

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Investigation of Pennsylvania's
Retail Natural Gas Supply Market

I-2013-2381742

**COMMENTS OF
PENNSYLVANIA INDEPENDENT OIL & GAS ASSOCIATION**

In accordance with the Natural Gas Choice and Competition Act, 66 Pa. C.S. §§ 2201-2212, the Commission provided a *Report to the General Assembly on Pennsylvania's Retail Natural Gas Supply Market* in October 2005. Because the *Report* concluded that effective competition did not exist in Pennsylvania's retail natural gas market, the Commission was required by Section 2204(g) of the Act to convene a natural gas stakeholders working group "to explore avenues, including legislative, for encouraging increased competition in this Commonwealth." The work of the Natural Gas Stakeholders Working Group¹ resulted in a September 2008 Final Order and Action Plan providing for implementation of a number of changes intended to enhance retail gas competition, including rulemakings regarding natural gas distribution company (NGDC) cost-recovery and natural gas supplier (NGS) licensing.

Nonetheless, the Commission determined that the number of customers purchasing gas from competitive suppliers during 2013 "remains dismal at less than thirteen percent on a statewide basis." Accordingly, by order entered September 12, 2013 in this docket, the Commission initiated this investigation based on the belief "that there are more opportunities for customers to benefit from robust competition in the retail natural gas market." Specifically, the Commission's goal is to help ensure that retail customers realize the benefits of Pennsylvania's abundant unconventional natural gas resources – a goal PIOGA shares – but the Commission understands that this requires the necessary midstream infrastructure to be built. While this build-out is determined primarily by competitive market forces, the Commission has initiated this proceeding to investigate what

¹ This group subsequently became known as SEARCH, an acronym for "Stakeholders Exploring Avenues for Removing Competition Hurdles."

changes within its control are needed to enable retail customers to reap the benefits of natural gas supply choice.

The Pennsylvania Independent Oil & Gas Association (PIOGA) is the comprehensive trade association representing oil and natural gas interests throughout Pennsylvania. PIOGA has nearly 1,000 members, including oil and natural gas producers, Commission-licensed NGSs, drilling contractors and service companies, as well as various professional firms, individuals and royalty owners. PIOGA members are involved in producing and marketing natural gas from conventional and unconventional formations for retail and transportation customers of the NGDCs.² PIOGA's comments are limited to questions 6-8 in the Commission's order.

Questions and Comments

6. *Are there outcomes from the Commission's recently completed electric RMI that would be applicable and useful to implement in the retail gas market? To the extent possible, please provide comments on the following topics:*

- a. Seamless Move*
- b. Accelerated Switching Timeframes*
- c. Standard Offer Program*
- d. Low-income Customer Shopping*
- e. Expanded Consumer Education About Shopping*
- f. Any additional RMI initiative that would translate well to the retail natural gas market*

PIOGA submits that Seamless Moves, Accelerated Switching Timeframes and Expanded Consumer Education About Shopping are outcomes from the electric competitive market investigation that could be applied and would be useful on the natural gas competitive side, for the same reasons that the Commission determined them to be appropriate for the electric competitive market. In addition, consumer education should highlight the fact that the use of Pennsylvania natural gas production – whether conventional or unconventional – provides “supply chain” benefits to Pennsylvania's economy as well as allowing local retail customers to benefit from favorable pricing.

² Effective April 1, 2010, the Independent Oil and Gas Association of Pennsylvania (IOGA of PA) and the Pennsylvania Oil and Gas Association (POGAM) merged and the name of the organization changed to Pennsylvania Independent Oil & Gas Association.

7. *To take advantage of the opportunity that is present through the Marcellus Shale resource, should NGDCs and NGSs be encouraged to explore opportunities with natural gas exploration and production companies?*

Initially, PIOGA points out that Pennsylvania's abundant unconventional natural gas resources are not limited to the Marcellus Shale. The Utica Shale is also being developed in Pennsylvania, but more so now in Ohio, and other Pennsylvania shales may also turn out to be good candidates for economical development.

