

COMMONWEALTH OF PENNSYLVANIA



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August 11, 2016

Rosemary Chiavetta, Secretary
PA Public Utility Commission
Commonwealth Keystone Bldg.
400 North Street
Harrisburg, PA 17120

Re: Implementation of Section 1329 of
the Public Utility Code
Docket No. M-2016-2543193

Dear Secretary Chiavetta:

Attached for electronic filing are the Comments of the Office of Consumer Advocate in the above-referenced proceeding.

Copies have been served per the attached Certificate of Service.

Respectfully submitted,

/s/ Christine Maloni Hoover
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Senior Assistant Consumer Advocate
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Attachment

cc: Stanley E. Brown, Law Bureau
Jani Tuzinski, TUS
Certificate of Service

*224792

CERTIFICATE OF SERVICE

Implementation of Section 1329 of :
the Public Utility Code : Docket No. M-2016-2543193

I hereby certify that I have this day served a true copy of the following document, the Office of Consumer Advocate's Comments in this proceeding in accordance with the requirements of 52 Pa. Code §1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 11th day of August 2016

SERVICE BY E-MAIL & INTER-OFFICE MAIL

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Implementation of Section 1329 of the Public Utility Code : : Docket No. M-2016-2543193

Introduction

The Office of Consumer Advocate (OCA) appreciates the opportunity to provide comments to the Public Utility Commission’s (Commission or PUC) Tentative Implementation Order addressing the newly enacted Section 1329. As set forth below, there are a number of areas where the OCA has provided suggested additions or modifications to the Commission’s proposals. Given the novel issues raised by 66 Pa. C.S. § 1329 (Section 1329), the OCA sees an opportunity for stakeholders and the Commission to work together to develop guidelines that can be used with any application that contains a Section 1329 ratemaking request. The OCA suggests that the Commission convene a working group to work on the details of the ratemaking issues raised by Section 1329, as discussed below.

Section 1329(a) Process to establish fair market value of selling utility

Under Section 1329, the fair market value of the selling utility will be established by selecting utility valuation experts (UVEs) from a list maintained by the Commission and then having each UVE determine fair market value by employing the cost, market and income approaches. 66 Pa. C.S. § 1329(a)(1-3). As discussed below, in order for the statutory process to be seen as fair, it will be important for Commission and the applicants to find and use well-qualified UVEs who have relevant training and experience and do not have conflicts of interest.

Utility Valuation Experts and Qualifications

At page 4 of the Tentative Implementation Order, the Commission indicates that Utility Valuation Experts (UVEs) must establish their qualifications, including the education and experience necessary for providing utility valuations. The Commission does not specify the necessary education it will consider sufficient. The Commission should establish minimum qualifications, such as a bachelor's degree in a related field and a certain amount of relevant professional experience in its Final Order.

The Commission lists its expectation that UVE applicants will “demonstrate compliance with Pennsylvania laws....” It is not clear what Pennsylvania laws are contemplated in this statement. The Commission also states that UVE applicants must be able to demonstrate “their financial and technical fitness, such as professional licenses, technical certifications, and/or names of current or past clients with a description of dates and types of services provided by the Applicant.” Tentative Implementation Order at 4-5. The Final Order should establish more specific standards for establishing financial and technical fitness such as specifying what licenses are required to be a utility valuation expert and what sorts of technical certifications are available and would be considered necessary for qualification.

Fiduciary Duty

The Commission states that applicants “must also acknowledge a fiduciary duty to provide a thorough, objective, and fair valuation.” Tentative Implementation Order at 4. The Commission should specify to which entity, or the public the UVEs will owe that fiduciary duty. If the UVE owes the fiduciary duty to the entity, the Commission should clarify whether a UVE is permitted to represent both buyers and sellers in different transactions. For example, a UVE

represents Buyer A in Transaction 1. Would it be appropriate for the UVE to represent Seller Z in Transaction 2, particularly if Buyer A is the buyer in Transaction 2?

