move All Natural Gas Procurement Costs To The GPC As Part Of The Price to Compare Is Improper. (Proposed Sections 62.223(A), (B))	6
3.	Merchant Function Charge	11
B.	Section 62.224-Purchase of Receivables.....	14
1.	Introduction	14
2.	Some Clarifications To The Proposed Regulations Are Needed To Ensure Adequate Consumer Protections	15
3.	The OCA Does Not Agree With The Commission’s Analysis As To Its Legal Authority To Mandate Implementation Of A POR Program	19
4.	The Commission Should Not Mandate A Transition To The Program Design Contained In The Proposed Regulations At This Time	21
5.	Conclusion.....	23
C.	Section 62.225: Release, assignment or transfer of capacity	23
D.	Alternatives to Improve Information To Customers To Assist In Making A Choice Such As Presented By Vice Chairman Christy Should Be Considered	24
III.	CONCLUSION	27

I. INTRODUCTION

On March 27, 2009, the Pennsylvania Public Utility Commission (PUC or Commission) entered a Proposed Rulemaking Order (Proposed Rulemaking Order or March 27, 2009 Order) to initiate a rulemaking proceeding to adopt regulations “governing the relationships between Natural Gas Distribution Companies (NGDCs) and the Natural Gas Suppliers (NGSs) which sell, or seek to sell, natural gas to end users on the NGDC distribution systems.” Proposed Rulemaking Order, Docket No. L-2008-2069114 (Order Entered on March 27, 2009). The Commission initiated the rulemaking in response to a Commission Final Order and Action Plan which identified certain steps that the Commission should consider taking in order to help promote the development of competition in the retail markets for natural gas supply in the Commonwealth. See, Investigation into the Natural Gas Supply Market; Report on Stakeholders’ Working Group (SEARCH); Action Plan for Increasing Effective Competition in Pennsylvania’s Retail Natural Gas Supply Services Market, Docket No. I-00040103F0002 (Final Order and Action Plan Entered on September 11, 2008) (SEARCH Order). The SEARCH Order identified three areas that the Commission believed were appropriate for commencing rulemakings to adopt regulations consistent with the goal of nurturing a robust retail market for natural gas. Those three areas are: 1) NGDC issues, 2) NGS issues and 3) business practice issues. See SEARCH Order at 7. The March 27, 2009 Rulemaking Order addressed the first of those three areas--NGDCs and their relation to the retail supply market. As such, the Rulemaking Order addressed five issues relating to NGDCs and their relation to the retail supply market: 1) Reformulation of the Price to Compare, 2) Purchase of Receivables, 3) Mandatory Capacity Assignment, 4) NGDC Costs of Competition Related Activities, and 5) Regulatory

Assessments. Specifically, the Commission proposed to add several sections to Chapter 62 (entitled “Natural Gas Supplier Choice”) of Title 52 of its regulations.

The OCA and various other commenters submitted Comments to the March 27, 2009 Order on August 25, 2009. In its Comments, the OCA urged great caution in proceeding to initiate efforts to remove perceived barriers to competition, particularly efforts that will come at the expense of rate stability for customers; at the expense of appropriate ratemaking principles; and at the expense of necessary consumer protections. After consideration of the Comments of the commenters, the Commission issued an Advance Notice of Final Rulemaking Order in this proceeding on August 10, 2010 (Advance Rulemaking Order). This Advance Rulemaking Order revises specific proposals that were included in the March 27, 2009 Order. In his accompanying Statement to the Advance Rulemaking Order, Vice-Chairman Tyrone J. Christy identified the most significant changes:

The proposed Final Rulemaking Order before us today is significantly different from the March 27 Order. Among the more significant changes to the March 27 Order are the following:

1. Elimination of the gas procurement reduction rate.
2. Inclusion of an NGDC's total natural gas procurement costs in the gas procurement charge (GPC).
3. The inclusion of a Merchant Function Charge (MFC) to be included within the Price to Compare (PTC).
4. Adjustment of the PTC quarterly instead of monthly.
5. Elimination of the net gas procurement adjustment.
6. A requirement that each NGDC file a tariff supplement under 66 Pa. C.S. § 1308(a) to identify the natural gas procurement costs included in base rates, to remove those costs from base rates and to recover those costs under 66 Pa. C.S. § 1307.
7. The addition of a detailed definition of natural gas procurement costs.
8. A requirement that NGSs use consolidated billing from the NGDC to qualify for a Purchase of Receivables (POR) program, except in two certain instances.
9. Changes to how the POR discount factor is to be determined.
10. Making capacity release to NGSs mandatory.

11. Elimination of the NGDC surcharge to collect the costs of implementing and promoting competition.
12. Elimination of the NGDC surcharge to collect regulatory assessments.

Natural Gas Distribution Companies and the Promotion of Competitive Markets, Docket No. L-2008-2069114 (August 10, 2010 Statement of Vice Chairman Tyrone J. Christy). Vice-Chairman Christy continued:

While many of the changes may reflect an improvement to the regulations as originally proposed, overall I have significant concerns that the regulations as drafted could result in increased costs to non-shopping customers of NGDCs, as well as cost shifting among customers that shop and those that decide to stay with the local NGDC.