While this question may appear to have only one answer – yes – PIOGA's experience suggests that unregulated entities must exercise caution when dealing with regulated entities³ because of Section 508 of the Public Utility Code:

The commission shall have power and authority to vary, reform, or revise, upon a fair, reasonable, and equitable basis, any obligations, terms, or conditions of any contract heretofore or hereafter entered into between any public utility and any person, corporation, or municipal corporation, which embrace or concern a public right, benefit, privilege, duty, or franchise, or the grant thereof, or are otherwise affected or concerned with the public interest and the general well-being of this Commonwealth. Whenever the commission shall determine, after reasonable notice and hearing, upon its own motion or upon complaint, that any such obligations, terms, or conditions are unjust, unreasonable, inequitable, or otherwise contrary or adverse to the public interest and the general well-being of this Commonwealth, the commission shall determine and prescribe, by findings and order, the just, reasonable, and equitable obligations, terms, and conditions of such contract. Such contract, as modified by the order of the commission, shall become effective 30 days after service of such order upon the parties to such contract.

A few years ago PIOGA producer member Bison Resources had filed an action in common pleas court seeking to have certain of its fixed price life-of-the-well gas purchase agreements with an NGDC declared to be terminated, null, void and unenforceable because the "vintage" price was too low.⁴ As anyone familiar with public utility regulation knows, the prices at which a gas utility purchases supply for its customers are subject to review in annual Section 1307(f) (or "purchased

³ As a result of the PUC's position in PIOGA's litigation concerning the PUC's imposition of annual public utility assessments on NGSs, it is unclear to what extent the PUC considers NGSs to be regulated. *See, Independent Oil and Gas Assoc. v. Pa. Public Utility Comm'n*, 804 A.2d 693, 2002 Pa. Commw. LEXIS 585 (Pa. Commw. July 12, 2002).

⁴ *See, Pennsylvania Public Utility Commission v. T.W. Phillips Gas and Oil Company*, Docket No. R-2008-2013026.

gas cost”, or PGC) proceedings to determine *the utility’s compliance* with least cost fuel procurement requirements.

The utility convinced the county court that Bison’s issues involved matters within the PUC’s jurisdiction such that Bison’s issues should be decided by the PUC in the first instance. Accordingly, Bison’s county court action was stayed pending PUC review of the issues, which was created by the utility’s petition for modification of the PUC’s order in the utility’s 2008 PGC proceeding. The utility’s petition sought PUC intervention to make adjustments to the price terms of Bison’s fixed-price agreements and to convene a hearing to investigate Bison’s claims and assertions and, if necessary, to adjust the purchase price paid by the utility to Bison under the agreements.

The Commission granted the utility’s petition and remanded the case to an ALJ to convene a hearing to examine Bison’s books and records to determine Bison’s costs of production so the PUC could then, retroactively, determine a “just and reasonable” wholesale price at which Bison could sell its natural gas to the utility, despite: (i) federal preemption in this area per the Natural Gas Act, the Natural Gas Policy Act and the Wellhead Decontrol Act and related FERC and court decisions;⁵ (ii) then-Commissioner Pizzingrilli’s apparent acknowledgment of this preemption in testimony before the House Consumer Affairs Committee on October 9, 2003 concerning “Pennsylvania’s Natural Gas Industry & 2003-04 Natural Gas Price Forecasts,”⁶ and (iii) the utility’s position that it wasn’t asking the Commission to “regulate the price that a producer may accept.”⁷ While the Commission cited Section 508 as the authority for this examination, in subsequent phases of the litigation the Commission stated that it had not made a “final” determination “regarding the scope of Section 508 or its ultimate application to this proceeding.”

⁵ See, e.g., 26 Energy L.J. 135 (2005): *Article: Liquefied Natural Gas Import Terminals: Jurisdiction Over Siting, Construction, and Operation in the Context of Commerce Clause Jurisprudence*; 103 Harv. L. Rev. 1306 (April, 1990), *Note: Preemption and Regulatory Efficiency in Federal Energy Statutes*.

⁶ “[T]he PUC does not regulate the wholesale price of natural gas”

⁷ Docket No. R-2008-2013026, TW Phillips’ Replies to Exceptions at 4.

But by requiring Bison to produce its books and records for a PUC hearing and determination of a just and reasonable wholesale price for Bison's natural gas, the PUC's reliance on Section 508 and its determination certainly had all the attendant adverse consequences of a final determination to Bison. While the underlying local court action was settled before the remand hearing could take place, the PUC refused to rescind any of the orders relying on its Section 508 authority.