Methods of Valuation

The Commission states that each UVE shall determine fair market value in compliance with the Uniform Standards of Professional Appraisal Practice and use the cost, market, and income approaches. Tentative Implementation Order at 5. Regarding the Uniform Standards of Professional Appraisal Practice (USPAP) the OCA understands that it was adopted by Congress in 1989 and contains standards for appraisal service, including real estate and personal property. Compliance with the standards is required for state-licensed and state-certified appraisers dealing with federally-related real estate transactions. It is not clear whether there are any standards related to utility valuation that would be more appropriate and relevant.

Regarding the cost, market and income approaches that the Commission states that the UVE shall use, those approaches are not defined in the Tentative Implementation Order. The OCA submits that these approaches should be defined in the Commission's Final Implementation Order.

Conflicts of Interest

The Commission's Tentative Implementation Order calls for the option of providing the identification of current or past clients but provides no guidance as to the intent or importance of collecting this information. The OCA submits that this information is critical to ensure that there is no conflict of interest present and should be mandatory. It is critically important that there not be any affiliation between a UVE and a buyer/seller in the underlying transaction or affiliates of the buyer and seller. The OCA notes that the list of clients, which should be required for each

applicant, should be for current **and** past clients, rather than current **or** past clients as provided for in the Tentative Implementation Order. Tentative Implementation Order at 4.

Although conflicts of interest are mentioned in the instructions for an application for registration as a UVE (attached to the Tentative Implementation Order), the Commission's Final Implementation Order should address this issue. In the second paragraph of the instructions, it states, "An entity that is directly or indirectly owned, partnered or in any way affiliated with a water/wastewater distribution company (WWDC) is not eligible for the registry." This implies that a UVE with any of these connections would not be permitted to register as a UVE, but this clear directive must also be embedded in the Final Order. The OCA submits that this prohibition should be expanded to include UVEs that worked for or consulted for any utility or municipality or municipal authority, or entity as defined in Section 1329 in the last five years. At a minimum, the limitation should apply to any requesting utility or requesting utility affiliate or entity as that is defined in Section 1329(g).

Review of UVE applications and Registration

The Commission should identify which bureau(s) will be responsible for reviewing the applications for UVEs. The OCA notes that it appears that the Bureau of Technical Utility Services (TUS) will review the UVE applications for a determination whether the credentials and experience "warrant inclusion on the list of qualified valuation experts on our website." July 21, 2016 Secretarial Letter at 2, Docket No. M-2016-2543193. TUS and Law Bureau also should review the applications for conflicts of interest as discussed above. A Secretarial Letter should be issued for each UVE application stating either that the application meets the criteria and does not contain any conflicts of interest or that the application is denied. Then, the list of registered UVEs should be posted on the PUC's website, along with the list of current and past clients and

a description of the services provided or areas of expertise. The public should be able to access the information that is provided by the UVE applicants who are registered and listed on the PUC's website.

Engineer's Assessment

Section 1329(a)(4) requires the buyer and seller to hire one engineer to conduct an assessment of the tangible assets of the selling utility. In the Tentative Implementation Order, the Commission states, "The engineer's assessment must include the original cost, by year and major plant category, of used and useful plant in service and related accrued depreciation calculations pursuant to 66 Pa. C.S. § 1311." Tentative Implementation Order at 5. The OCA submits that, similar to selecting a UVE the Commission should establish specific qualifications for the engineer as well as guidelines regarding avoidance of a conflict of interest when the buyer and seller are hiring a licensed engineer for the assessment report. The OCA submits that the licensed engineer should not have worked for either the buyer or seller or the entity, as it is defined in Section 1329(g), or an affiliate of either the buyer or seller.

The Commission provides the following considerations for the licensed engineer in establishing the cost assessment:

- An inventory of the used and useful utility plant assets to be transferred. Identify separately any utility plant that is held for future use.
- A list of all non-depreciable property such as land and rights-of-way.
- The inventory is to be developed from available records, maps, work orders, debt issue closing documents funding construction projects, and other sources to ensure an accurate listing of utility plant inventory by utility account.
- An estimate of years of construction or acquisition for the utility plant by year and account.