Id. The OCA agrees with Vice-Chairman Christy that many of these changes reflect an improvement to the regulations as originally proposed. Specifically: 1) the elimination of the gas procurement reduction rate, 2) the elimination of the proposed adjustment of the PTC monthly instead of quarterly, 3) the elimination of the net gas procurement adjustment, 4) the addition of a requirement that NGSs use consolidated billing from the NGDC to qualify for a Purchase of Receivables (POR) program, except in two certain instances, 5) changes to how the POR discount factor is to be determined, 6) the elimination of the NGDC surcharge to collect the costs of implementing and promoting competition, and 7) the elimination of the NGDC surcharge to collect regulatory assessments. The OCA also agrees with Vice-Chairman Christy that significant concerns remain. In particular, the OCA is concerned with the proposed Gas Procurement Charge (GPC) and its implementation. The Commission's proposal regarding the GPC will result in increased costs for non-shopping customers due to their subsidization of those customers that shop.

While the OCA continues to acknowledge that retail choice in the natural gas industry has been slow to develop, the worst result would be to take a path that is designed to

encourage greater customer switching by either increasing the price or degrading the reliability of the natural gas service that is currently provided to the vast majority of residential customers by their regulated natural gas distribution companies.

In his Statement accompanying the August 10, 2010 Order, Vice Chairman Christy also expressed this concern as he stated: “[O]verall I have significant concerns that the regulations as drafted could result in increased costs to non-shopping customers of NGDCs, as well as cost shifting among customers that shop and those that decide to stay with the local NGDC.” Natural Gas Distribution Companies and the Promotion of Competitive Markets, Docket No. L-2008-2069114 (August 10, 2010 Statement of Vice Chairman Tyrone J. Christy).

As the Commission considers these proposed regulations, the OCA is particularly concerned with proposed regulations that will make supplier of last resort service volatile and confusing, that will degrade essential consumer protections, or that will increase costs to consumers. The OCA’s Comments will particularly focus on issues regarding the GPC. The OCA submits that the unbundling of gas procurement costs (presently contained in base rates) and inclusion of those costs in the GPC as proposed in these regulations will increase costs to consumers and will likely lead to the subsidization of shopping customers by non-shopping customers. The OCA recommends modifications to the GPC in Proposed Section 62.223 to eliminate these impacts. As to the proposed regulation regarding Purchase of Receivables (POR), the OCA submits that while the proposal includes many important elements of a properly designed POR program, additional clarification of certain consumer protections is needed in the Commission’s proposed regulations. The OCA includes proposed modifications to Proposed Section 62.224 to ensure appropriate consumer protections are included in the POR program design.

II. COMMENTS BY INDIVIDUAL SECTION

A. Section 62.223: Price to Compare (PTC).

1. Introduction.

In Section 62.223, the Commission continues its proposal to significantly modify both distribution base rates and purchased gas cost rates to create a Price to Compare (PTC) that customers can use when reviewing competitive offers from natural gas suppliers (NGSs). Rather than having a NGDC's PTC reflect the gas cost rate determined in a NGDC's annual Section 1307(f) proceeding (including reconciliations for any over-collections and under-collections) as it does now, the Commission proposes that two other components be included in the PTC: a Gas Procurement Charge (GPC) and a Merchant Function Charge (MFC). As proposed by the Commission, the GPC will be "an element of the PTC, expressed on a per Mcf or Dth basis, that reflects the NGDC's total natural gas procurement costs" while the MFC will be "an element of the PTC, expressed on a per Mcf or Dth basis, that reflects the cost of uncollectibles associated with the NGDC's gas costs".

Under the Commission's proposal, within 60 days of its final regulation, NGDCs will file tariff revisions that will identify and remove, from delivery rates, the Company's natural gas procurement costs. The NGDC will then include and recover those same costs through the GPC on a per Mcf or Dth basis. The removal of the gas procurement costs is to be done on a revenue-neutral basis, meaning that there is to be a concomitant reduction in delivery rates. The Commission states that these total natural gas procurement costs shall not be subject to reconciliation, yet the NGDC may file an "updated" rate, with its quarterly gas cost rate adjustments, to ensure that the rate continues to reflect and recover the NGDC's gas procurement costs.

In addition to the GPC component, the Commission proposes that the PTC also include a MFC. The Commission proposes that each NGDC file a MFC rider which removes the cost of uncollectible expense applicable to current gas cost rates from its delivery rates (expressed as a ratio) and recover these uncollectible expenses through the MFC. The Commission states that this is to be done on a revenue-neutral basis by using the same write-off ratio to adjust delivery rates and purchased gas cost rates. The MFC rider is to be adjusted with each quarterly adjustment in purchased gas cost rates by applying the write-off ratio to the new PGC rates.

The OCA respectfully submits that the Commission's proposal to reformulate the price to compare to include a GPC as proposed by the Commission is flawed in several respects. Most importantly, the inclusion of *all* gas procurement costs, rather than just *avoidable* gas procurement costs in a bypassable surcharge results in non-shopping customers subsidizing shopping customers. As explained below, the Commission's proposal should not be implemented. In addition, while the OCA does not object to the use of a MFC, some implementation issues remain.

2. The Commission's Proposal To Move All Natural Gas Procurement Costs To The GPC As Part Of The Price To Compare Is Improper. (Proposed Sections 62.223(A), (B)).

In Proposed Sections 62.223(A) and (B), the Commission proposes to mandate that NGDCs file, within 60 days of the final regulation, tariff revisions that will identify and remove from delivery rates the Company's natural gas procurement costs. These costs will be included in the GPC and will be part of the NGDC's PTC or commodity rate on a per Mcf or Dth basis. Although the Commission states that these costs will not be subject to reconciliation, NGDCs will be allowed to "update" these rates with its quarterly gas cost rate adjustments to

ensure that the GPC rate continues to reflect and recover the Company's gas procurement costs.

These costs will include:

- natural gas supply management costs, including natural gas supply bidding, contracting, hedging, credit, risk management costs, any scheduling and forecasting services provided exclusively for SOLR service by the NGDC, and applicable administrative and general expenses related to those activities.
- administrative costs, including education, regulatory, litigation, tariff filings, working capital, information system and associated administrative and general expenses related exclusively to SOLR service.
- applicable taxes, excluding sales tax.

As part of the PTC, these costs will be bypassable, that is, they will be paid **only** by non-shopping customers.

The OCA submits that the proposal to create a GPC that includes all procurement related costs that are included in distribution rates suffers from two key flaws. First, if the GPC component is bypassable as the Commission proposes, then only the *avoidable* costs associated with procurement activity should be included in these costs. It is only avoidable costs of procurement that are "bypassed" or not incurred when a customer shops. The second flaw is that, whether the GPC component contains only avoidable costs or the total cost of procurement activity, allowing the NGDC to "update" this component in between base rate cases to ensure recovery treats these expenses as single-issue ratemaking. These costs are not volatile expenses that are outside of the control of the NGDC. Additionally, the "updating" process disrupts the revenue neutrality the Commission tries to establish.

The Commission proposal to include all procurement related costs in the GPC, rather than just avoidable costs, will result in non-shopping customers subsidizing the Company's entire procurement function that exists to benefit all customers. The NGDC retains the supplier of last resort obligation whether there are 50,000 customers or 500,000 customers on

its system. The supplier of last resort function exists for all customers, shopping and non-shopping alike. Customers shop for alternative supply with the understanding that if their supplier fails to deliver or goes out of business, the NGDC will meet all of their needs as the supplier of last resort. It is critical to note that when a customer shops, the NGDC does not avoid many of these procurement costs nor does the NGDC avoid the responsibility to serve the customers. It is not at all clear that if a company has 500,000 customers and 100,000 of those customers shop, the procurement costs go down by 20%. The procurement costs and obligations continue and may decline only slightly, if at all, when some customers shop.¹

Arguably, the NGDC can avoid some of its procurement costs as customers shop for alternative supply. But, it is only these *avoidable* procurement costs that would be appropriate for inclusion in a bypassable GPC. To include more than these avoidable procurement costs in a bypassable mechanism requires non-shopping customers to support and subsidize the essential procurement function and the responsibility of the NGDC that exists for the benefit of all customers. Vice Chairman Christy raised this point in his March 26, 2009 Statement accompanying the Proposed Rulemaking Order:

Also, if these costs are not avoidable and are included in the Price to Compare, then they may not be recovered by the NGDCs, potentially resulting in stranded costs. Under this scenario, consumers of the NGDCs who choose not to shop will be paying higher costs to support those customers who do choose to shop.

Natural Gas Distribution Companies and the Promotion of Competitive Markets, Docket No. L-2008-2069114 (March 26, 2009 Statement of Vice Chairman Tyrone J. Christy). Vice

¹ The Commission also states that, if a NGDC's SOLR function decreases to such an extent that its gas procurement costs recovered through SOLR rates are not adequate to support its residual gas procurement role, such a situation can be addressed by future rate changes or designation of an alternative SOLR supplier under the provisions of Section 2207(a)(1) of the Pennsylvania Public Utility Code. The OCA submits that neither of these solutions is feasible, however. A declining customer base should not be forced to bear an ever-increasing percentage of unavoidable costs until the costs become so high as to be unsustainable by the utility. Moreover, the suggestion that an alternative supplier is possible raises many issues and concerns that are far beyond this rulemaking endeavor.

Chairman Christy's Statement then is equally applicable at present. The OCA submits that attempting to achieve customer switching in a manner that results in higher costs to certain customers to subsidize essential functions for all customers is improper. Just as non-shopping customers pay for consumer choice education – even if they never shop – so too should shopping customers pay for the unavoidable costs of the SOLR function.

The OCA's second concern with the Commission's proposal relates to the proposal to "update" procurement costs on a quarterly basis. While the Commission has removed the reconciliation component in this revised version of the regulations, it has included the ability to "update" the GPC on a quarterly basis. The OCA interprets "update" to mean that the NGDC can change the level of expense prospectively to reflect actual expense or change the rate because sales have increased or decreased. These are adjustments that do not occur with base rate recovery between rate cases. If these costs are intended to reflect an item of base rate expense, then it is improper single issue ratemaking to allow such an expense item to be "updated" via a quarterly adjustment. This is particularly the case when such expense is not volatile or outside of the control of the utility. Clearly, the procurement expenses for NGDCs do not meet the necessary criteria for such special ratemaking treatment. These procurement costs are routine business expenses that NGDCs have incurred for decades. Most NGDCs purchasing departments are well-established, have little volatility in cost, and are within the control of the NGDC. The updating procedure treats these costs as a single item of expense different from all other base rate expense items cannot be justified. Additionally, by allowing the expense or rate to be "updated" on a quarterly basis, the recovery of these expenses through the GPC will not be revenue-neutral as the Commission suggests. At the first quarterly update, the revenue neutrality between delivery rates and the GPC will be disrupted.

The OCA submits, however, that there may be a means to achieve the Commission's intent. The OCA recommends that the GPC could be structured as a bypassable surcharge that includes only *avoidable* procurement costs. The GPC would not be updated or reconciled in any manner between base rate cases. By including only the avoidable cost, the bypassable structure is appropriate since only bypassable, or avoidable, costs are included in the surcharge. By making these avoidable costs truly non-reconcilable and removing the "updating" feature, the procurement costs are treated the same as recovery of such costs in base rates for a customer that does not shop but are avoided by the customer who does shop.

Given the complications introduced by the Commission's proposal, the OCA recommends that, rather than proceed with the GPC component as proposed by the Commission, each NGDC should be instructed to identify its avoidable procurement costs in its next distribution base rate case and unbundle those costs from its distribution rates. The avoidable procurement costs should then be recovered through a bypassable, non-reconcilable, non-updating GPC component as set forth by the OCA. The OCA proposes the following modifications to Proposed Section 62.223 to implement this approach.

In particular, the word "avoidable" should be inserted throughout Proposed Section 62.223, so that the provision reads as follows:

(b) An NGDC shall file a tariff change under 66 Pa. C.S. § 1308(a) to identify the avoidable natural gas procurement costs included in base rates and shall propose tariff revisions designed to remove those avoidable costs from base rates and to recover, on a revenue neutral basis, those annual costs under 66 Pa. C.S. §1307 (relating to sliding scale of rates; adjustments). Avoidable natural gas procurement costs shall include the following elements.

Additionally, in order to maintain conformity, the definition of the GPC under proposed Section 62.22 should be as follows:

GPC—Gas Procurement Charge--A mechanism by which the effect of avoidable natural gas procurement costs removed from an NGDC's base rates are recovered.

The OCA submits that these modifications are vital to ensure that non-shopping customers are not harmed.

Further, the Commission's proposal that all NGDCs file, within 60 days of the final regulation, tariff revisions that will identify and remove, from delivery rates, the Company's natural gas procurement costs will be difficult to achieve. Each of these filings will require careful analysis by many interested parties. Therefore, each NGDC would need ample time to initially file comprehensive tariff revisions and the parties will need adequate time for review. Statutory parties, such as the OCA, will have to review each of these filings. Requiring all NGDCs to file such tariff provisions at the same time would further exacerbate the inability of interested parties to carefully analyze each of these filings. As such, the OCA submits that this provision should not be adopted.

3. Merchant Function Charge.

In addition to the GPC component of the PTC, the Commission proposes that the PTC also include a Merchant Function Charge (MFC). The MFC is intended to reflect the cost of uncollectible expense associated with the NGDC's gas costs and the Commission proposes that each NGDC file a MFC rider which removes the cost of uncollectible expense applicable to current gas cost rates from its delivery rates and recovers the uncollectible expense through the MFC. This is to be accomplished by establishing a write-off ratio that is applied to the delivery rate and the then-current PGC rate on a revenue neutral basis under 66 Pa. C.S. § 1307 (relating to sliding scale of rates; adjustments). The Commission proposes that the write-off factor shall be determined by dividing the retail uncollectible expense by retail revenues and that the factor

applied to current applicable purchased gas cost rates shall be the implementation MFC amount to be removed from delivery rates. Further, after implementation, unbundled delivery charges may not be adjusted for the write-off factor outside of a base rate case but the MFC shall be updated quarterly to reflect new purchased gas cost rates effective with each applicable 1307(f) filing. As explained below, while the Commission states that its proposal is revenue neutral, the Commission should recognize that its proposal is not revenue neutral over time. Further, as set forth by Vice Chairman Christy, it must be established that the Commission's proposal is not contrary to Section 1408 of the Pennsylvania Public Utility Code.

With respect to the Commission's proposal, the OCA is operating under the assumption that the write-off factor (determined by dividing the retail uncollectible expense by retail revenues) will be expressed as a percentage and that this percentage will not change until the next distribution base rate case. After this percentage is determined, it will then be applied to current purchased gas cost (PGC) rates to arrive at a dollar amount that will be removed from delivery rates and added to the MFC rate. At the time the uncollectible expense is removed from delivery rates and added to the MFC rate, the OCA agrees that there will be a revenue neutral change. However, after this initial transaction, with the first quarterly adjustment of the PGC rate, this revenue neutrality will end. For example, when a new purchased gas cost rate becomes effective and the write-off factor, e.g., the percentage, is applied, the resulting dollar amount will be different (either higher or lower) than the dollar amount that was removed from delivery rates. In other words, the uncollectible expense amount collected through the MFC component of the PTC will increase or decrease as the purchased gas cost rates increase or decrease. The initial delivery rate reduction, however, will remain the same until the NGDC's next base rate case. Consequently, the transaction will no longer be revenue-neutral. This approach is contrary to

what would occur in a base rate setting process where the level of uncollectible expense does not change between base rate cases regardless of other changes in costs or rates.²

While the OCA does not object to the MFC as proposed, the OCA submits that Vice-Chairman Christy raises a critical point. Vice-Chairman Christy requested that the Commission's proposal be considered in light of the language in Section 1408 of the Pennsylvania Public Utility Code. This Section reads as follows:

§ 1408. Surcharges for uncollectible expenses prohibited

The commission shall not grant or order for any public utility a cash receipts reconciliation clause or another automatic surcharge mechanism for uncollectible expenses. Any orders by the commission entered after the effective date of this chapter for a cash receipts reconciliation clause or other automatic surcharge for uncollectible expenses shall be null and void. This section shall not affect any clause associated with universal service and energy conservation.

See, 66 Pa. C.S. §1408 (*emphasis added*). As described, the uncollectible expense included in the MFC will automatically adjust on a quarterly basis in conjunction with changes in the purchased gas cost rates. While the uncollectible expense amount collected through the MFC is not reconciled to actual uncollectible expense, moving the expense collection to a surcharge that changes quarterly does provide different rate treatment to the uncollectible expense than afforded in a base rate case. As an alternative, to replicate base rate treatment for this uncollectible expense, the NGDC could determine the dollar amount of uncollectible expense associated with purchased gas costs, convert that dollar amount to a per Mcf or Dth rate (based on the sales forecast used to establish base rates) and then charge that rate as the MFC until the next base rate case where the value is reset.

² If the Commission seeks to achieve revenue neutrality over time, each quarterly change in the amount of uncollectible expense recovered through the MFC would have to be correspondingly reflected in an adjustment to the delivery rate.

B. Section 62.224-Purchase of Receivables.

1. Introduction.

In its Proposed Rulemaking Order, the Commission determined that it would establish rules for Purchase of Receivables Programs (POR) since such programs can promote efficiencies, reduce costs to consumers and reduce barriers to entry. Proposed Rulemaking Order at 5-6. In the Proposed Rulemaking Order, the Commission set forth certain rules for POR programs that are implemented by NGDCs. The OCA filed comments to the Commission's proposal. As set forth in those comments, the OCA does not object to POR programs, but such programs should be voluntary on the part of the NGDC and should provide necessary consumer protections. OCA Comments of August 25, 2009 at 17-26. The OCA set forth in its Comments its recommended elements of a properly structured POR program. OCA Comments of August 25, 2009 at 18-19.

In the Advance Rulemaking Order, the Commission addressed the Comments of the Independent Regulatory Review Commission (IRRC) and the parties regarding the proposed regulations and also addressed the Commission's authority with regard to mandating POR programs. In resolving the issues raised by the OCA, the Commission did not adopt the OCA's proposal regarding limitations on an NGDC's ability to terminate for unregulated natural gas supplier (NGS) charges that exceeded the NGDC charges. The Commission found that a POR program that allows for termination based on non-payment of NGS charges even if they exceed the NGDC charges will reduce overall uncollectible expense and lower competitive supply offers. Advance Rulemaking Order at 27. The Commission also addressed other consumer protections recommended by the OCA for POR programs and adopted many of the recommended protections. While the OCA continues to prefer a POR program design that limits

termination for non-payment of unregulated charges that exceed the NGDC charges, the OCA submits that the proposed regulations provide a path forward for the development of POR programs by NGDCs in Pennsylvania that provide consumer protections necessary to the model adopted by the regulations.

The OCA will recommend in these Comments some minor clarifications to the proposed regulations to better ensure that the intended consumer protections are fully captured in the regulations. The OCA will also address Vice Chairman Christy's question regarding the authority of the Commission to mandate the implementation of a POR program by an NGDC. The OCA submits that the Commission does not have the authority to mandate POR programs, but agrees with the Commission that it should continue its policy of encouraging the implementation of voluntary POR programs. The Commission's policy has been successful and has resulted in cooperation among the stakeholders in the development of POR programs that meet all stakeholders' needs.

Finally, the OCA will also address the Commission's requirement that all NGDC POR programs be transitioned to the design contained in the regulations within 24 months or at the end of the POR program effective date. The OCA submits that it is premature to require such a transition as several POR programs are being undertaken by NGDCs at this time which will provide valuable information regarding the most effective program designs. Mandating a transition to a different program design could be costly and disruptive of a successful program.

2. Some Clarifications To The Proposed Regulations Are Needed To Ensure Adequate Consumer Protections.

In its Comments to the Proposed Rulemaking, the OCA provided the recommended elements of a POR program and identified the Commission's proposed regulation

where such element or consumer protection was provided or noted where it was not provided. OCA Comments of August 25, 2009 at 18-19. In the Advanced Rulemaking Order, the Commission addressed the Comments of the parties on the necessary elements of a POR program and made modifications to its proposals to reflect the need for additional consumer protections. The OCA welcomes the Commission's modifications, finding that the proposed regulations now include many of the proposed protections that the OCA sought in its Comments as well as other protections that are essential to a properly designed POR program.

Specifically, the OCA would note the following critical items included in the Commission's Advanced Rulemaking:

- The NGDC is only permitted to purchase receivables for basic supply service and no other product or service. The NGS must certify that the charges do not include any other products or service. **(Proposed Section 62.224(a)(2))**
- The NGDC should purchase the receivables at a reasonable discount that allows for the recovery of the initial, and on-going, incremental operating and administrative costs associated with the program. **(Proposed Section 62.224(a)(3))**
- The NGDC should purchase the receivables at a discount that allows for the recovery of the incremental NGS uncollectible expenses associated with the program. **(Proposed Sections 62.224(a)(3) and 62.224(a)(9))**
- The NGDC is required to conduct its normal collection activities for NGS customers, including termination of service for nonpayment pursuant to Chapter 14 of the Public Utility Code and Chapter 56 of the Commission regulations for the basic natural gas supply service charges only. **(Proposed Section 62.224(b)(1), (2), (3), and (4))**
- As a condition of the program, the NGS is required to agree not to reject a new customer based on credit-related issues. As a result, the NGS is not permitted to seek a separate security deposit. **(Advance Rulemaking Order at pg. 25 but not reflected in the regulations)**
- The NGDC is not permitted to recover retroactively from distribution ratepayers any difference between the discounts applied to NGS receivables and uncollected

amounts resulting from the purchase of these receivables. **(Proposed Section 62.224(a)(9), Advance Rulemaking Order at pg. 26)**

- The NGDC must agree to inform all customers affected by this policy change by separate bill insert that specifically describes this change in policy for termination of service. **(Proposed Section 62.224(b)(5))**
- The enrollment letter issued by the NGDC must be changed to inform customers of this change in policy at the time of selection of the NGS. **(Proposed Section 62.224(b)(6))**
- NGSs participating in the POR program must use NGDC consolidated billing and must include all accounts receivable related to basic gas supply service in the POR program, subject to certain limited exceptions where the NGDC cannot accommodate the rate structure. **(Proposed Section 62.224(a)(2)(I)).**

The OCA submits that the protections itemized above, and additional protections included in the Commission's proposed regulations are essential protections for a POR program.

The OCA has two suggested clarifications or modifications to the Commission's revised regulations. First, in Section 62.224(a)(2), the Commission correctly limits the POR program and termination of essential natural gas service to NGS charges for "natural gas supply" or "basic supply" service. The Commission, however, uses both terms and does not provide a complete definition of either term in regard to these charges. The OCA recommends that the Commission use the term "basic natural gas supply service charges" throughout Section 62.224 and that it provide a definition of basic natural gas supply service charges so that it is clear what is included in the POR program. The OCA offers the following recommended definition:

Basic Natural Gas Supply Service Charges--Charges directly related to the physical delivery of natural gas to a retail customer. Basic natural gas supply service charges shall not include charges for such things as "carbon-neutral" products, appliance maintenance service, energy efficiency services, termination or cancellation fees, security deposits or other products or services not directly related to the physical delivery of natural gas to a retail customer.

A clear definition of what is and is not included in basic natural gas supply service charge will avoid any unnecessary confusion as the POR programs proceed. The OCA would note that this definition, or a similar definition, is in use in the current NGDC POR programs that allow for the termination of natural gas supply service for unpaid NGS charges.

Second, as noted above, the Commission did mention one consumer protection in the Advance Rulemaking Order on page 25 that seems to have been inadvertently left out of the revisions. This protection relates to the requirement that an NGS participating in a POR program accept all customers without using a credit check or requiring an additional security deposit. The Commission specifically stated this requirement in its Order as follows:

Thus, in our final regulations, we will direct that an NGS must include all of its accounts receivable related to commodity sales in the POR program, to deter any “cherry picking” of best accounts for itself and worst account to the POR program. Also, an NGS will be required to accept all customers without using a credit check or requiring an additional security deposit.

Advance Rulemaking Order at 25. The requirement to accept all customers without using a credit check or requiring an additional security deposit does not appear in the proposed regulations, however. The OCA requests that the Commission specifically include this requirement in the final regulations. The OCA recommends that an additional section, Section 62.224(a)(10) be added that would read:

(a)(10) An NGS participating in an NGDC’s POR program must accept all customers responding to an offer included in the POR program without performing a credit check and without requiring an additional security deposit from the customer.

This additional provision will make clear the obligation of the NGS to customers responding to offers that are included in the POR program.

While the OCA continues to have reservations about POR programs that allow termination of essential utility service for unregulated charges that exceed what a customer would pay for supplier of last resort service, if such POR programs are to move forward, it is critical that other essential consumer protections be included in the program design. The revised regulations, with the two modifications proposed in these Comments, provide a sound framework for these consumer protections.

3. The OCA Does Not Agree With The Commission's Analysis As To Its Legal Authority To Mandate Implementation Of A POR Program.

In the Advanced rulemaking Order, the Commission finds that it has the authority to direct an NGDC to implement a POR program. Advance Rulemaking Order at 28-30. This finding is contrary to the Commission's prior holding that it lacked the authority to mandate the implementation of POR programs based on identical language in Section 2807(c)(3) concerning electric distribution companies. *Petition of PPL Utilities Corporation Requesting Approval of a Voluntary Purchase of Receivables Program*, Docket P-2009-2129502 (Order entered November 19, 2009). This question involves the interpretation of Section 2205(c)(5) of the Public Utility Code. In his Statement accompanying the Advance Rulemaking Order, Vice Chairman Christy asks the parties to comment on the question of the Commission's legal authority to mandate that NGDCs implement purchase of receivables programs.

The OCA submits that the Commission's prior interpretation of the identical language in Chapter 28 as prohibiting the imposition of mandatory POR programs is the proper interpretation of the applicable statutory language. Section 2205(c)(5) states:

No natural gas distribution company shall be required to forward payment to entities providing services to customers and on whose behalf the natural gas distribution company is billing those customers before the natural gas distribution company has received

payment for those services from customers. The commission shall issue guidelines addressing the application of partial payments.

66 Pa.C.S. §2205(c)(5). The language of this section of the Public Utility Code is clear that the Commission cannot require an NGDC to forward any payment to an NGS for NGS service that the NGDC has not received from the customer. A program that requires such an action cannot pass muster with this statutory language.

In the Advance Rulemaking Order, the Commission now attempts to create a distinction between an NGS using the billing service of the NGDC and a purchase of receivables program where the NGDC purchases the accounts receivable. This distinction, however, does not support a different result. Under a POR program, the NGDC is required to forward payment for the service provided by the NGS to the NGS whether or not the NGDC has received payment from the customer for that service. The NGDC only purchases an account after the service has been provided and the bill has been rendered. The NGDC is not being paid by the customer for any service that the NGDC has provided to the customer.

The Commission also asserts that once purchased, the accounts receivable become legally and practically indistinguishable from the NGDC's other accounts receivable as failure to pay can lead to termination of service or collection activity. The Commission reasons that this feature allows it to mandate POR programs. This feature, however, is created by the program design selected by the Commission and thus cannot be used to support the Commission's authority. The Commission's power and authority arise from its enabling statutes and by "strong and necessary implication" from the words of the statute. PECO Energy Co. v. Pa. PUC, 568 Pa. 39, 791 A.2d 1155 (2002). The words of the statute here are clear that the Commission cannot order an NGDC to forward any payment to an NGS before it is received

from the customer. The Commission cannot create a program that establishes a mechanism of a “purchase” to avoid this statutory limitation.

The OCA has no objection to the Commission continuing its current policy of encouraging the implementation of voluntary POR programs. As the Commission notes in the Advance Rulemaking Order, this policy has resulted in several NGDCs implementing programs that are the result of a cooperative approach among the stakeholders. Such an approach allows for the development of innovative practices and allows for the acceptance of all parties in support of the programs. The OCA urges the Commission to remove any discussion of its authority to mandate POR programs as part of its Final Rulemaking Order so as to continue the policy of the voluntary implementation of POR programs that has worked well in the last year.

4. The Commission Should Not Mandate A Transition To The Program Design Contained In The Proposed Regulations At This Time.

In the Advance Rulemaking Order, the Commission finds that NGDCs that have already implemented a POR program should continue with that program for its stated term, but should then transition the program to one consistent with the final regulations at the end of the term. If no term for the POR program is stated, the Commission states that the NGDC should update its POR program within 24 months of the effective date of the final regulations to a program that is consistent with the final regulations. Advance Rulemaking Order at 30-31. The OCA submits that it is premature to require a transition to the program design reflected in the final regulations at this time.

As the Commission recognizes, since the issuance of the Proposed Rulemaking Order in March of 2009, there have been numerous proceedings involving NGDCs and electric distribution companies (EDCs) where the issue of the implementation of POR programs has been

raised and resolved. Through litigation and settlement, POR programs have now been designed for Columbia Gas Company of PA, National Fuel Gas Distribution Corp., PECO Energy Co.--Gas, TW Phillips Gas Company and UGI Utilities-Gas. Through the litigation and settlement process, POR program models, and accompanying consumer protections, have been designed. While the POR program designs are not identical in all instances, models have developed and consumer protections that are essential to the approach taken have been developed. In addition, resources are being spent (or have been spent) to implement the agreed upon program designs.

The settlements, and the POR programs developed under the settlements, provide the Commission and the stakeholders with the opportunity to determine best practices for Pennsylvania and to identify any problems that may result from the different POR program designs. To mandate the transition of these voluntarily initiated programs to a different design does not provide an opportunity for the necessary lessons to be learned. Such a requirement could also result in the incurrence of uneconomic costs to change a program that is working well.³

The OCA submits that rather than mandate at this time that all POR program designs be transitioned to the design contained in the final regulations, the Commission should allow the NGDCs and stakeholders to evaluate the operation of the existing POR programs at the end of their term to determine the best course.⁴ If the program is successful and the cost of transitioning the program to the final regulations is high, the NGDC should be permitted to seek a waiver of the regulations so that it can continue its successful program. In this way, the

³ As discussed in Section B.3, above, in the OCA's view the Commission does not have the authority to mandate a POR program. While the Commission has the authority to define the parameters of any POR program that may be implemented, it may be difficult for the Commission to encourage an NGDC to implement a program design that differs from the model accepted by the NGDC.

⁴ If there is no stated term for the POR program, the OCA recommends that the POR program be allowed to operate for at least 36 months before consideration of any change in the program to conform the program to the final regulations.

decision regarding the appropriate program design for an individual NGDC will be fully informed.

5. Conclusion.

The OCA submits that with the modifications and clarifications set forth in these Comments, Section 62.224 provides a reasonable framework for the further development of POR programs in Pennsylvania. The OCA recommends that the modifications and clarifications included in these Comments be adopted.

C. Section 62.225: Release, assignment or transfer of capacity.

In its proposed Section 62.225, the Commission appears to address an NGDC's ability to release, assign or transfer firm storage or transportation capacity to NGSs or large commercial or industrial customers on its system. In its March 27, 2009 Order, the Commission stated that "it might be helpful to the development of the retail markets if the ability of NGDCs to control their capacity on interstate natural gas pipelines were not as strong." Proposed Rulemaking Order, Docket No. L-2008-2069114 (Order Entered on March 27, 2009) at 7. The Commission further stated that it was aware that such a change would require a change in the existing law found at 66 Pa. C.S. § 2204(d)-(f). Id. In its March 27, 2009 Order, the Commission formalized its regulations "in harmony with the existing law in order to give both NGDCs and NGSs some guidance and to ensure that requirements that the release, assignment or transfer of capacity by a NGDC shall be on a nondiscriminatory basis and shall be at the applicable contract rate for such capacity." Proposed Rulemaking Order, Docket No. L-2008-2069114 (Order Entered on March 27, 2009) at 7. This initially proposed regulation was Section 62.225.

In its August 26, 2009 Comments, the OCA determined that the provisions of the Proposed Section 62.225 were included in the Public Utility Code at 66 Pa.C.S. §2204(d) and did not identify any different impact on the rates of PGC customers from these provisions when compared to Section 2204(d). As such, the OCA had no objection and did not propose any modifications to Section 62.225. However, the current provisions of the Proposed Section 62.225 appear to be intended to replace the existing statutory Section 2204(e)--contrary to what the OCA understood to be the intent of the Commission's proposal in the March 27, 2009 Order. As the proposed Section 62.225 significantly modifies Section 2204(e) in its current form, the OCA submits that Section 62.225 should not be implemented absent further clarification of the Commission's intent and analysis of any potential ramifications.

D. Alternatives to Improve Information To Customers To Assist In Making A Choice Such As Presented By Vice Chairman Christy Should Be Considered.

In his accompanying Statement, Vice Chairman Christy stated that he remains concerned that natural gas consumers lack the necessary information to make an informed decision as to whether they should switch to an alternative supplier. In his March 27, 2009 Statement, he suggested that consumers be provided some form of a monthly projection of natural gas prices based upon the best available market information before they make a decision to switch to a competitive supplier. The OCA, among other commenters, addressed this issue, but the August 10, 2010 Order does not address this issue.

The Vice Chairman's Statement accompanying the March 27, 2009 Order echoed the comments presented in testimony by the Consumer Advocate at the beginning of this investigation. In his testimony, the Consumer Advocate expressed the heart of the issue as follows:

I also believe that the relatively low numbers of Pennsylvania residential customers who have opted to take natural gas supply service from an alternative supplier is partly a reflection of how difficult it is for many residential customers to shop for natural gas supply service in a volatile, confusing marketplace. Customers must first make a determination of what they are paying for that portion of their natural gas supply service that is subject to competition, *i.e.*, the “price to compare.” Even though the price to compare is generally available from the NGDC, or from other sources such as the OCA Shopping Guides, it is still no easy task for a typical residential customer to make a comparison of an NGS offer when the NGDC’s price to compare changes on a quarterly basis. This is especially true when it can take up to 45 days or more for a switch to an alternative supplier to take place. In the interim, a quarterly update by the NGDC could turn what looked like a good deal into a bad deal before the term of the new contract with the NGS even commences. Such situations lead to customer confusion and frustration with the retail choice process.

Investigation Into Competition in the Natural Gas Supply Market, Testimony of Irwin A. Popowsky of September 30, 2004, Docket I-00040103.

Vice Chairman Christy offered a proposal that the Commission provide projected natural gas price forecasts to customers so that they can make more informed, educated choices. The OCA agrees that, without necessary information, customers face a difficult choice. Yet, forecasts of natural gas prices can be unreliable even if performed by the best forecasters. The OCA presented another type of information that might be utilized in its Comments. The OCA recommended that the actual NYMEX futures contract prices for a specific time period, such as a 12-month strip could be used. Such prices are based on actual market information, rather than just forecasts. While not a full solution, having such information available to customers when comparing price offers may be an improvement.

As noted by Vice-Chairman Christy in his August 10, 2010 Statement, some commenters to the March 27, 2009 Order stated that providing historical data to consumers might assist them in understanding how gas prices may vary. However, the OCA submits that,

while historical data may constitute a piece of the information which consumers may wish to review, recent experience indicates that historic prices may not be any indicator of future prices. Recent price spikes in mid-2008 and early 2006 were certainly not indicated by the prior 12-month data.⁵ Neither were the plummeting prices that occurred and have continued since the mid-2008 price spike.

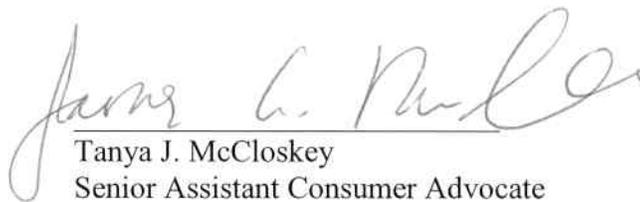
In the OCA's view, customers would benefit from additional information about future expected prices and presentation of the price to compare on the bill. It is not clear, however, how this information can be provided in a timely and accurate manner.

⁵ The July 2008 NYMEX price was \$13.105, while a year earlier, the price was \$6.929. Likewise, the Jan 2006 NYMEX price was \$11.431, while a year earlier, the price was \$6.213.

III. CONCLUSION

The OCA appreciates the opportunity to comment on the Commission's proposed regulations. As set forth herein, the OCA respectfully submits that the Commission's proposed regulations are in need of certain modifications to conform with the law, sound ratemaking principles and sound public policy. The OCA urges the Commission to adopt the modifications proposed by the OCA in these Comments.

Respectfully Submitted,



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