Accordingly, PIOGA requests that consideration of NGDC and NGS opportunities with unregulated gas exploration and production companies include determinations of the scope of the PUC's authority to adjust contracts under Section 508 – more specifically: (i) the limits, if any, of that authority in the context of these opportunities; (ii) the extent to which contracts with NGSs come within the authority of Section 508; and (iii) whether that authority permits retroactive adjustments.⁸

8. *Recognizing that the Commission withdrew the proposed rulemaking addressing NGDC business practices at Docket No. L-2009-2069117 and committed to commencing a new proposed rulemaking on these issues, please provide comments on the continued need to address standardized supplier tariffs and business practices with regard to imbalance trading, tolerance bands, cash out and penalties, nominations and capacity.*

In its order permitting the NGDC business practices rulemaking to expire and be deemed withdrawn by operation of law, the Commission acknowledged the comments of the Independent Regulatory Review Commission (IRRC): “We acknowledge and accept that the biggest problem with the instant rulemaking is the lack of supporting data to demonstrate the need for standardizing business practices and the costs relating to various proposals in the rulemaking.”⁹ In view of the Commission's duty to oversee the competition in the retail natural gas market, the Commission in that order took steps to “ensure that a new rulemaking on NGDC business practices and standards, including system operating rules and supplier tariffs, is drafted and promulgated consistent with [IRRC's] advice” by directing the new rulemaking proceeding to be initiated within six months.¹⁰

⁸ This issue implicates the federal and Pennsylvania constitutional prohibitions against impairment of contracts. *See, First National Bank of Pennsylvania v. Flanagan*, 528 A.2d 134, 135, n. 1 (Pa. 1987).

⁹ *Proposed Rulemaking: Natural Gas Distribution Company Business Practices*; 52 Pa. Code §§ 62.181-62.185, Docket No. L-2009-2069117, Order entered December 1, 2011, at 5-6.

¹⁰ *Id.*, at 6-7.

Although that new rulemaking was not initiated, the Commission's reasons for directing it to be done remain valid now:

In our judgment, certain efficiencies can be achieved by standardizing some NGDC business practices that will benefit all participants in the retail market.

The use by NGDCs of a common set of business practices and standards should increase efficiency in industry operations and may increase the participation of NGSs in the retail natural gas supply market.¹¹

PIOGA respectfully suggests that during the second phase of this proceeding,¹² Commission staff review the comments in the prior rulemaking and gather additional updated information to enable staff – rather than a stakeholder process – to use its expertise to develop a draft “strawman” standardized Supplier Coordination Tariff (SCT) and best business practices, as the Commission intended to do to initiate the stakeholder process that was to run concurrently with the prior rulemaking proceeding but did not achieve the necessary consensus on an initial proposal necessary to move forward with the process.

Consistent with its comment above concerning consumer education about the benefits of Pennsylvania natural gas production, PIOGA also respectfully suggests that any draft SCT include provisions to more fully implement the Commission's regulation requiring distinct consideration of Pennsylvania produced natural gas: “The development of Pennsylvania natural gas should be promoted, because it will achieve benefits that accrue to gas utilities and their customers.”¹³ As PIOGA stated in comments in the prior rulemaking, all the NGDCs that rely upon Pennsylvania natural gas to serve customers should be required to implement this provision of the Commission's regulations.

¹¹ *Id.*, at 5, 7.

¹² The second phase will “examine and address how to best resolve the issues raised and then how to implement the prudent changes identified to improve competition.”

¹³ 52 Pa. Code § 60.1.

Conclusion

PIOGA appreciates the opportunity to provide these comments and requests that the Commission's actions in this investigation incorporate the requests and suggestions herein.

Respectfully submitted,



Kevin J. Moody, Esquire
General Counsel
PIOGA
212 Locust Street, Suite 300
Harrisburg, PA 17101-1510
717-234-8525, ext. 113
Fax: 717-234-8812
kevin@pioga.org

Pittsburgh Office
115 VIP Drive, Suite 210
Wexford, PA 15090-7906
724-933-7306

Dated: December 12, 2013