- The use of current prices restated as costs to the Original Cost price level including related accrued depreciation. Where cost data is not available, the use of appropriate cost trend indices in accordance with recognized industry practices.
- Costs for utility plant compiled by utility account by year of installation.
- A calculation of accumulated depreciation by estimated service life applicable for comparable utility plant.
- A report explaining the process for developing the cost assessment.

Tentative Implementation Order at 5-6. The OCA is unsure of the meaning of the first sentence of the 5th bullet point. Specifically, it is not clear what meaning to give to “The use of current prices restated as costs to the Original Cost price level including related accrued depreciation,” given the next sentence which addresses how to handle the situation where no cost data is available. The OCA recommends that the first sentence of bullet point 5 be deleted as it appears to have no meaning or purpose in the assessment.

Section 1329(b) Utility Valuation Experts

Section 1329(b) addresses the selection of the utility valuation experts provided for in Section 1329(a). Section 1329(b)(2) prohibits those UVEs from deriving any material financial benefit from the sale of the selling utility, other than fees (66 Pa.C.S. § 1329(b)(2)(i)) or from being an immediate family member of a director, officer or employee of either the acquiring or selling utility or entity within a 12 month period of the date of hire for the appraisal. 66 Pa. C.S. §1329(b)(2)(ii). These specific statutory restrictions on UVEs should be included in the UVE application instructions and provided as part of the application so that TUS will have full and complete information. As discussed above, along with additional protections to avoid any conflict or appearance of a conflict, this section must be strictly enforced. This selection process will require certain disclosures about the UVE. As noted above, such relevant information about

the UVE should be publicly available. See UVE application instructions, subpart I. However, the UVE application permits the UVE applicant to label information as confidential. Id. The OCA submits that such confidentiality restrictions should be very limited due to the necessity of keeping this process of registration and UVE selection as transparent as possible. Without keeping the information regarding experience, affiliates, and conflicts public, it will undermine the foundation of the Section 1329 process.

Fees to Be Paid to UVEs

Section 1329(b)(3) addresses the maximum fees to be paid to UVEs. Specifically, the section states:

Fees paid to utility valuation experts may be included in the transaction and closing costs associated with acquisition by the acquiring utility or entity. Fees eligible for inclusion may be of an amount not exceeding 5% of the fair market value of the selling utility or a fee approved by the commission.

66 Pa. C.S. § 1329(b)(3). In the Tentative Implementation Order the Commission addresses the need for ample justification within the application and the direct testimony that will be filed with the application to show how the UVEs' fees were derived. Tentative Implementation Order at 7. The OCA agrees that full supporting documentation will need to be included in the application and the testimony. That should include, at a minimum, the contract engaging the UVE and invoices that describe the work performed. The contract and invoices will need to be attached to the testimony given the short time frame for Section 1329(d) proceeding.

Regarding the Commission's ability to approve a fee, the OCA submits that the Commission may want to consider doing this because of the potential impact of the use of a percentage of the appraised fee provision. Specifically, it is possible that the use of a percentage of appraised value will encourage the inflation of the fair market value by appraisers so that the

5% fee will also be increased. This potential impact can be avoided by the Commission making clear that the fee will be reviewed for reasonableness and should note that the fee is not expected to always be at the cap of “5% of the fair market value”. 66 Pa. C.S. § 1329(b)(3). This also could be addressed by the Commission approving a case-specific flat fee based on hours worked and that does not exceed 5% of the fair market value, rather than always approving a fee that is a percentage of the fair market value. Finally, the Commission should further clarify whether the seller is required to pay for its own UVE or if the buyer is permitted to pay the seller’s costs. Ratepayers should only have to pay one fee. Moreover, the buyer paying for both fair market appraisals would appear to be a conflict and would certainly undercut the requirement of two separate appraisals. See 66 Pa. C.S. § 1329(a)(2).

Definition of Transaction and Closing Costs

There is also no definition in the Tentative Implementation Order regarding what constitutes “transaction and closing costs”. The OCA submits that transaction and closing costs should be defined as the UVE’s appraisal fee, and buyers’ closing costs, including reasonable attorney fees. It is important that these costs not be a catch all for costs that would not normally be associated with transaction and closing costs.¹ In addition, it should be made clear that there is no preapproval of the reasonableness or recovery of these costs as part of the Section 1329 application. The statute says that these UVE costs “may be included” in the transaction and closing costs for the acquiring utility. 66 Pa. C.S. § 1329(b)(3). Therefore, the UVE fees and the other transaction and closing costs that the buying utility seeks to include in rate base should be reviewed as part of the next base rate case following the closing of the transaction which is the

¹In energy applications, transaction and closing costs are not generally recoverable. West Penn Power, 2011 WL 858491 (PaPUC 2011)

time when the acquired company's rate base will first be included in rates. 66 Pa. C.S. § 1329(c)(1)(i). Not only would that be consistent with claiming the rate base in that case, it would allow the parties to review the transaction and closing costs in the context of the rate base claim and expenses in the rate case.

Section 1329(c) Ratemaking Rate Base

Overview

Section 1329(c)(1) permits the rate base of the selling utility to be incorporated into the rate base of the acquiring utility in the acquiring utility's next base rate case (Section 1329(c)(1)(i) or the rate base of the entity in its initial tariff filing (Section 1329(c)(1)(ii)).

Section 1329(c)(2) addresses the determination of the ratemaking rate base, i.e., the lesser of the purchase price or the fair market value. Clarifications are needed regarding the use of fair market value of the selling utility. Since the assets may be included in different plant accounts, it will be important to determine the components of fair market value that is to be included in each plant account. The Commission should direct the buying utility or entity to provide utility plant in service schedules by plant account, under the fair market valuation and original cost, from the engineer's assessment report. Additionally, it will be important to determine the depreciation expense for the assets once the assets are within the plant accounts. One option would be to calculate the overall depreciation rate of the original cost rate base, and apply that percentage to the fair market value rate base.

Acquisition by an Entity

In its Tentative Implementation Order, the Commission states that a Section 1102 application, filed by an entity seeking a certificate of public convenience (CPC), "may be filed simultaneously but no later than the same day as the application for Section 1329 acquisition."

Tentative Implementation Order at 8. Due to the compressed time period for a Section 1329 application, the Commission strongly encourages the filing of the Section 1102 application in advance of the Section 1329 application. Id.

The OCA submits that an entity, as defined in Section 1329(g) must submit a Section 1102 application based on the provision in Section 1329(e). Section 1329(e) states:

An entity shall provide all the information required by subsection (d)(1) to the commission as an attachment to its application for a certificate of public convenience filed pursuant to section 1102.

66 Pa. C.S. § 1329(e). This section specifically provides for an entity to file under Section 1102, and attach the information that is required in Section 1329(d)(1). This is a Section 1102 filing. Thus, a filing by an entity would not be subject to the six month statutory deadline which is contained in Section 1329(d)(2) and which applies to acquisitions under that section by a public utility. This differentiation is reasonable because, as the Commission recognized, the issues to be dealt with in granting an initial certificate of public convenience under Section 1102 will be greater, in part, because the entity will have to establish technical, financial, and managerial fitness, as well as determining the initial rates. The Commission should make it clear that the Section 1102 Application takes precedence and should be thoroughly considered.

The Commission should make clear that it will not undertake consideration of such a Section 1102 Application in the expedited time period for applications claiming Section 1329(d) treatment. As mentioned above, an application for an initial certificate of public convenience involves developing a record regarding the technical, financial and managerial fitness of the applicant, as well as determining the initial rates and tariffs.

In addition, the merits of applications arising under Section 1102 are measured by the standards set forth in the City of York v. Pa. P.U.C., 449 Pa 136, 141, 295 A.2d 825, 828 (1972)(City of York). In City of York, the Supreme Court addressed a proposed merger of three telephone companies. The Pennsylvania Supreme Court specifically cited Section 203, the predecessor statute to Section 1103, and set forth the standard as follows:

Section [1103] of the Public Utility Law requires that those seeking approval of a utility merger demonstrate more than the mere absence of any adverse effect upon the public. Section [1103] requires that the proponents of a merger demonstrate that the merger will affirmatively promote the “service, accommodation, convenience, or safety of the public” in some substantial way.

449 Pa. at 141, 295 A.2d at 828. This is the standard by which all mergers of Pennsylvania utility companies must be judged.

This standard was addressed by the Commonwealth Court in Middletown Township v. Pa. P.U.C., 482 A.2d 674 (Pa. Commw. Ct. 1984) (Middletown). In Middletown, in order to acquire part of the facilities of the Newtown Artesian Water Company, Middletown Township filed an application for a Certificate of Public Convenience. The ALJ determined that the acquisition would be a benefit to some customers, but would have an adverse impact on other customers. Id. at 679. The ALJ, therefore, denied the application. Id. The Commission adopted the ALJ’s Initial Decision and the Township appealed. In hearing the appeal, the Commonwealth Court considered the City of York standard applicable through Section 1102 and Section 1103. The Court affirmed the Commission’s decision to reject the merger stating, *inter alia*, that “when the ‘public interest’ is considered, it is contemplated that the benefits and detriments of the acquisition be measured as they impact on all affected parties, and not merely on one particular group or geographic subdivision as might have occurred in this case.” Id. at 682 (emphasis in original). The Court added that “the primary objective of the law in this area is

to serve the interests of the public.” Id.; see also Popowsky v. Pa. P.U.C., 937 A.2d 1040 (Pa. 2007). Thus, even if a public utility is seeking Section 1329 ratemaking treatment of an acquisition of a municipal system, it still must meet the legal standards under Section 1102 first, before consideration can be given to whether it meets the requirements under Section 1329.

Section 1329(d) Acquisitions by public utility

Section 1329(d) addresses acquisitions by a public utility, but not an entity which is addressed in Section 1329(e). Section 1329(d) provides a list of information that the acquiring utility must provide with its application for approval of the Section 1102 application. See Tentative Implementation Order at 8-9.

As just discussed, the applications will be filed under Section 1102 and will be required to meet that legal standard. If the legal standard of finding affirmative public benefits is met, then the Commission will undertake the analysis required under Section 1329. As also discussed above, the OCA submits that the Commission should define transaction and closing costs as referred to in Section 1329(d)(1)(iv). The OCA’s proposed definition, as discussed above, should be defined as including the cost of the UVE’s appraisal fee, and closing costs, including reasonable attorney fees.

An additional issue raised by Section 1329(d)(1)(v) is the phrase “rate stabilization plan” which is defined as “A plan that will hold rates constant or phase rates in over a period of time after the next base rate case.” 66 Pa. C.S. § 1329(g). It appears that a determination would be made in the application that would address rates for the selling customers for what could be a substantial period of time, i.e., after the next base rate case. The OCA’s concern is that such a determination would be made without the benefit of a cost of service study and without looking

at the total revenue requirement in that next base rate case. The OCA submits that the Commission should make clear that rate stabilization plans are subject to review in each rate case for reasonableness and should not place long term burdens on the acquiring utility's existing ratepayers. In addition, if one is proposed, the applicant will need to provide testimony, schedules, and workpapers that establish the basis for the plan and its impact on existing customers who would need to cover the revenue requirement that would be shifted to them under the rate stabilization plan.

Schedule

In the Tentative Implementation Order the Commission addresses the requirement in Section 1329(d)(2) that the final order be issued within six months of the filing date of an application under Section 1329(d)(1). Tentative Implementation Order at 9-11. The OCA agrees with the Commission that applications should not be accepted until they are complete (Tentative Implementation Order at 10) and that the six month deadline should not begin until there is a staff determination that the "filing is perfected and in full compliance with all items on the Application Filing Checklist..." Tentative Implementation Order at 11. The OCA also supports Commission notification to the applicants of the actual accepted date. