RULES AND REGULATIONS

Title 25—ENVIRONMENTAL PROTECTION

STATE CONSERVATION COMMISSION

[25 PA. CODE CH. 83]

Facility Odor Management

The State Conservation Commission (Commission) is adopting final-form regulations in Chapter 83, Subchapter G (relating to facility odor management) to govern odor management at certain facilities and agricultural operations. These final-form regulations are authorized by 3 Pa.C.S. §§ 501—522 (relating to nutrient management and odor management).

These final-form regulations were adopted at the Commission's meeting of July 29, 2008.

A. *Effective Date*

These regulations will go into effect February 27, 2009.

B. *Contact Person*

For further information, contact Karl G. Brown, Executive Secretary, State Conservation Commission, Suite 407, Agriculture Building, 2301 North Cameron Street, Harrisburg, PA 17110, (717) 787-8821. Persons with a disability may use the Pennsylvania AT&T Relay Service by calling (800) 654-5984 (TDD users) or (800) 654-5988 (voice users). This final-form regulation is available on the Commission's web site: www.agriculture.state.pa.us/agriculture/cwp/view.asp?a=3&q=127144.

C. *Statutory Authority*

These final-form regulations are promulgated under 3 Pa.C.S. § 504(1.1) (relating to powers and duties of Commission), which authorizes the Commission to promulgate regulations establishing practices, technologies, standards, strategies and other requirements for odor management plans (OMPs); section 4 of the Conservation District Law (3 P. S. § 852), which authorizes the Commission to promulgate rules and regulations as may be necessary to carry out its functions; and section 503(d) of the Conservation and Natural Resources Act (71 P. S. § 1340.503(d)), which amended the authority and responsibilities of the Commission, the Department of Environmental Protection (DEP) and the Department of Agriculture.

D. *Background and Introduction*

Act 38 was signed by Governor Rendell on July 6, 2005, and constituted an important part of his initiative to protect Agriculture, Communities and the Rural Environment (ACRE). As part of that initiative, the DEP and the Commission promulgated other regulations implementing Act 38 provisions addressing water quality issues in 2005 and 2006. At the same time, various funding, technical assistance and policy development programs aimed at supporting agriculture in this Commonwealth were started and expanded during that same time frame. Examples are the Commission's enhanced Plan Development Incentives Program (PDIP) to support phosphorus based nutrient management plan writing, grants for alternative manure utilization and technologies projects, expanded agricultural compliance and technical assistance and expanded regulatory oversight over the farm community.

These final-form regulations address the concerns of communities about odors generated at new and expanding agricultural operations. The final-form regulations require OPMs for manure storage facilities and animal housing facilities at the operations most likely to elicit public concerns from neighbors—concentrated animal operations (CAOs) and concentrated animal feeding operations (CAFOs).

CAOs and CAFOs fall under a very comprehensive set of water quality regulations which have recently been amended to address current environmental issues. CAOs shall meet various requirements under Chapter 83 (relating to State Conservation Commission), administered by the Commission and delegated county conservation districts. CAFOs shall follow permitting requirements under the National Pollutant Discharge Elimination System (NPDES) regulations administered by DEP under Chapter 92 (relating to National Pollutant Discharge Elimination System permitting, monitoring and compliance). Those regulations address water quality, not odor management.

These final-form regulations were developed in close coordination with several groups. First, the Nutrient Management Advisory Board (NMAB) was highly involved with the development of these final-form regulations. The NMAB represents a wide range of agricultural, academic, governmental, environmental and private interests. A special NMAB Committee was formed and met with the Commission staff more than 20 times from 2006 through 2008, providing strong direction and assistance to the Commission staff in developing these final-form regulations. The Committee and the Commission staff led discussions of the proposed rulemaking with the full NMAB on April 13, 2006, July 13, 2006, December 5, 2006, February 6, 2007, July 12, 2007, September 5, 2007, October 10, 2007, and April 24, 2008. The NMAB approved these final-form regulations on April 24, 2008, and passed them on to the Commission with their recommendation for the Commission's approval.

In addition to the extensive involvement of the NMAB, the Commission's staff has worked closely with a team of experts on odor management at the Pennsylvania State University (PSU). These experts have developed and refined an odor management planning process over the last several years. This process was the one the Legislature had in mind when it passed the odor management provisions of Act 38. Key elements of this process have been incorporated into the regulations and are described in some detail in this preamble.

The Commission staff also worked with a third group—an interagency team of agriculture experts from the Department of Agriculture, the United States Department of Agriculture Natural Resources Conservation Service (NRCS), county conservation districts, DEP, the PSU College of Agricultural Sciences and Penn State Extension.

The Commission's staff provided briefings on the regulations as they were being developed and finalized, to numerous groups representing local government, industry and the public. The Agriculture Air Quality Task Force also received briefings on the draft regulations during 2006.

Finally, the Commission held two public meetings and two public hearings to solicit comments on the proposed regulations. The two meetings were held on October 1, 2007, and October 4, 2007, in Dubois and Lancaster, respectively. The two hearings were held on October 8, 2007, and October 11, 2007, in Dubois and Lancaster, respectively.

This final-form rulemaking incorporates the input from all the parties described previously, in addition to the 12 commentators that provided formal comments on the proposed regulations during the 60-day comment period. These final-form regulations follow the format of the nutrient management regulations in Chapter 83, to facilitate comprehension by the regulated community and others familiar with those regulations.

Two key aspects of these regulations bear special mention. First, the regulations are limited in their scope to odors associated with new or expanding manure management and animal housing facilities at CAOs and CAFOs. These regulations do not otherwise apply to existing agricultural operations, and they do not address odor from land application of manure. These limitations reflect the odor management provisions in Act 38.

Second, the OMPs are not required to eliminate odors. Under Act 38, they only need to include reasonably available technology, practices, standards and strategies to manage odor impacts, considering both the practical and economic feasibility of installation and operation and the potential impacts from the facilities. This aspect of Act 38 reflects the impracticality of completely eliminating odors associated with agricultural operations, as well as the evolving nature of the science of odor management and of the regulation of odor management. The Legislature was obviously cognizant of the subjective nature of odors in rural areas and the difficulties in eliminating and regulating them. The Commission developed this rulemaking with that legislative dictate in mind.

E. *Summary of Changes from the Proposed Rulemaking*

General

Clarifying and stylistic changes to the proposed regulations are made throughout these revisions. Many changes are intended to address changes requested by the Independent Regulatory Review Commission (IRRC) to conform to the Regulatory Review Act (71 P. S. §§ 745.1—745.15). Some of these will be described as follows.

Numerous commentators expressed their support of the Commission's proposal. Commentators expressed that the process outlined in the regulations is a balanced and flexible approach of addressing odor management from animal production operations. The proposal was described by a majority of the commentators as being practical for the farm community to implement.

A majority of the commentators indicated their support of the Commission's position to assess an operation based on the characteristics of the area existing at the time of the plan development. Also they strongly supported the concept of not requiring plan amendments unless the farm is proposing a significant expansion or new construction activity that would be expected to increase the impacts from odors generated from the site. These commentators expressed that a person moving into an area next to an existing animal operation should consider the possible impacts from the farm as they are assessing the area, and not hold the farmer responsible to add additional odor BMPs to address new neighbors moving into the area, unless the farmer is making changes to the farm at the same time.

A commentator expressed the need for the Commission to meet with representatives from the Pennsylvania State Association of Township Supervisors (PSATS) and builders organizations to discuss the problems created when residential development is encouraged to take place in close proximity to farming areas. The Commission agrees with this comment and will make the effort to actively reach out to these entities to help them understand how their efforts, in combination with these new requirements, can help minimize conflicts with agricultural operations in their area.

A commentator expressed that the public should be given access to the processes involved in developing and maintaining an OMP. The program as developed under these regulations will provide the public with access to proposed plans, and an opportunity to provide comments, during the approval process. The plans will be approved by the Commission, or the local county conservation district. Those approvals will be made at public meetings, and access to the final plan will be allowed prior to the meetings. This is the same process followed for Nutrient Management Plans under Act 38.

§ 83.701 (relating to definitions)

Impact: Two commentators expressed some concern relating to the definition of the term "impact" as used in the regulations. The proposed definition excluded the assessment of property values and health effects when assessing the potential impact of an operation on the neighboring landowners. These two commentators questioned why those issues were not included in this definition. One additional commentator expressed support for the Commission's definition of "impact" and supported the lack of any requirement to consider these issues.

The statute requires OMPs that "manage the impact of odors," but does not define the word "impact." The Commission has developed a use of that term that is consistent with the statute, based on consideration of the language in the statute, and the nature of the science of odor management at agricultural operations in this Commonwealth at the time Act 38 was passed by the Legislature.

There is no clear indication in the statute that odor impacts must include mental and physical health affects, or changes in property values. The statutory references to health and safety in unrelated sections listed by one commentator were provisions contained in the statute when it was the Nutrient Management Act, which addressed solely water quality impacts from nutrient pollution. Those impacts were well known at the time the Nutrient Management Act was passed. The situation was very different for odors in 2005 when the Legislature added these new provisions to the Nutrient Management Act and created Act 38.

When Act 38 became law in 2005, there was an existing OMP offered by the PSU College of Agriculture. The program was well-known to the Legislature—indeed, the factors and criteria used in 3 Pa.C.S. § 504(1.1) are very similar to the ones used by the PSU voluntary OMP. Therefore, the Commission believes that the Legislature intended that the odor management requirements under Act 38 would follow the then-existing PSU program.

The PSU voluntary OMP management program was developed over several years using data from hundreds of personal interviews by PSU researchers, who studied the

main indicator of "odor impacts"—conflicts between farms and their neighbors. The conflicts were essentially objections raised or asserted by neighbors to the odors from new and expanded operations after they became operational. The PSU researchers were able to identify the various factors that caused these conflicts, including those that were later contained in 3 Pa.C.S. § 504(1.1)(i). Notably, this scientific research did not address mental and physical health effects, or changes in property values.

The PSU research also included evaluation of measures which can be taken to minimize these conflicts, as the location and positioning of new farm buildings and other structures. Again, the measures were directed at minimizing the causes for conflicts, not for addressing any health or property value effects.

Therefore, the Commission believes that the final-form rulemaking stays true to the intent of the Legislature when Act 38 was passed. If the Legislature desires to expand the scope of the odor management program in the future to encompass these other issues, the Commission will revise these regulations accordingly.

Expansion: This term was suggested to be defined in the regulation to provide consistent implementation of the regulation. The Commission agreed with the comment and included a definition of this term in the final-form rulemaking.

Construction: This term was suggested to be included in the definition section of the regulations to further program consistency. The Commission agreed with this comment and included this definition.

§§ 83.711 and 83.721 (relating to applicant eligibility.)

Plan development: Commentators suggested that the Commission allow for plan development funding for any existing animal operation, including expanding operations. The Commission agreed with this comment and therefore the final-form rulemaking has been revised to allow the Commission to support plan development for all operations in existence as of February 27, 2009. Plan development is key to addressing odor management issues from farming operations and the Commission believes that it is important to support efforts to develop these plans on all farms in the State.

§ 83.731 (relating to conservation districts)

Heading: A commentator expressed the confusion that could exist with the heading of this section. The heading implied that the Commission may delegate to various local agencies, where the statute only permits delegation to properly qualified conservation districts. The Commission agreed with the comment and revised the heading to more accurately reflect that only conservation districts will be considered by the Commission for delegation of authority under this new regulation.

§ 83.741 (relating to general)

Types of Operations: The Commission discovered that it failed to include one of the circumstances by which a farm could change its animal density and therefore become a CAO and possibly a CAFO. The final-form regulation was revised to include the situation when a farm operation may lose acreage and therefore fall under the CAO and possibly CAFO designation.

§ 83.742 (relating to identification of construction activities)

(*Editor's Note*: The proposed addition of § 83.742 was withdrawn by the Commission.)

Section 83.742 of the proposed regulations was deleted in the final-form rulemaking, since it is incorporated into the definition of construction and construction activities.

Expanding a manure storage when improving storage integrity: The regulations stated that when improving the integrity of an existing storage, if the operator does not expand the facility by more than 15% then the activity would not be considered construction for the purposes of planning under the act. A commentator indicated that the Commission should define from what point in time that 15% expansion is to be measured from. The Commission has revised this wording (which now resides in the definition section under "construction") to say that that the percentage increase will be measured from the current manure storage volume as verified by the approved Nutrient Management Plan.

Replacing a destroyed animal facility: A commentator expressed support of the Commission's direction to allow replacement of a destroyed animal housing facility with one of similar size. The Commission further clarified this wording which now resides in the definition section under "construction" by stating that if the replacement building has a similar animal capacity as the one that was destroyed, this activity would not be considered construction for the purposes of planning under the act.

§ 83.751 (relating to content of plans)

Conformance with local ordinances: A commentator expressed that the Commission should add wording to this section of the regulations to state that OMPs need to be consistent with any local land use ordinance. The Commission believes that the incorporation of this comment could allow for a local ordinance to impair the Commission's ability to approve an OMP, even if that ordinance was in conflict with the regulations. This is contrary to the intent of 3 Pa.C.S. § 519 (relating to preeemption of local ordinances), as well as Chapter 3 of Act 38, which establish and protect the preemption of the State-Wide Odor Management Program over certain local laws and regulations.

§ 83.761 (relating to identification of agricultural operations and regulated facilities)

Surrounding land use: Comments were provided which indicated that the readers were confused about the scope of the assessment required by the Commission relating to the "surrounding land use." In the final-form regulations, § 83.761(a)(2)(iii) and (b)(3) have been removed as they were redundant and therefore creating confusion. Section 83.771(b)(1) and (2) have been revised to clarify the criteria needed to conduct an evaluation.

The "surrounding land use" criterion is given meaning in § 83.771(b)(1)(ii), where the types of uses to be considered are listed. Beyond these basic criteria, further details are described in the Commission's Odor Management Guidance, where Surrounding Land Use Factors are described for completing an Odor Site Index. The Guidance is not a requirement, but is available to persons preparing OMPs.

Prevailing winds: A commentator questioned how the program was proposing to assess the direction of the prevailing winds during plan development. The prevailing winds text was removed from this section of the regulations but it remains in the Evaluation section of the regulations. The technical experts at PSU provided that, prevailing winds in this Commonwealth are commonly from the West-Northwest. Therefore for the purposes of this program, the Commission uses West to Northwest as the prevailing wind direction. The final-form rulemaking has been revised to explicitly indicate that West and Northwest will be presumed to be the prevailing wind direction under the Act 38 Facility Odor Management Program.

§ 83.762 (relating to operator commitment statement)

Documentation requirements: Section 83.762(3) has been revised to replace the word "records" with "documentation" and "documentation of plan implementation activities," consistent with the revisions made in § 83.791.

§ 83.771 (relating to managing odors)

Accessibility of BMP information: Many commentators expressed a concern that some of the information relating to the Level 2 Odor BMPs would only be available if the person requesting that information could pay for the copy-right and duplication fees imposed on those documents. The regulations list three possible reference sources for Level 2 Odor BMPs. The Commission has restructured these lists to ensure that they are all open and available to the public through the Commission's free web site. For individuals that do not have access to the Internet, the Commission will provide these BMP lists upon request at no charge to the public.

Use of AEUs to determine evaluation distance: A commentator indicated that the Commission should specifically identify what criteria will be used for determining evaluation distance for odor management planning purposes. Subsection (b)(3) was not definitive enough for the reader to feel comfortable in understanding how the Commission would make this determination. The Commission agreed with this comment and the final-form regulation has been revised to state that AEUs "shall" be used for determining the evaluation distance used within the program.

Time period to implement: It was obvious through the various comments the Commission received on this topic that many readers were confused about the 3-year lifespan of an approved plan. In the final-form rulemaking, § 83.801(f) has been revised to remove the redundant language. In addition, § 83.771(d) has been revised to clarify that an evaluation must be redone (by means of a new plan) if construction activities on the regulated facility are not started within 3 years from the date of plan approval. This section of the regulations has also been revised to allow the Commission to extend the 3-year deadline, not to exceed an additional 2 years, for situations when due to circumstances beyond the reasonable control of the operation, including delays caused by permitting of the facility, the agricultural operation was not able to obtain the necessary permits and approvals in time to initiate construction activities within the 3-year time frame.

§ 83.781 (relating to identification of Odor BMPs)

Vague language: A commentator expressed the concern that language used within this section of the regulation was too vague to allow the regulated community to implement the standards, and to allow the Commission to enforce the program. The phrase "feasible from a practical and economic perspective" comes directly from Act 38. The Commission has provided operators the opportunity in these regulations to select from a significant number of possible BMPs to address odor sources on their operation. Operators can select those BMPs that they would consider practical and economically feasible for their operation. The final-form rulemaking eliminates the phrase "normal maintenance activities used in the industry in this Commonwealth" as this wording has been determined to not provide any additional clarity to the regulations. The regulation now states that the Level I BMPS are intended to mean management-oriented measures, whereas Level 2 BMPs are structurally-oriented and other nonmanagement based measures.

§ 83.783 (relating to operation and maintenance schedule)

Lifespan of the required BMPs: A commentator expressed the concern that the regulations do not state whether the OMP needs to be followed indefinitely or only until the BMPs are installed. The Commission agreed with this comment and added language into this paragraph to indicate that the plan will need to include the lifespan of the various BMPs required in the plan. The BMPs would then need to be maintained, in accordance with program standards, for the entire lifespan documented in the plan.

§§ 83.791 and 83.792 (relating to general recordkeeping requirements; and recordkeeping relating to Odor BMPs)

Practicality of the recordkeeping requirement: Several commentators expressed a concern about the scope and practicality of the recordkeeping expectations of the Commission. Commentators have expressed the variability of records that may be required based on the type of BMPs required. In the final-form rulemaking, § 83.791(b) has been deleted; the Commission is not requiring use of a Commission-generated form. The headings for §§ 83.791 and 83.792 have been changed to use the word "documentation" to better reflect that the Commission is not requiring a standard form and that the Commission will accept and require a wide range of formats for this documentation, depending on the BMP being installed.

Section 83.792 has been revised to require that the plan identify the types of documentation needed to demonstrate compliance with the plan. This documentation will be required for all BMPs installed under an approved Facility Odor Management Plan. An example of this documentation would include contractor invoices and as-built design sketches relating to the implementation of a Windbreak/Shelterbelt BMP.

Submission of records for public review: A commentator suggested the Commission should require in regulations that records required under this program be submitted to the conservation district or Commission so that they would be available for public review. The Commission has included language in § 83.792 indicating that the required documentation shall be maintained onsite. The Commission believes that compliance can be accomplished effectively through the maintenance of documents onsite at the operation. Annual inspections by program staff of the approved operations, as well as additional visits in response to any complaints from neighbors, will provide adequate opportunity for program staff to ensure that the operator is complying with the operation and maintenance provisions of the plan.

§ 83.801 (relating to initial plan review and approval)

Nutrient Management Advisory Board review: A commentator notified the Commission that the second 90-day review period allowed for in the proposed regulations was not authorized in the law. The Commission concurs that the second 90-day review period is not explicitly stated in the Act 38 for Odor Management and therefore the second 90-day review period has been removed from the final-form rulemaking.

The allowance in subsection (c) for the Commission or the farmer to obtain a formal recommendation on the plan proposal from a committee of the NMAB was also removed in the final-form regulations due to the 90-day review restriction. The Commission recognizes that to

accommodate the initially proposed process of obtaining a recommendation from an outside Committee of the NMAB, the plan review activity would take longer than 90 days allowed for this action.

Lifespan of the approved plan: The wording relating to this issue was removed from subsection (f) because it was determined to be redundant since this issue is addressed in its entirety in § 83.771(d).

§ 83.802 (relating to plan implementation)

Documentation: Wording was changed in subsection (b) from "records" to "plan implementation documentation" to be consistent with the changes made in §§ 83.791 and 83.792.

§ 83.811 (relating to plan amendments)

Assessing farm expansion for amendment purposes: A commentator indicated that the proposed regulations did not provide enough clarity in subsection (b)(1) to explain how incremental changes in animal numbers would affect the amendment trigger. The Commission agrees with the commentator that the regulations need to indicate when the change in AEUs will be evaluated from. The final-form regulations incorporate this change in § 83.811(b)(1) as suggested by the commentator. Also in this paragraph it was suggested that the amendment trigger be revised to 10%, similar to the nutrient management plan amendment trigger. The Commission continues to believe that a 25% change is most relevant when dealing specifically with odor issues, not 10% as used for considering nutrient issues.

Amendments due to a change in the "operational management system:" The Commission received extensive comments on this amendment trigger provided in subsection(b)(3) of the proposed regulation. Commentators were concerned of how this amendment trigger would be evaluated and interpreted by the Commission. The Commission agrees with these comments. This amendment trigger has been eliminated from the final-form rulemakings as it does not provide any additional clarity to the regulations that is not already addressed in § 83.811(b)(1) and (2).

Amendments to revise Odor BMPs: Numerous commentators expressed a concern that the proposed regulations did not facilitate operators changing their plans to implement innovative, more effective BMPs than those originally included in the approved OMP. The Commission agreed with these comments. Revised § 83.811(d) provides operators with an opportunity to propose a change to the Odor BMPs listed on their approved nutrient management plan through amending only the Odor BMP section of the plan and not requiring operators to amend the remainder of the plan including the Odor Site Index. But if the operator has triggered any of the significant operation changes as outlined in § 83.811(b), a full plan amendment, requiring the rewrite of the entire plan, will be required including rerunning the Odor Site Index for the operation.

§ 83.812 (relating to plan transfers)

Signatures for plan transfers: Subsection (a) was revised consistent with submitted comments to clarify that a new operator must sign off on the plan prior to the plan being considered as transferred to the new operator. This signature indicates that the new operator concurs with the information in the plan and agrees to carry out the plan.

F. *Benefits, Costs and Paperwork*

1. *Benefits*

The main benefit of these regulations is to establish a level of regulatory requirements regarding agricultural odor management that does not currently exist in this Commonwealth's rural communities. It is part of the balanced approach embodied in the Governor's ACRE initiative.

The Commission has developed the final-form regulations in close coordination with various Federal, State and local agencies and institutions. These include the NMAB and the Board's Odor Management Committee, the PSU College of Agriculture, PDA, DEP, the NRCS, various county conservation districts and Penn State Extension.

Farmers will benefit from this rulemaking in several ways. First, implementation of an OMP approved by the Commission affords important legal protections under Act 38. Second, odor management is an important issue in rural areas of this Commonwealth and this rulemaking will help to minimize conflicts between farmers and their neighbors, especially in areas where there is suburban encroachment into rural areas.

2. *Costs*

The cost of implementing these final-form regulations will mainly impact the regulated community and the Commonwealth. The Commonwealth costs are most readily seen in the financial assistance that the Commission is proposing to provide for plan development, and for plan implementation.

Note that CAO and CAFO farms that construct animal housing facilities or manure storage facilities are required to get an OMP.

Costs to the regulated community

Development of OMPs: Based on the Commission's experience with the nutrient management program costs, and the projected time to conduct a site assessment for the proposed OMP, the Commission anticipates that the average cost for an OMP will be $1,120 per OMP.

The Commission anticipates that 90 operations will develop OMPs under these regulations annually. This will equate to a total annual planning cost to the farm community of $100,800, of which a portion of this will be offset through the Commission's plan development cost share program.

Implementation of OMPs: The final-form regulations which provide for multiple levels of Odor BMPs anticipate that there will be no new cost to the regulated community until Level 2 Odor BMPs are required to be implemented and maintained. The cost for implementing Level 2 BMPs on a given farm are extremely variable. Based on the Commission's assessment of the various BMPs that may be installed, and the general costs for installing these BMPs, the Commission has determined an average cost of installing Level 2 BMPs on a farm to be $15,000. Each plan will use site specific criteria, and that there will be large variability in the Level 2 Odor BMPs implemented on regulated operations. Some farms needing Level 2 BMPs may only need to expend less than $500 to

implement these BMPs where other farms needing Level 2 BMPs may need to be expend thousands of dollars.

The Commission anticipates that 17 operations a year will develop OMPs requiring Level 2 BMPs. This will equate to a total annual plan implementation cost to thefarm community of $255,800. A portion of this will be offset through the Commission's plan implementation cost share program for certain eligible farms.

Retention of documentation and BMP standards: The Commission has revised the principal reference document to be used for identifying possible Level 2 BMPs. This Odor BMP Reference List will now be made available to the public at no cost, therefore eliminating any possible costs associated with researching the principal odor management BMPs available for use under the program.

The Commission has revised its recordkeeping section in the final-form regulations to allow for a wide variety of documentation to verify BMP implementation and maintenance compliance. This documentation is expected to be a part of normal farm operations and is not expected to impose any additional program compliance costs on the regulated community.

Costs to the Commonwealth

Development of OMPs: The final-form rulemaking provides for the Commonwealth, through the Commission, to provide funding for financial assistance for plan development to offset the cost of developing OMPs for farmers whose agricultural operations are in existence as of February 27, 2009. This funding is similar to the Commission's PDIP that has provided cost share funding to farmers for the development of nutrient management plans since 1997. This new State cost share program, proposed to fund 75% of the cost of developing an OMP, is essential to ensure that farmers are not negatively impacted by these CAO and CAFO planning requirements. Applying the 75% State cost share rate currently proposed for this program, the anticipated government cost per funded plan would be $840 ($1,120 total cost, $840 cost share, $280 farmer cost).

The Commission anticipates that 65 operations will be eligible annually for the Commission's PDIP. This will equate to a total annual plan development cost share amount from the Commonwealth of $54,600.

Implementation of OMPs: The final-form regulations authorize funding to offset the implementation of odor BMPs on certain participating operations installing manure storage facilities. This new grant program is proposed to provide support at an 80% State cost share rate. At the anticipated average cost for implementing a Level 2 Odor BMP of $15,000, the 80% cost share rate would equate to $12,000 in State cost share funds per operation receiving this assistance ($15,000 total cost, $12,000 cost share, $3,000 farmer cost).

The Commission anticipates that six operations will be eligible (according to the eligibility limitations outlined in the final-form regulations) annually for the Commission's cost share program to support OMP implementation. This will equate to a total annual plan implementation cost share amount from the Commonwealth of $72,000.

Commission: The Commission will continue to spend approximately $60,000 per year for Commission staff wages and expenses.

Technical assistance: The Commission will continue to contract with PSU to provide technical and educational assistance in the development and implementation of these new odor management regulations as well as PDA's Odor Management Specialist Certification Program. This project is funded at $10,000 per year.

3. *Paperwork Requirements*

The final-form regulations have been written to minimize paperwork but still maintain program integrity and tracking. Farmers are required to keep records on their farm, but are not required to submit those documents to the Commission.

G. *Sunset Review*

The Commission will evaluate the effectiveness of these final-form regulations on an ongoing basis. Therefore, no sunset date is being established for the regulations.

H. *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on August 22, 2007, the Commission submitted a copy of the proposed regulations, published at 37 Pa.B. 4780 (September 1, 2007), to IRRC and to the Chairpersons of the House Agriculture and Rural Affairs Committee and the Senate Agriculture and Rural Affairs Committee (Committees). In addition to submitting the proposed regulations, the Commission provided IRRC and the Committees with a copy of a detailed Regulatory Analysis Form.

Under section 5(c) of the Regulatory Review Act, IRRC and the Committees were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing this final-form rulemaking, the Commission has considered all comments from IRRC, the Committees and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), on October 1, 2008, this final-form rulemaking was deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on October 2, 2008, and approved the final-form rulemaking.

I. *Findings*

The Commission finds that:

(1) Public notice of proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201 and 1202) and regulations promulgated thereunder at 1 Pa. Code §§ 7.1 and 7.2.

(2) A public comment period was provided as required by law, and all comments were considered.

(3) These amendments do not enlarge the purpose of the proposal published in 37 Pa.B. 4780.

(4) This rulemaking is necessary and appropriate for administration and enforcement of the authorizing laws identified in section C of this order.

J. *Order*

The Commission, acting under the authorizing statutes, orders that:

(a) The regulations of the Commission, 25 Pa. Code Chapter 83 are amended, by adding §§ 83.701—83.707, 83.711, 83.721,83.731, 83.741, 83.751, 83.761, 83.762, 83.771, 83.781—83.783, 83.791, 83.792, 83.801, 83.802, 83.811 and 83.812 to read as set forth in Annex A.

(b) The Chairperson of the Commission shall submit this order and Annex A to the Office of General Counsel and the Office of Attorney General for review and approval as to legality and form, as required by law.

(d) The Chairperson of the Commission shall submit this order and Annex A to IRRC and the Senate and House Committees as required by the Regulatory Review Act.

(e) The Chairperson of the Commission shall certify this order and Annex A and deposit them with the Legislative Reference Bureau, as required by law.

(f) This order shall take effect February 27, 2009.

JOHN HANGER,
Acting Chairperson

(*Editor's Note*: The addition of § 83.742, included in the proposal at 38 Pa.B. 4780 has been withdrawn by the Commission.)

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 38 Pa.B. 5818 (October 18, 2008).)

Fiscal Note: 7-418. (1) Nutrient Management and General Funds:

		Nutrient Mangement Fund Planning, Loans, Grants and Technical Assistance	*General Fund General Government Operations*
(2)	Implementing Year 2007-08 is	$10,000	$60,000
(3)	1st Succeeding Year 2008-09 is	$30,000	$60,000
	2nd Succeeding Year 2009-10 is	$141,640	$60,000
	3rd Succeeding Year 2010-11 is	$141,640	$60,000
	4th Succeeding Year 2011-12 is	$131,140	$60,000
	5th Succeeding Year 2012-13 is	$118,540	$60,000
(4)	2006-07 Program—	$1,861,000	$29,642,000
	2005-06 Program—	$1,600,000	$29,451,000
	2004-05 Program—	$3,016,000	$31,017,000

(7) Nutrient Management Fund and General Fund; (8) recommends adoption. The distribution of funding for the grant programs will be provided to the extent funds are available.

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION

PART I. DEPARTMENT OF ENVIRONMENTAL PROTECTION

Subpart C. PROTECTION OF NATURAL RESOURCES

ARTICLE I. LAND RESOURCES

CHAPTER 83. STATE CONSERVATION COMMISSION

Subchapter G. FACILITY ODOR MANAGEMENT

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GENERAL PROVISIONS

§ 83.701. Definitions.

The following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicates otherwise:

AEU—Animal equivalent unit—One thousand pounds live weight of livestock or poultry animals, on an annualized basis, regardless of the actual number of individual animals comprising the unit.

Act—3 Pa.C.S. §§ 501—522 (relating to nutrient management and odor management).

Agricultural operations—The management and use of farming resources for the production of crops, livestock or poultry.

Animal housing facility—A roofed structure or facility, or any portion thereof, used for occupation by livestock or poultry.

CAFO—Concentrated animal feeding operation—An agricultural operation that meets the criteria established by the Department in regulations under the authority of The Clean Streams Law (35 P. S. §§ 691.1—691.1001), found in Chapter 92 (relating to National Pollutant Discharge Elimination System Permitting, Monitoring and Compliance).

CAO—Concentrated animal operation—Agricultural operations with eight or more animal equivalent units where the animal density exceeds two AEUs per acre on an annualized basis.

Commission—The State Conservation Commission established by the Conservation District Law (3 P. S. §§ 849—864).

Conservation district—A county conservation district established under the Conservation District Law.

Construction or construction activities—The act or process of systematically building, forming, assembling or otherwise putting together a facility or parts of a facility.

(i) The terms do not include any of the following, when used in relation to the following activities at animal housing facilities:

(A) Replacement of existing equipment at an existing animal housing facility.

(B) Replacement of an existing animal housing facility in existence as of February 27, 2009, that has been destroyed by fire, flooding, wind, or other acts of God, vandalism, or other similar circumstances beyond the operator's control, with a facility that is of similar animal capacity.

(ii) The terms do not include any of the following, when used in relation to the following activities at manure management facilities:

(A) Improving the integrity of an existing manure storage facility with no more than a 15% increase in manure storage volume as measured from the current storage volume documented in the approved nutrient management plan.

(B) Adding treatment technology, such as solids separation, anaerobic digestion, and composting, and their associated facilities, on agricultural operations in existence as of February 27, 2009, provided that the treatment technology is designed, built and operated consistent with the Commission's current "Odor Management Guidance."

Expand, expansion—Creation of additional space of an animal housing facility by increasing the size of an animal housing facility, or increasing the volume of a manure storage facility by increasing the size of the manure storage facility.

Facility—Refers to the animal housing facility and manure management facility, or portion of a facility, which are required to be, or are voluntarily subject to this subchapter.

Farming resources—The animals, facilities and lands used for the production or raising of crops, livestock or poultry. The lands are limited to those located at the animal facility which are owned by the operator of the facility, and other owned, rented or leased lands under the management control of the operator of the facility that are used for the application, treatment or storage of manure generated at the facility.

Fund—The Nutrient Management Fund established under section 512 of the act (relating to nutrient management fund).

Impacts—

(i) Conflicts arising from the offsite migration of the odors from agricultural facilities.

(ii) The term does not include mental or physical health affects, or changes in property values.

Livestock—

(i) Animals raised, stabled, fed or maintained on an agricultural operation with the purpose of generating income or providing work, recreation or transportation.

(ii) Examples include: dairy cows, beef cattle, goats, sheep, swine and horses.

(iii) The term does not include aquatic species.

Manure—

(i) Animal excrement, including poultry litter, which is produced at an agricultural operation.

(ii) The term includes materials such as bedding, washwater and other materials which are commingled with that excrement.

Manure management facility—

(i) A manure storage facility, including a permanent structure or facility, or a portion of a structure or facility, utilized for the primary purpose of containing manure.

(ii) The term includes liquid manure structures, manure storage ponds, component reception pits and transfer pipes, containment structures built under a confinement building, permanent stacking and composting facilities and manure treatment facilities.

(iii) The term does not include the animal confinement areas of poultry houses, horse stalls, free stall barns or bedded pack animal housing systems.

OMP—Odor management plan—Plan—

(i) A written site-specific plan identifying the Odor BMPs to be implemented to manage the impact of odors generated from animal housing and manure management facilities located or to be located on the site.

(ii) The term includes plans approved for VAOs and facilities not required to submit a plan under this subchapter.

(iii) The term includes plan amendments required under this subchapter, except when otherwise stated.

Odor BMP—Odor best management practice—A practice or combination of practices, technologies, standards and strategies to manage the potential for odor impacts from animal housing facilities and manure management facilities that are subject to this subchapter.

Odor management specialist—A person satisfying the certification requirements of the Department of Agriculture's proposed Odor Management Certification Program in 7 Pa. Code Chapter 130f (relating to odor management certification).

Odor Site Index—The field evaluation methodology developed specifically for this Commonwealth and approved by the Commission, which applies site-specific factors such as proximity to adjoining landowners, land use of the surrounding area, type of structures proposed, species of animals, local topography and direction of the prevailing winds, to determine the potential for odor impacts.

Offsite migration—The airborne movement of odors past the property line of an agricultural operation.

Public use facility—Public schools, hospitals, public nursing homes/elder care facilities and apartment buildings with greater than four dwelling units.

VAO—Voluntary agricultural operation—

(i) Any operation that voluntarily agrees to meet the requirements of this subchapter even though it is not otherwise required under the act or this chapter to submit an odor management plan.

(ii) The term includes agricultural operations applying for financial assistance under the act.

§ 83.702. Scope.

This subchapter specifies the criteria and requirements for:

(1) Odor management planning required under the act for certain facilities at CAOs and CAFOs.

(2) Voluntary OMPs developed for VAOs and facilities not required to submit a plan under this subchapter, that are submitted to the Commission or delegated conservation district for approval under the act.

(3) The construction, location and operation of animal housing facilities and animal manure management facilities, and the expansion of existing facilities, as part of a plan developed under the act.

(4) The awarding of financial assistance under the act for the development and implementation of OMPs for existing agricultural operations.

§ 83.703. Purpose.

The purposes of this subchapter are as follows:

(1) To provide for the management of odors generated only from animal housing facilities and manure management facilities on certain CAOs and CAFOs, considering the following:

(i) Site-specific factors.

(ii) Reasonably available technology, practices, standards and strategies.

(iii) The practical and economic feasibility of installation and operation of the technology, practices, standards and strategies.

(iv) The potential impacts from the facilities that may lead to conflicts between the agricultural operation and neighbors, arising from the offsite migration of the odors.

(2) To apply scientific information on odor management that is current at the time of plan approval, using the factors in paragraph (1), and recognizing the limitations of that scientific information and the subjective nature of identifying and managing odor impacts from agriculture.

(3) OMPs are intended to address the potential for odor impacts. The plans are not required to completely eliminate the potential for odor impacts.

(4) To encourage the management of odors generated from any VAOs and facilities, not required to submit a plan under this subchapter, consistent with paragraphs (1)—(3).

§ 83.704. Relation to Subchapter D (relating to nutrient management regulations).

This subchapter may not be construed as modifying, rescinding or superseding applicable manure management requirements for water quality protection contained in Subchapter D (relating to nutrient management).

§ 83.705. Preemption of local ordinances.

(a) The act and this subchapter are of Statewide concern and occupy the whole field of regulation regarding odor management to the exclusion of all local regulations.

(b) No ordinance or regulation of a political subdivision or home rule municipality may regulate the management of odors generated from animal housing or manure management facilities regulated by this chapter if the municipal ordinance or regulation is in conflict with this chapter and the regulations or guidelines promulgated under it.

(c) Nothing in the act or this subchapter prevents a political subdivision or home rule municipality from adopting and enforcing ordinances or regulations which are consistent with and no more stringent than the requirements of the act and this subchapter.

(d) A penalty may not be assessed under any valid local ordinance or regulation for any violation for which a penalty has been assessed under the act or this subchapter.

§ 83.706. Limitation of liability.

If an operator for an agricultural operation is fully and properly implementing and maintaining an OMP approved by the Commission or a delegated county conservation district under the act and this subchapter, the implementation shall be given appropriate consideration as a mitigating factor in any civil action for penalties or damages alleged to have been caused by the odor impacts.

§ 83.707. Compliance assistance and enforcement.

(a) The Department of Agriculture will assist the Commission in developing programs to assist those engaged in production agriculture to comply with the act and this subchapter.

(b) The Department of Agriculture will act as an ombudsman to help resolve issues related to county conservation district implementation of the act and this subchapter for those conservation districts delegated odor management program responsibilities under § 83.731 (relating to delegation to conservation districts).

(c) The Commission will be responsible for taking enforcement actions under the act and this subchapter. In the exercise of its enforcement authority, the Commission will be assisted by the staff of the Departments of Agriculture and Environmental Protection.

FINANCIAL ASSISTANCE FOR PLAN DEVELOPMENT

§ 83.711. Applicant eligibility.

Agricultural operations existing as of February 27, 2009, which are subject to this subchapter under § 83.741(b) (relating to general) or § 83.741(g), are eligible to receive funding under this program.

FINANCIAL ASSISTANCE FOR PLAN IMPLEMENTATION

§ 83.721. Applicant eligibility.

An owner of an agricultural operation existing as of February 27, 2009, may apply for financial assistance for the implementation of OMPs developed under the act only when the Commission requires construction of a manure management facility as part of the nutrient management program requirements, as determined under Subchapter D (relating to nutrient management). The owner shall have legal and financial responsibility for the agricultural operation during the term of the financial assistance provided by the Commission.

DELEGATION TO CONSERVATION DISTRICTS

§ 83.731. Delegation to conservation districts.

(a) The Commission may by written agreement delegate to a conservation district one or more of its administrative or enforcement authorities under the act.

(b) The delegation of administrative or enforcement authority may be made to a conservation district when the district demonstrates it has or will have an adequate program and sufficient resources to accept and implement the delegation.

(c) To the extent delegated by the agreement, the delegations may include the authority to enforce the act and this subchapter and to exercise other powers and duties otherwise vested in the Commission to implement the act.

(d) A delegation agreement will:

(1) Specify the powers and duties to be performed by the delegated district.

(2) Provide for the commitment of sufficient trained staff and resources to perform the powers and duties to be delegated.

(3) Require the delegated conservation district to maintain records of activities performed under the delegation.

ODOR MANAGEMENT PLANS

§ 83.741. General.

(a) OMPs submitted under this subchapter must meet the requirements in this section and §§ 83.751, 83.761, 83.762, 83.771 and 83.781—83.783.

(b) *Applicability*. Agricultural operations that meet the criteria of paragraphs (1) and (2) shall develop and implement an OMP:

(1) *Types of operations*. Operations that meet one of the following:

(i) CAOs and CAFOs existing as of February 27, 2009.

(ii) Agricultural operations existing on February 27, 2009, which, because of an increase, resulting from expansion in the number of animals maintained at the operation, will become regulated as either a CAO or CAFO.

(iii) Agricultural operations existing on February 27, 2009, which, because of a decrease in lands available for manure application, will become regulated as either a CAO or CAFO.

(iv) New agricultural operations after February 27, 2009, which will be regulated as either a CAO or CAFO.

(2) *Types of activities*. Operations that meet one of the following:

(i) Constructing a new animal housing facility or a new manure management facility after February 27, 2009.

(ii) Constructing an expansion of an animal housing facility or a manure management facility after February 27, 2009.

(c) *Transition*. Agricultural operations that initiate facility construction prior to February 27, 2009, are not required to develop and implement an OMP.

(d) *Scope of plan*.

(1) The OMP for activities under subsection (b)(2)(i) are only required to be developed and implemented with respect to the new facility.

(2) The OMP for activities under subsection (b)(2)(ii) are only required to be developed and implemented with respect to the newly constructed portion of the facility.

(e) *Schedule to obtain plan approval*. Operations required to have an OMP under this subchapter shall obtain approval of their OMP prior to the commencement of construction of new or expanded facilities.

(f) *Implementation of plans*.

(1) Operations required to have an OMP under this subchapter shall fully implement the approved plan prior to commencing use of the new or expanded animal housing facility and manure management facility.

(2) A plan is considered fully implemented when the Odor BMPs in the plan are being implemented in compliance with the schedule of Odor BMPs.

(g) *Voluntary plans*. An agricultural operation which is not required to comply with this subchapter may voluntarily submit a plan any time after February 27, 2009.

(h) *Qualifications*. Plans shall be developed by odor management specialists certified in accordance with the Department of Agriculture's odor management certification requirements in 7 Pa. Code Chapter 130f (relating to odor management certification). The specialists shall certify that the plans are in accordance with the act and this subchapter.

(i) *Signature requirements*. Plans shall be signed by the operator of the agricultural operation indicating concurrence with the information in the plan and acceptance of responsibilities under the plan. The following signature requirements apply:

(i) For sole proprietorships, the proprietor.

(ii) For partnerships, a general partner.

(iii) For corporations, a vice president, president or authorized representative. The plan must contain an attachment executed by the secretary of the corporation which states that the person signing on behalf of the corporation is authorized to do so.

(j) *Penalties*. Operators and odor management specialists who sign plans may be subject to penalties for any false information contained in the plans.

CONTENT REQUIREMENTS FOR ALL PLANS

§ 83.751. Content of plans.

(a) A plan must follow the standardized plan format provided by the Commission, unless otherwise approved by the Commission.

(b) The operator shall be involved in the development of the plan.

(c) The Odor BMPs listed in the plan must be consistent with the management practices listed in other relevant plans required by State regulations administered by the Commission or the Department, such as the nutrient management plan and Agriculture Erosion and

Sedimentation Control plan developed for the operation, unless otherwise approved by the Commission or delegated conservation district.

PLAN SUMMARY INFORMATION

§ 83.761. Identification of agricultural operations and regulated facilities.

(a) *Agricultural operation identification sheet*. The plan must include an agricultural operation identification sheet that contains the following information:

(1) The operator name, address and telephone number, and the address for the regulated facilities if that address is different from the operator's address.

(2) A description of the operation for both the existing and proposed facilities, clearly indicating the regulated facilities or portions thereof, or both, identifying how the odor will be addressed through the plan, including the following:

(i) Animal types and numbers included on the agricultural operation.

(ii) Types of structures proposed.

(3) The signatures and documentation as required by § 83.741 (relating to general).

(4) The counties and municipalities where land included in the plan is located.

(5) The name, odor management certification program identification number and signature of the odor management specialist that prepared the plan and the date of plan preparation.

(b) *Maps*. The plan must include a topographic map drawn to scale identifying the lands where the facilities that are addressed in the plan are located. The map must clearly identify the following:

(1) The location and boundaries of the agricultural operation.

(2) The location of the neighboring homes, businesses, churches and public use facilities in the evaluation distances as determined by § 83.771(b)(1)(i) (relating to managing odors).

(3) Local topography.

(4) The location of proposed and existing animal housing and manure management facilities.

§ 83.762. Operator commitment statement.

The plan must include a statement, signed by the operator, committing to the following:

(1) Implementation of the Odor BMPs.

(2) Maintaining the Odor BMPs consistent with the operation and maintenance criteria contained in the plan.

(3) Keeping documentation of plan implementation activities, as described in the plan, and to allow access by the Commission or delegated conservation district to the documentation needed to determine compliance status.

(4) Allowing access to the agricultural operation by the Commission or delegated conservation district needed for status reviews and inspections for complaints.

(5) Providing operator's biosecurity protocols to the Commission or a delegated conservation district, if requested.

MANAGING ODORS

§ 83.771. Managing odors.

(a) *General*. OMPs must address the offsite migration of odors generated from facilities, as described in subsections (b) and (c). OMPs are intended to address the potential for odor impacts. The plans are not required to completely eliminate the potential for odor impacts.

(b) *Evaluation*. The plans must include an evaluation of the potential impacts according to the following:

(1) The evaluation must address proximity to neighboring landowners, land use of the surrounding area, type of structures proposed, species of animals, local topography and direction of the prevailing winds, according to the following:

(i) To establish the extent of the surrounding area to be included in this evaluation, an evaluation distance from the proposed facility shall be established. The number of AEUs on the agricultural operation shall be used as the primary factor in determining this evaluation distance.

(ii) The types of neighboring land owners and land uses that shall be assessed in this evaluation include homes, businesses, churches and public use facilities existing at the time of the submission of the plan.

(iii) The geographic center of a facility may be used as the starting point for the evaluation distance and for determining proximity to neighboring homes, businesses, churches and public use facilities.

(iv) Prevailing winds are presumed to be coming from the West and Northwest.

(2) The criteria and procedures in the current "Odor Management Guidance" (Guidance) issued by the Commission, and in effect at the time of plan submission, may be used to comply with this paragraph, including the use of an Odor Site Index contained in the Guidance. If the criteria and procedures in the Guidance issued by the Commission are not followed, an alternative method must be approved by the Commission.

(c) *Odor BMPs*. Based on the evaluation in subsection (b), the plan must include Odor BMPs that are necessary, if any, to address the potential for offsite migration of odors to meet the purposes of this subchapter, and as described in § 83.781 (relating to identification of Odor BMPs).

(d) *Time period to implement*. If construction activities of the new or expanded facility do not commence within 3 years of the date of plan approval, a new plan shall be submitted and approved prior to construction of the facility subject to this subchapter. The Commission may allow for extensions of the 3-year time frame, not to exceed an additional 2 years, when the agricultural operation was not able to obtain the necessary permits and approvals in time to initiate construction activities within the 3-year time frame due to circumstances beyond the reasonable control of the operation.

ODOR BMPs

§ 83.781. Identification of Odor BMPs.

(a) *General*. A plan must identify all existing and planned Odor BMPs used to address the potential for odor impacts from the facilities covered by the plan.

(b) *Odor BMPs*. Odor BMPs are only required if they are necessary to address the potential for impacts, and installation and operation of the BMPs are feasible from a practical and economic perspective. The Commission

may require the agricultural operation to demonstrate why a particular Odor BMP is not feasible from a practical and economic perspective for the given operation.

(c) *Level of Odor BMPs.*

(1) Based on the evaluation in § 83.771(b) (relating to managing odors), and the criteria in subsection (b), determine the Odor BMPs which need to be included in the plan, if any. If Odor BMPs are needed, the BMPs must meet one of the following levels:

(i) *Level 1 Odor BMPs.* Basic management-oriented Odor BMPs that are applicable to the operation according to the species of animals, such as dust management, moisture control and facility sanitation, and that manage odors according to the purposes of this subchapter.

(ii) *Level 2 Odor BMPs.* Specialized nonmanagement oriented Odor BMPs that are applicable to the type of operation, such as windbreak shelterbelts, biofilters and manure storage covers, that are in addition to the Level 1 Odor BMPs, and that manage odors according to the purposes of this subchapter.

(2) The criteria and Odor BMPs contained in the current "Odor Management Guidance" issued by the Commission, and in effect at the time of plan submission, may be used to comply with this subsection. If the criteria and Odor BMPs contained in the current "Odor Management Guidance" issued by the Commission are not followed, an alternative method must be approved by the Commission.

(d) *Description of Odor BMPs.* The plan must list the Odor BMPs, their general construction and implementation criteria, and their operation and maintenance requirements.

(e) *Implementation of supplemental Odor BMPs.* Supplemental Odor BMPs may be implemented in addition to the approved Odor BMPs in the plan, on a temporary or permanent basis, without approval by the Commission or a delegated conservation district.

(1) Plan updates to address operational changes of these supplemental Odor BMPs shall be:

(i) Retained at the operation.

(ii) Submitted to the Commission or delegated conservation district for inclusion in the approved OMP within 30 days after the end of the calendar year in which they are implemented.

(2) Inspection reports, as provided for in § 83.802(b) (relating to plan implementation), may be used as documentation for plan updates.

§ 83.782. Implementation schedule.

(a) OMPs must contain a schedule that identifies all Odor BMPs with the corresponding time frames that each Odor BMP will be implemented.

(b) Odor BMPs that involve planting of vegetation such as a shelterbelt are considered fully implemented if the planting satisfies the criteria in the OMP.

(c) Prior to utilizing a new or expanded facility that is required to implement an OMP under this subchapter, the operation must receive written approval from the Commission, or a delegated conservation district, confirming implementation of the plan.

(1) The operation shall provide the Commission, or a delegated conservation district, with written notification provided by certified mail, of the intent to utilize the facility.

(2) If the Commission, or a delegated conservation district, fails to act within 10 business days of the notification to utilize the facility, it will be deemed approved.

§ 83.783. Operation and maintenance schedule.

OMPs must contain a schedule that identifies all operation and maintenance procedures, the time frames that the operation and maintenance procedures will be conducted and the lifespan for each Odor BMP listed in the plan.

DOCUMENTATION REQUIREMENTS

§ 83.791. General documentation requirements.

Unless otherwise specified in the plan, documentation required under this subchapter is not required to be submitted to the Commission or delegated conservation district, but shall be retained by the agricultural operation for at least 3 years from the date they are prepared.

§ 83.792. Documentation relating to plan implementation.

Written documentation to demonstrate implementation of the OMP must be appropriate to the types of Odor BMPs required by the plan, including documentation of installation, operation and maintenance activities relating to the approved Odor BMPs consistent with the documentation requirements included in the approved plan, and shall be completed and maintained at the operation.

PLAN REVIEW AND IMPLEMENTATION

§ 83.801. Initial plan review and approval.

(a) Plans shall be submitted for initial review and approval to the Commission, or alternatively to delegated conservation districts, for agricultural operations located in counties delegated administrative authority under § 83.731 (relating to delegation to conservation districts). A person performing the plan review shall be certified in accordance with the Department of Agriculture's odor management certification requirements in 7 Pa. Code Chapter 130f (relating to odor management certification).

(b) The Commission or a delegated conservation district will, within 10 days from the date of receipt of the plan, provide notice to the operator indicating whether all of the required plan elements have been received.

(c) The Commission or a delegated conservation district will approve or disapprove the plan or plan amendment within 90 days of receipt of a complete plan or plan amendment. The Commission or a delegated conservation district may confer with experts in odor management, such as those at Pennsylvania State University, Natural Resources Conservation Service, and with others having knowledge of the local community in which the agricultural operation is located.

(d) If the Commission or delegated conservation district does not act on the plan within the 90-day period, the agricultural operation that submitted the plan is authorized to implement the plan and the plan will be deemed approved.

(e) The notice of determination to disapprove a plan will be provided in writing to the operator submitting the plan, and include an explanation specifically stating the reasons for disapproval. If a plan is disapproved, the operator submitting the plan shall have 90 days after receipt of the notice of disapproval to resubmit a revised plan.

(f) Approvals will be granted only for those plans that satisfy the requirements of this subchapter.

§ 83.802. Plan implementation.

(a) The plan shall be fully implemented in accordance with the implementation schedule included as part of the approved plan.

(b) Periodic inspections and review of the agricultural operation, the plan and the plan implementation documentation will be conducted by the Commission or a delegated conservation district at least annually to determine the status of the operation's compliance and whether a plan amendment is required.

PLAN AMENDMENTS AND TRANSFERS

§ 83.811. Plan amendments.

(a) A plan amendment is required if the operation expects to make a significant change in any animal housing and manure management facilities subject to this subchapter, prior to those changes being implemented.

(b) Any of the following are presumed to be a significant change in the operation which will require a plan amendment:

(1) A net increase of equal to or greater than 25% in AEUs, as measured from the time of the initial plan approval.

(2) If calculations in the plan as originally submitted are in error, or if figures used in the plan are inconsistent with this subchapter, and adequate justification has not been given in writing for the inconsistency.

(c) Any operation which would be required to submit a plan amendment under subsection (b) may avoid that requirement if it can demonstrate that there will not be an increase in the potential for offsite migration of odors under § 83.771 (relating to managing odors).

(d) Any operation that is required to implement Odor BMPs under § 83.781 (relating to identification of Odor BMPs), may submit a plan amendment requesting to change the Odor BMPs that are to be implemented, without conducting a new evaluation of the potential offsite migration of odors as described in § 83.771(b), if the following applies:

(1) Supporting documentation is submitted, such as the implementation, operation and maintenance schedule, to demonstrate compliance with § 83.771(c).

(2) The operation is not making a significant change in the operation as described in subsection (b).

(3) The operator will continue to implement the original Odor BMPs until the Commission has approved the requested amendment.

(e) A plan amendment shall be developed and certified by an odor management specialist and be submitted to the Commission or delegated conservation district for approval under this subchapter.

§ 83.812. Plan transfers.

(a) An approved OMP may be transferred to a subsequent owner or operator of an agricultural operation by notification of the transfer to the Commission or a delegated conservation district, unless the transfer results in operational changes requiring a plan amendment under § 83.811 (relating to plan amendments). However, any new signatures required under § 83.741(i) (relating to general) must be obtained before a plan is transferred to any new operator.

(b) If the transfer of the approved plan results in operational changes requiring a plan amendment under § 83.811, the plan amendment shall be submitted for approval of the Commission or a delegated conservation district along with, or before, the notification required under subsection (a).

[Pa.B. Doc. No. 08-2143. Filed for public inspection November 28, 2008, 9:00 a.m.]

Title 49—PROFESSIONAL AND VOCATIONAL STANDARDS

STATE BOARD OF CHIROPRACTIC

[49 PA. CODE CH. 5]

Reactivation of Lapsed License

The State Board of Chiropractic (Board) amends § 5.17 (relating to biennial registration; unregistered status and inactive status; failure to renew; address of record) to read as set forth in Annex A.

Description and Need for the Rulemaking

Under section 501(b) of the Chiropractic Practice Act (act) (63 P. S. § 625.501(b)), a chiropractor's license must be renewed biennially, and a licensee "who has failed to renew his license for a period of longer than five years shall be required to apply for a license in accordance with subsection (a) if he desires to resume practicing chiropractic." Currently, § 5.17(m) requires a licensee whose license has been inactive for more than 5 years to apply for licensure in accordance with §§ 5.12 or 5.13 (relating to licensure by examination; and licensure by reciprocity). In addition to the current two bases to reactivate a license that has been lapsed for more than 5 years, this regulation will permit the licensee to demonstrate competence to resume practice by showing at least 5 years of continuous licensed practice of chiropractic in another jurisdiction immediately preceding application for reactivation or by successfully completing, within 6 months prior to applying for reactivation, the Special Purpose Examination in Chiropractic and the Pennsylvania Jurisprudence Examination.

Summary of Comments and Responses to Proposed Rulemaking

The Board published a notice of proposed rulemaking at 37 Pa.B. 4627 (August 25, 2007) with a 30-day public comment period. The Board received no written comments from the public. The Board received comments from the House Professional Licensure Committee (HPLC) and the Independent Regulatory Review Commission (IRRC) as part of their review of proposed rulemaking under the Regulatory Review Act (RRA) (71 P. S. §§ 745.1—745.12). The Board did not receive comments from the Senate Consumer Protection and Professional Licensure Committee (SCP/PLC) as part of its review of proposed rulemaking under the act.

The HPLC first questioned the option to show continuous licensed practice in jurisdictions that do not offer reciprocity and might not have equivalent standards of

practice. It is important to note that the licensee seeking to reactivate a lapsed license previously demonstrated that the licensee met the Commonwealth's standards for licensure. By comparison, a Commonwealth-licensed chiropractor who continued to renew the chiropractor's license would not have been required to demonstrate any standard of professional practice. The Board concludes that, regardless of the scope or standard of practice in another jurisdiction, active practice of chiropractic, coupled with completion of the required amount of continuing education and the Pennsylvania's Jurisprudence Examination as discussed as follows, is adequate to demonstrate current competence to resume practice in this Commonwealth.

The HPLC also questioned the option for a licensee to complete the Pennsylvania Chiropractic Law Examination, noting that this examination does not focus on the ability to practice as a chiropractor. The Board intended to require this examination in addition to the Special Purpose Examination in Chiropractic to demonstrate current competence to resume the practice of chiropractic in this Commonwealth. Accordingly, the Board has revised § 5.17(m)(4) to clarify the requirement to successfully complete both examinations. In light of this comment, the Board reconsidered the value of requiring the Jurisprudence Examination and concluded that it is an appropriate requirement for reactivation when the licensee has not practiced in this Commonwealth for more than 5 years. Notably, under the existing regulations for reactivation based upon either taking the licensure examinations or qualifying for licensure by reciprocity, successful completion of the Pennsylvania's Jurisprudence Examination is required. According, the Board also revised § 5.17(m)(3) to require successful completion of the Pennsylvania's Jurisprudence Examination, in addition to continuous practice of chiropractic in another jurisdiction, to reactivate a license that has been lapsed for more than 5 years.

IRRC commented that the option to reactivate a license that has been lapsed for more than 5 years based upon practice in another jurisdiction should explicitly state that completion of the continuing education requirement is required. Section 5.17(f)(3) requires a licensee renewing a current license to provide proof of attendance at continuing education courses during the previous biennial renewal period; and § 5.17(j) requires a licensee applying to reactivate a lapsed license (without reference to the period of lapse) to submit evidence of compliance with the continuing education requirements. The Board agrees with IRRC that explicitly stating this requirement in § 5.17(m) would improve the clarity of the rulemaking. Accordingly, the Board has revised § 5.17(m) to explicitly require compliance with all other requirements for reactivation, including the continuing education requirement.

Fiscal Impact and Paperwork Requirements

The final-form regulation will have no adverse fiscal impact on the Commonwealth or its political subdivisions and will impose no additional paperwork requirements upon the Commonwealth, political subdivisions or the private sector.

Effective date

The final-form regulation will become effective upon publication in the *Pennsylvania Bulletin*.

Statutory Authority

The final-form regulation is authorized under sections 302(3) and 501(b) of the act.

Regulatory Review

Under section 5(a) of the RRA (71 P. S. § 745.5(a)), on August 15, 2007, the Board submitted a copy of the notice of proposed rulemaking published at 37 Pa.B. 4627, to IRRC and the Chairpersons of the HPLC and the SCP/PLC for review and comment.

Under section 5(c) of the RRA, IRRC, the HPLC and the SCP/PLC were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing the final-form regulation, the Board has considered all comments received from IRRC, the HPLC, the SCP/PLC and the public.

Under section 5.1(j.2) of the RRA (71 P. S. § 745.5a(j.2)), on September 17, 2008, the final-form regulation was approved by the HPLC. On October 15, 2008, the final-form regulation was deemed approved by the SCP/PLC. Under section 5.1(e) of the RRA, IRRC met on October 16, 2008, and approved the final-form regulation.

Additional Information

Persons who require additional information about the final-form regulation should submit inquiries to Deborah Smith, Administrator, State Board of Chiropractic, by mail to P. O. Box 2649, Harrisburg, PA 17105-2649, (717) 783-7155 or st-chiro@state.pa.us.

Findings

The Board finds that:

(1) Public notice of proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No. 240) and regulations promulgated thereunder, 1 Pa. Code §§ 7.1 and 7.2.

(2) A public comment period was provided as required by law and all comments were considered.

(3) The amendments to this final-form rulemaking do not enlarge the scope of proposed rulemaking published at 37 Pa.B. 4627.

(4) The final-form rulemaking adopted by this order is necessary and appropriate for the administration of the act.

Order

The Board, acting under its authorizing statute, orders that:

(a) The regulations of the Board, 49 Pa. Code Chapter 5, are amended by amending § 5.17, to read as set forth in Annex A, with ellipses referring to the existing text of the regulation.

(b) The Board shall submit this order and Annex A to the Office of Attorney General and the Office of General Counsel for approval as required by law.

(c) The Board shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(d) The final-form rulemaking shall take effect upon publication in the *Pennsylvania Bulletin*.

JONATHAN W. MCCULLOUGH, DC,
Chairperson

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 38 Pa.B. 6123 (November 1, 2008).)

Fiscal Note: Fiscal Note 16A-4314 remains valid for the final adoption of the subject regulation.

Annex A

TITLE 49. PROFESSIONAL AND VOCATIONAL STANDARDS

PART I. DEPARTMENT OF STATE

Subpart A. PROFESSIONAL AND OCCUPATIONAL AFFAIRS

CHAPTER 5. STATE BOARD OF CHIROPRACTIC

Subchapter B. LICENSURE, CERTIFICATION, EXAMINATION AND REGISTRATION PROVISIONS

§ 5.17. Biennial registration; unregistered status and inactive status; failure to renew; address of record.

* * * * *

(m) To reactivate a license that has been inactive for more than 5 years, the licensee shall satisfy all other requirements for reactivation required by this section, including the continuing education requirements, and establish current competence to practice by at least one of the following:

(1) Successful completion of the examinations required under § 5.15(a) (relating to licensure examinations) within 1 year prior to application for reactivation.

(2) Compliance with § 5.13 (relating to licensure by reciprocity).

(3) Proof of continuous licensed practice of chiropractic in one or more other jurisdictions of the United States or Canada for at least 5 years immediately preceding application for reactivation and successful completion of the examination required by § 5.15(a)(2) (relating to licensure by examination).

(4) Successful completion of both of the following examinations within 6 months prior to application for reactivation:

(i) The examination required by § 5.15(a)(2).

(ii) The Special Purpose Examination in Chiropractic administered by the National Board of Chiropractic Examiners.

[Pa.B. Doc. No. 08-2144. Filed for public inspection November 28, 2008, 9:00 a.m.]

Title 52—PUBLIC UTILITIES

PENNSYLVANIA PUBLIC UTILITY COMMISSION

[52 PA. CODE CH. 75]

Implementation of Act 35 of 2007; Net Metering and Interconnection

The Pennsylvania Public Utiltiy Commission (Commission) on May 22, 2008, adopted a final-omitted rulemaking order which amends the net metering regulations required by the Alternative Energy Portfolio Standards Act (act) (73 P. S §§ 1648.1—1648.8) to be consistent with Act 35 of 2007 (Act 35).

Executive Summary

On June 23, 2006, at Docket No. L-00050174, the Commission entered a final-form rulemaking order regarding net metering of customer-generators. This final-form rulemaking became effective upon publication in the *Pennsylvania Bulletin* on December 16, 2006. On July 17, 2007, Governor Edward Rendell signed Act 35 into law, which became effective immediately. This law amended portions of the Alternative Energy Portfolio Standards Act. On October 4, 2007, the Commission issued a Secretarial Letter seeking comments on how the Act 35 amendments should be reflected in the Commission's regulations in 52 Pa. Code §§ 75.1—75.51. Thirteen comments and six reply comments were submitted. On July 2, 2008, the Commission entered an order at the previously-captioned docket finalizing the regulations.

The Commission has adopted amendments to its Alternative Energy Portfolio Standards regulations, 52 Pa. Code Chapter 75, to make the regulations consistent with Alternative Energy Portfolio Standards Act, as amended by Act 35. Specifically, under the general provisions of Chapter 75, the Commission revised the definitions of "alternative energy credit," "customer-generator," "force majeure," and "tier I alternative energy source" § 75.1 to mirror the same definitions contained in the amended Act 35.

In addition, the Commission amended portions of the net metering provisions in Subpart B of Chapter 75, to make them consistent with the language of the act as amended by Act 35. Specifically, the Commission revised the definitions "net metering," and "virtual meter aggregation," contained in § 75.12, so that they reflect the changes contained in the Act 35 amendments. The Commission also deleted the definition of "avoided cost of wholesale power" as that term is no longer used in the regulations and added "year and yearly" to provide clarity. The Commission also revised § 75.13(c), (d) and (f) to reflect the Act 35 amendment's requirement that customer-generators be compensated at the full retail value for excess generation produced on an annual basis, as opposed to compensation at the avoided cost of wholesale power on a monthly basis. Finally, the Commission revised § 75.14(e), such that this regulation matches the definition of virtual meter aggregation contained in the Act 35 amendments.

Public Meeting held
May 22, 2008

Commissioners Present: Wendell F. Holland, Chairperson; James H. Cawley, Vice Chairperson; Tyrone J. Christy; Kim Pizzingrilli, Dissenting Statement Follows

Implementation of Act 35 of 2007;
Net Metering and Interconnection;
Doc. No. L-00050174

Final-Omitted Rulemaking Order

By the Commission:

The Commission is adopting this Final-Omitted Rulemaking Order in order to amend the net metering regulations required by section 5 of the act (73 P. S. § 1648.5) to be consistent with Act 35. A final form net metering rulemaking was approved by the Commission in 2006, and delivered to the Independent Regulatory Review Commission (IRRC). Final Rulemaking Re Net Metering for Customer-generators pursuant to section 5 of the (73 P. S. § 1648.5) (act), Docket No. L-00050174 (Order entered June 23, 2006). The rulemaking was approved by IRRC on November 2, 2006, and was then approved by the Pennsylvania Attorney General on December 1, 2006. The final-form rulemaking was legally effective upon publication in the *Pennsylvania Bulletin* on December 16, 2006.

On July 17, 2007, Governor Edward Rendell signed Act 35 of 2007 into law. Act 35 became effective immediately. Act 35, § 4. This law amends a number of provisions of the aforementioned act, including those relating to the definition of customer-generators, the reconciliation mechanism for surplus energy supplied through net metering and the price to be paid for such surplus energy. These changes include:

• Revising the definition of "customer-generator" to increase the capacity limit on nonresidential projects from 1 to 3 megawatts generally, and from 2 to 5 megawatts for those projects that operate in parallel with the grid;

• Revising the definition of "net metering" to include a restriction on virtual meter aggregation; and,

• Revising section 1648.5 to require that customer-generators be compensated for excess generation on an annual basis at the full retail value for energy, as opposed to the current monthly standard at the avoided cost of wholesale power.

These statutory changes require corresponding revisions to the following sections of our Alternative Energy Portfolio Standard regulations.[1] The definitions in § 75.1 of "Act," "Alternative energy credit," "Customer-generator," "Force majeure" and "Tier I alternative energy source" will be revised to reflect Act 35's amendments of those terms. The definitions in § 75.12 of "Net metering" and "Virtual metering aggregation" will be revised to conform to Act 35's amendment of the term "Net metering." Section 75.13(c), (d) and (f), will be revised to conform to Act 35's amendment of section 5 of the act (73 P. S. § 1648.5). The amendment to section 5 also requires deletion of the term "Avoided cost of wholesale power" in § 75.12. The definition for the terms "Year and Yearly" was added to § 75.12 to clarify that these terms correspond with the planning year as determined by the PJM Interconnection, LLC regional transmission organization. Additionally, § 75.12 dealing with "physical meter aggregation" and § 72.13(c) will be revised to correct printing errors.

On October 4, 2007, the Commission issued a Secretarial Letter seeking comments on how the Act 35 amendments to the act should be reflected in the regulations at 52 Pa. Code § 75.1, et seq. This Secretarial Letter noted that while a majority of the changes merely involve replacing existing language with language contained in Act 35, some of the amendments raise new issues that had not been previously considered. The Secretarial Letter specifically pointed out several issues related to the requirement that "excess generation from net metered customer generators shall receive full retail value for all energy produced on an annual basis." The Commission requested comments on the following issues:

• What is the meaning of "full retail value for all energy produced"? Act 35 does not specifically define this term. The term could be interpreted as meaning the fully bundled retail rate for generation, transmission, distribution, and any applicable transition charges. Alternatively, given the Legislature's use of the terms "excess generation" and "energy" it also could be interpreted as being limited to the generation component of the retail rate.

• What are the projected costs associated with these competing interpretations, i.e., given a projected level of net metered generation (kwh), what are the projected costs to the remaining customers of an EDC if net metered customer generators receive x cents per kwh versus y cents per kwh?

• How should any residual stranded cost charges be treated in the annual reconciliation?

• Are there any additional issues to be addressed by moving the reconciliation of excess energy from a monthly to an annual basis?

• Act 35 does not define the phrase "annual basis." Does this phrase mean a calendar year, fiscal year or does it correspond with the act compliance period of June 1 through May 31?

• Should demand charges for distribution, transmission and generation services paid by net metered customers be adjusted? If so, should each component of the demand charge be adjusted to reflect the net flow of energy through a net meter? How should the adjustments be calculated?

• Should the Commission provide monthly credits for net metered accounts, and carry over monthly excess generation to the next billing month, with any remaining excess energy (where total annual generation of energy exceeds total annual usage) cashed out at the end of the year? Alternatively, do the metering regulations only provide for annual compensation for excess generation in any month?

The Commission received comments and reply comments related to these and other issues regarding the effect Act 35 amendments have on the Commission's existing regulations. Comments have been filed by the following parties: the Citizens for Pennsylvania's Future (PennFuture); the Energy Association of Pennsylvania (EAP); Heat Shed, Inc. (Heat Shed); the Industrial Energy Consumers of Pennsylvania, Duquesne Industrial Interveners, Met Ed Industrial Users Group, Penelec Industrial Customer Alliance, Philadelphia Area Industrial Energy Users Group, Penn Power Users Group, PP&L Industrial Customer Alliance, and West Penn Power Industrial Interveners (collectively, IECPA, and others); the Mid Atlantic Solar Energy Association and Solar Alliance (collectively MSEIA); the Office of Consumer Advocate (OCA); the Office of Small Business Advocate (OSBA); the Pennsylvania Department of Environmental Protection (DEP); PECO Energy Company (PECO); the Pennsylvania Farm Bureau (Farm Bureau); the Pennsylvania Waste Industries Association (PWIA); the Retail Energy Supply Association (RESA); and Vogel Holding, Inc. (Vogel). Reply comments were filed by the following parties: PennFuture; EAP; IECPA, and others; DEP; PWIA; and Vogel.

Discussion

The Commission has reviewed each of the comments filed in this proceeding. We will address each of them in seriatim.

Section 75.1. Definitions.

The definitions revised by this rulemaking merely mirror the changes in the same definitions contained in Act 35. As indicated previously, the specific definitions in § 75.1 that were revised are "Act," "Alternative energy credit," "Customer generator," "Force majeure" and "Tier I alternative energy source."

[1] We are also taking the opportunity to make several non-substantive changes to the regulations such as correcting capitalization errors in Sections 75.12 and 75.13(c). In addition we are adding a definition of "year and yearly" to reinforce that those terms refer to the planning year of PJM Interconnection, L.L.C.

Position of the Parties

The Commission received few comments regarding the definitions in this section. PWIA supported the change in the definition of "customer generator," as it would allow more customer generators to participate in net metering. PWIA requested that the Commission add wastewater treatment systems used to treat landfill leachate to the list of critical infrastructure that permits generators with a nameplate capacity of between 3 megawatts (Mw) and 5 Mw to participate in net metering.

The DEP asserts that the definition of alternative energy credit should be amended to be consistent with the amendment in Act 35 relating to ownership of the credits. The DEP also asserts that the amendments in Act 35 to the definitions of "customer-generator" and "net metering" delete the requirement that the primary purpose of the generation system must be to offset part or all of the customer generator's electricity needs. The DEP also notes that the amendments raised the capacity limits for generation systems at nonresidential customer service locations.

Disposition

The Commission declines to expand the definition for "customer generator" as requested by PWIA. The Act 35 amendments did not change or expand the list of critical infrastructure facilities that qualify as distributed generation systems with a nameplate capacity between 3 Mw and 5 Mw for net metering; as such, this Commission declines to change or expand the list of qualifying facilities in this proceeding. The Commission agrees with the DEP that the definition of "alternative energy credit" must be revised to conform to the Act 35 amendments and has done so. Finally, the Commission agrees with the DEP that the definitions of "customer generator" and "net metering" must also be revised to conform to the Act 35 amendments and has done so.

Section 75.12. Definitions.

Avoided Cost of Wholesale Power

The amendment to section 5 of the act (73 P. S. § 1684.5), adds the following sentence at the beginning of the section: "Excess generation from net metered customer-generators shall receive full retail value for all energy produced on an annual basis." This language clearly changes the Commission's present net metering regulation, which states as follows:

> At the end of each billing period, the EDC shall compensate the customer generator for kilowatt hours generated by the customer generator over the amount of kilowatt hours delivered by the EDC during the billing period at the EDC's avoided cost of wholesale power.

52 Pa. Code § 75.13(d)

As there being no other reason for the phrase "avoided cost of wholesale power" within these regulations, the Commission is deleting this definition from these regulations.

Position of the Parties

PennFuture believes that customer-generators should be compensated for excess generation at the end of the annualized year at the avoided cost of wholesale power as currently defined in these regulations. They assert that any excess power at the end of the annualized period should be treated as power sold to the grid by an independent power producer. PennFuture references New Jersey's net metering regulation at N.J.A.C. 14:4-9.2, as a model.

The DEP asserts that the Commission should follow New Jersey's lead and require EDC's to compensate customer generators at the avoided cost of wholesale power. The DEP supports this assertion by noting that Act 35 did not change the requirement that Pennsylvania's net metering rules must be consistent with the net metering rules in other MISO and PJM states.

OCA submits that the Commission should follow the New Jersey rules and compensate customer generators for excess generation at the end of the annual period at the avoided cost of wholesale power. RESA submits that customer generators should be credited at the locational marginal price (LMP) for generation sales and charged the bundled full retail price for electricity consumed.

Disposition

We disagree with PennFuture, the DEP and RESA. The language found in Section 5 of Act 35 clearly addresses the compensation to be paid to customer generators for any excess generation produced over a 1 year period. This language directly addresses the Commission's current regulation regarding compensation on a monthly basis for excess generation at 52 Pa. Code § 75.13(d). It specifically directs that "[e]xcess generation from net metered customer generators shall receive full retail value for all energy produced on an annual basis," not the avoided cost of wholesale power or the LMP on a monthly basis. While the act also directs this Commission to develop net metering interconnection rules consistent with the rules defined in other states served by PJM and MISO, 73 P. S. § 1648.5, the Commission cannot disregard the clear words of the statute, 1 Pa.C.S. § 1921(b), and must, if possible, interpret the statute in a way to give effect to all provisions of the statute, 1 Pa.C.S. § 1921(a). The application of the phrase "full retail value for all energy produced on an annual basis" within these regulations is addressed later in this Order when we discuss changes to § 75.13.

Net Metering

The definition of "net metering" in these regulations has been revised to conform to the definition as amended by Act 35. Specifically, the Commission has deleted the requirement that the system be intended to primarily offset the customer's electricity requirements and added language noting that net metering is available when any portion of the electricity generated is used to offset the customer's electricity requirements.

Position of the Parties

The DEP noted that the Act 35 amendment to the definition of "net metering" deleted the requirement that the primary purpose of the generation system must be to offset part or all of the generator's need for electricity. The DEP asserts that while these changes will increase the number of customer generators eligible to participate in net metering, and resolve disputes between customers and EDCs, they do not believe that any other changes are required in relation to the definitions.

Disposition

The Commission agrees with the DEP that the Act 35 amendments only require a change to the definition of net metering in the regulation such that it conforms to the language in the amended statutory definition.

Physical Meter Aggregation

The Commission is simply correcting a capitalization error in this definition. The current definition capitalizes OF in the phrase "all meters regardless OF rate class. . . ." This phrase should now be as follows: "all meters regardless of rate class. . . ."

Virtual Meter Aggregation

Again the definition of "virtual meter aggregation" in these regulations has been revised to conform to the definition as amended by Act 35. Specifically, the Act 35 amendments added language limiting the geographic boundary for virtual meter aggregation to properties owned or leased and operated by customer generators that are within two miles of the boundaries of that customer generator's property and within a single EDC's service territory. The Commission added similar language to the definition of virtual meter aggregation in this section.

Position of the Parties

MSEIA agrees that the virtual net metering application should stay within the bounds of a given EDC, but were puzzled as to why there is a two mile radius limit. MSEIA states that this two mile restriction limits the ability of customer generators in less developed areas to take advantage of virtual net metering. MSEIA asks this Commission to extend the virtual net metering boundary to the full extent of the EDC's regional boundary. The DEP simply notes that the Act 35 amendments codify the concept of virtual meter aggregation found in this Commission's regulations.

Disposition

The Commission must decline to adopt MSEIA's request as this Commission is bound by the requirement to promulgate regulations that do not conflict with the statute the regulations are implementing. See *Popowsky v. Pa. PUC*, 589 Pa. 605, 910 A.2d 38 (2006) and *Commonwealth v. Colonial Nissan, Inc.*, 691 A.2d 1005, 1009 (Pa. Commw. Ct. 2007). The Pennsylvania General Assembly specifically directed that for a customer to be eligible for virtual meter aggregation, the generator must be "located within two miles of the boundaries of the customer generator's property . . ." 73 P. S. § 1648.2. We cannot disregard the Legislature's clear direction under the pretext of pursuing its spirit, 1 Pa.C.S. § 1921(b).

Furthermore, as this Commission indicated in its previous final rulemaking order for net metering, we modified "the language in § 75.14(e) from 'contiguous and adjacent properties owned and operated by the customer generator' to owned and/or leased parcels within two miles of the customer generator's property lines to allow customer generators to participate in net metering on a better economic footing." See p. 22 of Final Rulemaking Order at L-00050174 entered on June 23, 2006. This change was prompted by the Farm Bureau's comment indicating that the proposed definition did not fit the reality of a typical farm operation that would operate an anaerobic digester.

Thus, this Commission had previously adopted this definition for meter aggregation by specifically considering the ability of customer generators in less developed areas to take advantage of net metering. As pointed out by the DEP, the Act 35 amendment simply codifies this Commission's previous rulemaking. As such, this Commission is unable to expand the definition of virtual meter aggregation as requested by MSEIA.

Year and Yearly

The act and the Act 35 amendments reference annual requirements but do not define what these annual periods consist of. As these regulations relate to the act, this Commission has added a definition for year and yearly to clarify the time period covered where the statute uses the term "annual." This Commission has defined year and yearly as being the PJM planning year as it corresponds with the act compliance reporting year.

Position of the Parties

EAP, OSBA and PECO all agree that the term "annual basis" should conform to the act compliance reporting period, which is based on the PJM planning year. The DEP, MSEIA and PennFuture all agree that the term "annual basis" should be defined as a calendar year as it provides a simple and uniform tracking mechanism for EDCs and customer generators. PennFuture and MSEIA further indicate that they would support an alternative definition as long as it was fair and convenient to customer generators and consistent throughout the state. OCA also comments that this term should be defined in a way that provides the greatest administrative ease for customer generators and EDCs.

Disposition

The Commission agrees with EAP, OSBA and PECO that since these regulations are intended to implement portions of the act, as amended, any reference to an annual period should conform to the AEPS compliance reporting period of June 1 through May 31, which is the PJM planning year. This Commission believes that keeping any references to annual periods consistent throughout these regulations will eliminate confusion and provide the greatest administrative ease for all involved.

Section 75.13. General provisions.

Section 75.13(c)

The Commission is modifying the language in this section to clarify the meaning of "full retail rate." The Commission is also adding language to establish an appropriate monthly billing period credit system for excess generation to meet the Act 35 amendment's requirement for compensation of excess generation on an annual basis. In addition, the Commission is correcting capitalization errors in this subsection. The current subsection of this regulation has the following phrase in the first sentence: "Tier I or tier ii resource . . . ." The capitalization in this phrase is changed as follows: "Tier I or Tier II resource . . . ."

Monthly Credits

With these amendments to § 75.13(c), the Commission is reiterating that customer generators are to be credited at the fully bundled rate, to include generation, transmission and distribution, for all energy produced up to the level of energy used during a billing period. Furthermore, the Commission believes that, due to the Act 35 amendment's requirement for annual compensation for excess generation, customer generators should receive a kilowatt hour per kilowatt hour credit applied to their next billing period, for any excess energy produced by the customer generator during any billing period. These credits are to continue to accumulate until they are exhausted or the end of the year, as defined previously.

Position of the Parties

EAP and PECO comment that to be consistent with the plain language of the amendments, the regulations should only provide for annual compensation of excess monthly generation. EAP and PECO further assert that the value of excess energy should be carried forward and any excess value at the end of the annual period is to be paid to the customer. IECPA also comments that there should be monthly credits based on the retail generation component with any excess generation compensated based upon the EDC's avoided cost of power. OSBA comments that under the Act 35 amendments, compensation is no longer to be paid on a monthly basis. OSBA further comments that applying a kilowatt hour credit to the next billing period would in effect compensate the customer generator at the fully bundled retail generation rate. OSBA asserts that such a crediting scheme would be contrary to the apparent intent of Act 35, which they assert was to require compensation for excess generation at the retail rate rather than the wholesale generation rate.

PWIA and Vogel suggest that any excess generation in a billing period should be credited on a kilowatt hour per kilowatt hour basis at the full retail rate and carried over in successive billing periods. The customer generator is then compensated at the full retail rate for any remaining credits at the end of the annual period. PWIA and Vogel both point out that the purpose of the act is to increase the use of alternative energy sources. PWIA and Vogel both assert that by compensating the customer generator at the fully bundled retail rate will further the intent of the act.

The DEP, OCA and PennFuture comment that the language of the Act 35 amendment clearly dictates that customer generators are to be credited at the fully bundled rate during each monthly billing period and that any excess credits are to be carried forward to subsequent monthly billing periods. The DEP, OCA and PennFuture assert that such a crediting scheme furthers the goal of the act to promote alternative energy sources. PennFuture further asserts that most alternative energy projects must reduce their monthly electric bills to cover debt servicing and achieve a rate of return that will encourage further investment in developing alternative energy sources.

MSEIA comments that the preferred method would be to automatically carrying over monthly excess generation as a full retail value credit into the next billing period. The Farm Bureau stated that customer generators should be compensated at the full retail value, meaning that if it costs 10 cents to buy electricity from a utility they should be credited 10 cents for excess energy. RESA comments that customer generators should be credited for their generation in a timely manner and not have to wait for an annual true up. RESA asserts that such a mechanism would further the intent of the act to encourage the use of alternative energy sources.

Disposition

The Commission agrees with the DEP, OCA, MSEIA, PennFuture, PWIA and Vogel in that the clear intent of the Act 35 amendment was to facilitate the research, development and deployment of small alternative energy resources by providing monthly credits consistent with the full retail value for the kilowatt hours generated by the renewable resource. As such, this Commission believes that for energy produced from a renewable resource up to the level of monthly energy usage by a customer generator should include the fully bundled charges for generation, transmission and distribution service. To be consistent, any excess kilowatt hours from any monthly billing period is to be carried forward and credited against the customer generator's usage during subsequent billing periods at the full retail rate then in effect, until the excess kilowatt hours are exhausted or the end of the compliance year. The Commission further agrees with PennFuture's observation that adoption of the model advocated by EAP, IECPA, OSBA and PECO would create a financial impediment to further investment in research, development and deployment of alternative energy sources, thus frustrating the intent of the act.

To properly implement the previously conclusions, the Commission has added language to § 75.13(c) that clarifies that the phrase "full retail rate" shall include generation, transmission and distribution charges. In addition, language was added that provides for giving a kilowatt hour credit to the customer's next billing cycle for any excess generation, in any one billing cycle, at the same full retail rate. Finally, language was added noting that these excess kilowatt hours shall continue to accumulate until the end of the compliance year.

Full Retail Value for all Energy Produced on an Annual Basis

This Commission believes that by adding the sentence "Excess generation from net metered customer generators shall receive full retail value for all energy produced on an annual basis," the Act 35 amendments intended to shift compensation for excess energy from a monthly to an annual basis. While this added language did not define what rate customer generators should receive, this Commission believes that compensating customer generators for any unused credits at the end of the compliance year at the price to compare rate, as defined in 52 Pa. Code § 54.182, is the most reasonable approach to achieve the intent of the act as amended. Such an approach is also in the public interest as it balances the laudable goal of increasing the research, development and deployment of alternative energy with the costs to be born by the ratepayers. Consequently, this Commission has revised § 75.13(d) such that it conforms to this interpretation of the Act 35 amendments. Specifically, language was added directing EDCs to compensate customer generators at the price to compare rate for any credits remaining at the end of the compliance year.

Position of the Parties

Heat Shed, MSEIA, PWIA and Vogel all advocate for defining full retail value as the fully bundled rate that includes generation, transmission, distribution and transition charges. Heat Shed supports this position by asserting that solar production would provide a savings to utilities as solar generators would be producing energy during the utilities' highest peak demand periods. MSEIA asserts that by using the term "full" the Legislature intended to include the fully bundled rate. MSEIA also asserts that no state defines excess generation as only the decoupled generation component. PWIA and Vogel assert that because the legislature replaced avoided cost of wholesale power with full retail value, the customer generator must be paid a complete retail price that contains all of the possible components. PWIA and Vogel further assert that the Act requires compensation at the fully bundled retail rate for excess generation regardless of whether the customer generator is compensated on a month to month or annual basis.

The DEP, PennFuture, OCA and RESA all assert that customer generators should be compensated at the avoided cost of wholesale power or LMP for any excess generation credits remaining at the end of the year. The DEP asserts that the legislature did not intend to compensate customer generators at the fully bundled retail rate because there would have been no need to codify virtual meter aggregation, as compensating credits remaining at the fully bundled retail rate would have accomplished the same purpose. The DEP and OCA assert that the Act 35 amendments did not alter the requirement that our regulations conform to net metering rules of other states within PJM. PennFuture asserts that the intent of net metering was to promote the development of technologies such as solar, biodigesters and small scale wind. RESA asserts that the term full retail value should be interpreted to mean the customer generator is credited at the LMP for excess generation and charged the full retail price, to include generation, transmission and distribution, for electricity consumed. RESA supports this argument by noting that the customer generator is basically selling its electricity into the wholesale spot market; as such, the customer generator should be compensated for excess generation at the LMP grossed up for losses.

EAP, IECPA, OSBA and PECO all contend that full retail value should be interpreted to mean only the generation component of a retail rate. EAP and PECO believe that the use of the terms "excess generation" and "energy produced" define the words "full retail value." EAP also notes that the Act 35 amendments use the term value instead of full retail price or rate. EAP and PECO further comment that EDCs should be fully compensated for the use of their system; pointing out that customer generators use the EDC's system to receive electricity and to distribute excess generation. IECPA supports its assertion by noting that EDCs will not avoid distribution nor transition costs associated with customer generators. IECPA further notes that including charges other than the generation component could result in unjust and unreasonable cost shifts to other customers of the EDC.

OSBA comments that as the legislature is presumed to have been aware of the use of avoided cost of wholesale power in the current regulation, its use of full retail value evidences its intent that customer generators be compensated at a retail rate rather than a wholesale rate. OSBA further notes that by substantially increasing the eligible output of qualifying customer generators, the legislature was aware that such a change would increase the potential compensation afforded customer generators and the corresponding costs to non customer generators. OSBA asserts that without clear statutory language to the contrary, the lesser cost alternative should be adopted. Finally, EAP, IECPA, OSBA and PECO note that allowing customer generators to bypass transition charges directly contradicts the Electric Generation Customer Choice and Competition Act, 66 Pa.C.S. § 2808.

Disposition

The Commission agrees with DEP, Heat Shed, MSEIA, OCA, PennFuture, PWIA, RESA and Vogel to the extent that customer generators must receive annual compensation for excess generation in a manner that encourages research, development and deployment of alternative energy systems, which is the clear intent of the act, as amended. However, the Commission disagrees with the above referenced parties as to the amount of such compensation.

Specifically, the Commission must disagree with the DEP, OCA, PennFuture and RESA that these regulations must follow other PJM state regulations and compensate customer generators at the avoided cost of wholesale power rate for any remaining generation credits at the end of the compliance year. It is clear that the Act 35 amendments replaced the Commission's use of avoided cost of wholesale power with full retail value in relation to EDC compensation for excess generation.

Furthermore, the Commission must also disagree with Heat Shed, MSEIA, PWIA and Vogel, all of whom assert that customer generators must be compensated at the fully bundled rate for any excess generation credits remaining at the end of the compliance year. MSEIA's assertion that no state defines excess generation as only the decoupled generation component, implying that they receive greater compensation, is less than accurate. This Commission is aware of three states that provide compensation for excess energy at the generation rate.[2] This Commission is also aware of three states, Arizona,[3] Massachusetts[4] and New Jersey,[5] that provide for compensation at the avoided cost of wholesale power or equivalent rate, which only involves the energy component. Furthermore, this Commission is aware of 11 states[6] that do not compensate customer generators for excess energy. As such, this Commission believes that providing compensation equal to the price to compare rate, which includes the unbundled generation and transmission rates, is more than reasonable in that it provides greater compensation than the states listed previously.

The Commission must disagree with EAP, IECPA, OSBA and PECO that full retail value should be interpreted to mean only the generation component of a retail rate. This Commission believes that such an interpretation would unreasonably frustrate the clear intent of the act, which is to promote the research, development and deployment of distributed alternative energy systems. Under these circumstances, it would be unreasonable to limit customer generator's annual compensation to just the unbundled generation rate.

Furthermore, this Commission does not agree with EAP, IECPA, OSBA and PECO who assert that compensation at any rate other than the unbundled generation rate would directly conflict with the Electric Generation Customer Choice and Competition Act. 66 Pa.C.S. § 2808. While the Commission agrees with IECPA's assertion that section 2808(a) directs that customer generators' share of transition or stranded costs be recovered through a competitive transition charge, the Commission does not

[2] Colorado, 4 C.C.R. 723-3, rule 3664(b) (any excess energy at the end of the calendar year is to be compensated at the EDC's average hourly incremental cost of electricity supply); Ohio, O.A.C. Ann. 4901:1-10-28(e)(3) (only the excess generation component can be accumulated as a credit); and New Mexico, 17.9.570.10 N.M.A.C. (energy delivered by a customer-generator is to be purchased at the EDC's applicable time-of-use or single period energy rate) and 17.9.571.11 N.M.A.C. (when a customer leaves the system the customer-generator is compensated for excess energy at the EDC's energy rate).

[3] A.A.C. § R14-2-1801

[4] 220 C.M.R. 8.05(2)(d)

[5] N.J.A.C. 14:8-1.2

[6] Arkansas, 126 03 C.A.R.R 023 Rule 2.04(c) (customer shall not receive any compensation for excess energy delivered during billing period); Delaware, 26 Del. C. § 1014(e) (any unused credits at the end of the 12-month period shall be forfeited to EDC); Florida, 25-6.065, F.A.C. (in no event shall customer be paid for excess energy delivered to EDC at end of 12-month period); Illinois, 220 I.L.C.S. 5/16-107.5(d)(3) (at the end of the year any remaining credits shall expire); Indiana, 170 I.A.C. 4-4.2-7(3) (when customer leaves system any unused credits shall revert to the EDC); Maine, C.M.R. 65-407-313(d)(3) (customer will receive no compensation for unused kilowatt-hour credits); Maryland, Md. PUC Code Ann. § 7-306(6) (any remaining generation credits at the end of the 12-month period shall revert to the EDC); New Hampshire, N.H. Admin. Rules, PUC 903.02(j) (when customer leaves system there shall be no payment or credit to customer for any remaining excess generation); Oregon, Or. Admin. R. 860-39-0055 (unused kilowatt-hour credits at end of year will be transferred to customers enrolled in the low-income program); Vermont, C.V.R. 30-000-048, 5.104(A)(4) (any kilowatt-hour credits not used within 12 months shall revert to EDC without any compensation); and Virginia, V.A.C. 5-315-50 (customer shall receive no compensation unless they have a purchase power contract).

agree that compensating these same customers at a rate equal to the price to compare rate conflicts with this provision. Section 2808(a) addresses the recovery of stranded costs, including the stranded costs from customers that install on site generation which operates in parallel with the utility's system and which significantly reduces purchases of electricity from the grid. Section 2808 does not address in any way the rate at which customer generators should be compensated for their excess generation.

However, the Commission does agree with IECPA that as customer generators will continue to use an EDC's distribution systems, it would be unreasonable to allow them to use those systems free of charge by shifting the costs for their use of those systems onto other customers. Thus, this Commission believes that it would be unreasonable and not in the public interest to include distribution and transition charges within the compensation provided to customer generators for any remaining excess generation credits at the end of the compliance year. It is presumed that the legislature intends to favor the public interest as opposed to private interest. 1 Pa.C.S. § 1922.

To summarize, the Commission is amending 52 Pa. Code § 75.13(d) such that, for any unused kilowatt hours accumulated at the end of the annualized period, compensation to the customer generator shall equal the price to compare rate, as defined in 52 Pa. Code § 54.182, which includes the retail generation and transmission components of the retail rate, and which consumers also utilize when choosing whether or not to obtain supply service from an EGS. Since the EDC's retail generation and transmission rates may fluctuate during a year, such compensation shall be calculated by using the weighted average generation and transmission rates, with the weighting based on the rates in effect when the monthly excess generation actually was delivered by the customer generator to the EDC. If the transmission or generation rate designs incorporate time of use rates, the weighted average rates should reflect the rates in effect during the time that the customer generator delivered its generation to the EDC.

Furthermore, this Commission believes that in interpreting the act as amended by Act 35, it is essential to capture the intent of Act 35 by providing a reasonable value to customer generators to encourage and facilitate the deployment of renewable distributed resources. These modifications should provide for the flexibility to enable customers to capture this value, and further to enable Pennsylvania to attract developers to the state for this purpose.

Section 1204 of Pennsylvania Statutes

The Commission has determined that a final-omitted rulemaking may be in its best interest for revising our regulations at 52 Pa. Code § 75.1 et seq. Section 1204 of the Pennsylvania Statutes, 45 P. S. § 1204, states:

Except as otherwise provided by regulations promulgated by the joint committee, an agency may omit or modify the procedures specified in sections 201 and 202, if:

(1) The administrative regulation or change therein relates to: (i) military affairs; (ii) agency organization, management or personnel; (iii) agency procedure or practice; (iv) Commonwealth property, loans, grants, benefits or contracts; or (v) the interpretation of a self-executing act of Assembly or administrative regulation; or

(2) All persons subject to the administrative regulation or change therein are named therein and are either personally served with notice of the proposed promulgation, amendment, or repeal or otherwise have actual notice thereof in accordance with law; or

(3) The agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the order adopting the administrative regulation or change therein) that the procedures specified in sections 201 and 202 are in the circumstances impracticable, unnecessary, or contrary to the public interest.

45 P. S. § 1204.

Based upon the circumstances of this situation, specifically, that Act 35 effectively amends the provisions of the act, as well as our ensuing regulations at 52 Pa. Code § 75.1, et seq., that were adopted to conform with the Act 213 of 2004, the exception at § 1204(3) is, in our opinion, applicable. Indeed, section 1204(3) provides that an exception to routine notice requirements is permissible if the agency finds for good cause that notice is, inter alia, "impracticable, unnecessary or contrary to the public interest." Clearly, good cause exists for the Commission to conform its regulations at 52 Pa. Code § 75.1 et seq., to comply with a valid statutory amendment that substantively changes our regulations. This action by the Commission merely carries out the intention of Act 35 by making changes to our regulation limited to those required to be consistent with the new act. To open a complete de novo rulemaking proceeding to effectuate a statutory amendment would be clearly redundant, unnecessary, and not in the public interest.

Furthermore, the Commission has sought and received comments and reply comments regarding the issues to be addressed to bring the regulations into conformity with the amendments. This modified rulemaking procedure ostensibly meets the intent of the de novo rulemaking procedure while expediting the process. The Commission believes that such an expedited proceeding is prudent based on the fact that certain of the amendment's provisions require immediate action by public utilities.

Regulatory Review

Under section 5.1(c) of the Regulatory Review Act (71 P. S. § 745a(c)), the Commission submitted a copy of the final-omitted rulemaking, served on September 25, 2008, to the IRRC, the Chairperson of the House Committee on Consumer Affairs and the Senate Committee on Consumer Protection and Professional Licensure (Committees), the Office of Attorney General and the Office Budget.

This final-omitted rulemaking was deemed approved by the House and Senate Committees and was approved by IRRC on november 6, 2008, in accordance with section 5.1(e) of the act.

Dissenting Statement of Commissioner Kim Pizzingrilli

The most significant and contentious issue addressed by the revision of the net metering rule is the compensation standard for excess generation at the end of each annual period. Act 35 revised the act to require that:

Excess generation from net-metered customer-generators shall receive full retail value for all energy produced on an annual basis.

73 P. S. § 1648.5.

The Commission requested comments and reply comments in 2007 regarding the implementation of this language.

Two different interpretations of this provision were provided by the commenting parties. Representatives of distributed generation interests asserted that customer-generators must be compensated at the fully bundled retail rate, including transmission, distribution and generation components, for all excess kilowatt hours at the end of the annual period. The other stakeholders, including the Office of Consumer Advocate, the Office of Small Business Advocate, the Department of Environmental Protection, the Energy Association of Pennsylvania and its member companies, commented that customer-generators may only be paid the generation component for their excess generation at the end of the annual period. There was a difference of opinion among the second group of stakeholders as to whether the generation component should be the unbundled, retail generation rate as reflected in the tariff, or alternatively, based on the avoided wholesale cost of power.

Instead of adopting one of these positions, the majority finds that customer-generators should be compensated at the price-to-compare, which is defined as the sum of all unbundled transmission and generation related charges associated with providing default service to retail customers. While I appreciate the public policy argument advanced to support this interpretation, I do not believe it is reasonably consistent with the plain language of the statute. Legislative intent should control. 1 Pa.C.S. § 1921.

Therefore, I dissent.

KIM PIZZINGRILLI,
Commissioner

For the previous reasons, the exceptions to the notice of proposed rulemaking requirements enunciated in section 1204(3) are applicable in the instant case. Accordingly, under sections 501 and 1501 of the Public Utility Code, 66 Pa.C.S. §§ 501 and 1501, section 204 of the Act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. § 1204) and the regulations promulgated thereunder at 1 Pa. Code §§ 7.1, 7.2 and 7.5, the Commission adopts the regulations at 52 Pa. Code § 75.1 et seq., as set forth in Annex A; therefore,

It Is Ordered That:

1. This order, together with Annex A, be published as final in the *Pennsylvania Bulletin*.

2. The Secretary shall submit this order and Annex A to the Attorney General for review and approval and to the Governor's Budget Office for fiscal review.

3. The Secretary shall submit this order and Annex A to the legislative standing committees and to the IRRC for review and approval.

4. The Secretary shall certify this order and Annex A and deposit them with the Legislative Reference Bureau for final publication upon approval by the IRRC.

5. A copy of this order and Annex A be served upon the Department of Environmental Protection, all jurisdictional electric distribution companies, licensed electric generation suppliers, the Office of Consumer Advocate, the Office of Small Business Advocate and all Parties who filed comments at this docket number.

6. The regulations of the Commission, 52 Pa. Code Chapter 75, are amended by amending §§ 75.1 and 75.12—75.14 to read as set forth in Annex A, with ellipses referring to the existing text of the regulations.

7. These amendments become effective upon publication in the *Pennsylvania Bulletin*.

8. The contact person for this order is Kriss E. Brown, Law Bureau, (717) 787 4518.

JAMES J. MCNULTY,
Secretary

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 38 Pa.B. 6429 (November 22, 2008).)

Fiscal Note: 57-264. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 52. PUBLIC UTILITIES

PART I. PUBLIC UTILITY COMMISSION

Subpart C. FIXED SERVICE UTILITIES

CHAPTER 75. ALTERNATIVE ENERGY PORTFOLIO STANDARDS

Subchapter A. GENERAL PROVISIONS

§ 75.1. Definitions.

The following words and terms, when used in this chapter, have the following meanings unless the context clearly indicates otherwise:

Act—The Alternative Energy Portfolio Standards Act (73 P. S. §§ 1648.1—1648.8).

Alternative energy credit—A tradable instrument that is used to establish, verify and monitor compliance with the act. A unit of credit must equal 1 megawatt hour of electricity from an alternative energy source. An alternative energy credit shall remain the property of the alternative energy system until the alternative energy credit is voluntarily transferred by the alternative energy system.

* * * * *

Customer-generator—A nonutility owner or operator of a net metered distributed generation system with a nameplate capacity of not greater than 50 kilowatts if installed at a residential service or not larger than 3,000 kilowatts at other customer service locations, except for customers whose systems are above 3 megawatts and up to 5 megawatts who make their systems available to operate in parallel with the electric utility during grid emergencies as defined by the regional transmission organization or where a microgrid is in place for the primary or secondary purpose of maintaining critical infrastructure, such as homeland security assignments, emergency services facilities, hospitals, traffic signals, wastewater treatment plants or telecommunications facilities, provided that technical rules for operating generators interconnected with facilities of an EDC, electric cooperative or municipal electric system have been promulgated by the institute of electrical and electronic engineers and the Commission.

* * * * *

Force majeure—

(i) Upon its own initiative or upon a request of an EDC or an EGS, the Commission, within 60 days, will determine if alternative energy resources are reasonably available in the marketplace in sufficient quantities for the EDCs and the EGSs to meet their obligations for that reporting period under the act. In making this determination, the Commission will consider whether EDCs or EGSs have made a good faith effort to acquire sufficient

alternative energy to comply with their obligations. Evidence of good faith efforts include:

(A) Banking alternative energy credits during transition periods.

(B) Seeking alternative energy credits through competitive solicitations.

(C) Seeking to procure alternative energy credits or alternative energy through long-term contracts.

(D) Other competent evidence the commission credits as demonstrating a good faith effort.

(ii) In further making its determination, the Commission will assess the availability of alternative energy credits in the Generation Attributes Tracking System (GATS) or its successor, and the availability of alternative energy credits generally in this Commonwealth and other jurisdictions in the PJM Interconnection, LLC regional transmission organization (PJM) or its successor. The Commission may also require solicitations for alternative energy credits as part of default service before requests of force majeure may be made.

(iii) If the Commission determines that alternative energy resources are not reasonably available in sufficient quantities in the marketplace for the EDCs and EGSs to meet their obligations under the act, the Commission will modify the underlying obligation of the EDC or EGS or recommend to the General Assembly that the underlying obligation be eliminated. Commission modification of the EDC or EGS obligations under the act will be for that compliance period only. Commission modification may not automatically reduce the obligation for subsequent compliance years.

(iv) If the Commission modifies the EDC or EGS obligations under the act, the Commission may require the EDC or EGS to acquire additional alternative energy credits in subsequent years equivalent to the obligation reduced by a force majeure declaration when the Commission determines that sufficient alternative energy credits exist in the marketplace.

* * * * *

Tier I alternative energy source—Energy derived from:

(i) Solar photovoltaic and solar thermal energy.

(ii) Wind power.

(iii) Low-impact hydropower.

(iv) Geothermal energy.

(v) Biologically derived methane gas.

(vi) Fuel cells.

(vii) Biomass energy.

(viii) Coal mine methane.

* * * * *

Subchapter B. NET METERING

§ 75.12. Definitions.

The following words and terms, when used in this subchapter, have the following meanings unless the context clearly indicates otherwise:

Base year—For customer-generators who initiated self generation on or after January 1, 1999, the base year will be the immediate prior calendar year; for all other customer generators, the base year will be 1996.

Billing month—The term has the same meaning as set forth in § 56.2 (relating to definitions).

Customer-generator facility—The equipment used by a customer-generator to generate, manage, monitor and deliver electricity to the EDC.

Electric distribution system—That portion of an electric system which delivers electricity from transformation points on the transmission system to points of connection at a customer's premises.

Meter aggregation—The combination of readings from and billing for all meters regardless of rate class on properties owned or leased and operated by a customer-generator for properties located within the service territory of a single EDC. Meter aggregation may be completed through physical or virtual meter aggregation.

Net metering—The means of measuring the difference between the electricity supplied by an electric utility or EGS and the electricity generated by a customer-generator any portion of the electricity generated by the alternative energy generating system is used to offset part or all of the customer-generator's requirements for electricity.

Physical meter aggregation—The physical rewiring of all meters regardless of rate class on properties owned or leased and operated by a customer-generator to provide a single point of contact for a single meter to measure electric service for that customer-generator.

Virtual meter aggregation—The combination of readings and billing for all meters regardless of rate class on properties owned or leased and operated by a customer-generator by means of the EDC's billing process, rather than through physical rewiring of the customer-generator's property for a physical, single point of contact. Virtual meter aggregation on properties owned or leased and operated by a customer-generator and located within 2 miles of the boundaries of the customer-generator's property and within a single electric distribution company's service territory shall be eligible for net metering.

Year and yearly—Planning year as determined by the PJM Interconnection, LLC regional transmission organization.

§ 75.13. General provisions.

(a) EDCs shall offer net metering to customer-generators that generate electricity on the customer-generator's side of the meter using Tier I or Tier II alternative energy sources, on a first come, first served basis. EGSs may offer net metering to customer-generators, on a first come, first served basis, under the terms and conditions as are set forth in agreements between EGSs and customer-generators taking service from EGSs.

(b) An EDC shall file a tariff with the Commission that provides for net metering consistent with this chapter. An EDC shall file a tariff providing net metering protocols that enable EGSs to offer net metering to customer-generators taking service from EGSs. To the extent that an EGS offers net metering service, the EGS shall prepare information about net metering consistent with this chapter and provide that information with the disclosure information required in § 54.5 (relating to disclosure statement for residential and small business customers).

(c) The EDC shall credit a customer-generator at the full retail rate, which shall include generation, transmission and distribution charges, for each kilowatt-hour produced by a Tier I or Tier II resource installed on the

customer-generator's side of the electric revenue meter, up to the total amount of electricity used by that customer during the billing period. If a customer generator supplies more electricity to the electric distribution system than the EDC delivers to the customer-generator in a given billing period, the excess kilowatt hours shall be carried forward and credited against the customer-generator's usage in subsequent billing periods at the full retail rate. Any excess kilowatt hours shall continue to accumulate until the end of the year. For customer-generators involved in virtual meter aggregation programs, a credit shall be applied first to the meter through which the generating facility supplies electricity to the distribution system, then through the remaining meters for the customer-generator's account equally at each meter's designated rate.

(d) At the end of each year, the EDC shall compensate the customer-generator for any excess kilowatt-hours generated by the customer-generator over the amount of kilowatt hours delivered by the EDC during the same year at the EDC's price to compare.

(e) The credit or compensation terms for excess electricity produced by customer-generators who are customers of EGSs shall be stated in the service agreement between the customer-generator and the EGS.

(f) If a customer-generator switches electricity suppliers, the EDC shall treat the end of the service period as if it were the end of the year.

(g) An EDC and EGS which offer net metering shall submit an annual net metering report to the Commission. The report shall be submitted by July 30 of each year, and include the following information for the reporting period ending May 31 of that year:

(1) The total number of customer-generator facilities.

(2) The total estimated rated generating capacity of its net metering customer-generators.

(h) A customer-generator that is eligible for net metering owns the alternative energy credits of the electricity it generates, unless there is a contract with an express provision that assigns ownership of the alternative energy credits to another entity or the customer-generator expressly rejects any ownership interest in alternative energy credits under § 75.14(d) (relating to meters and metering).

(i) An EDC shall provide net metering at nondiscriminatory rates identical with respect to rate structure, retail rate components and any monthly charges to the rates charged to other customers that are not customer-generators. An EDC may use a special load profile for the customer-generator which incorporates the customer-generator's real time generation if the special load profile is approved by the Commission.

(j) An EDC may not charge a customer-generator a fee or other type of charge unless the fee or charge would apply to other customers that are not customer-generators. The EDC may not require additional equipment or insurance or impose any other requirement unless the additional equipment, insurance or other requirement is specifically authorized under this chapter or by order of the Commission.

(k) Nothing in this subchapter abrogates a person's obligation to comply with other applicable law.

§ 75.14. Meters and metering.

(a) A customer-generator facility used for net metering must be equipped with a single bidirectional meter that can measure and record the flow of electricity in both directions at the same rate. If the customer-generator agrees, a dual meter arrangement may be substituted for a single bidirectional meter.

(b) If the customer-generator's existing electric metering equipment does not meet the requirements in subsection (a), the EDC shall install new metering equipment for the customer-generator at the EDC's expense. Any subsequent metering equipment change necessitated by the customer-generator shall be paid for by the customer-generator.

(c) When the customer-generator intends to take title or transfer title to any alternative energy credits which may be produced by the customer-generator's facility, the customer-generator shall bear the cost of additional net metering equipment required to qualify the alternative energy credits in accordance with the act.

(d) When the customer-generator expressly rejects ownership of alternative energy credits produced by the customer-generator's facility, the EDC may supply additional metering equipment required to qualify the alternative energy credit at the EDC's expense. In those circumstances, the EDC shall take title to any alternative energy credit produced. An EDC shall, prior to taking title to any alternative energy credits produced by a customer-generator, fully inform the customer-generator of the potential value of the alternative energy credits and other options available to the customer-generator for the disposition of those credits. A customer-generator is not prohibited from having a qualified meter service provider install metering equipment for the measurement of generation, or from selling alternative energy credits to a third party other than an EDC.

(e) Virtual meter aggregation on properties owned or leased and operated by a customer-generator shall be allowed for purposes of net metering. Virtual meter aggregation shall be limited to meters located on properties owned or leased and operated within 2 miles of the boundaries of the customer-generator's property and within a single EDC's service territory. Physical meter aggregation shall be at the customer-generator's expense. The EDC shall provide the necessary equipment to complete physical aggregation. If the customer-generator requests virtual meter aggregation, it shall be provided by the EDC at the customer-generator's expense. The customer-generator shall be responsible only for any incremental expense entailed in processing his account on a virtual meter aggregation basis.

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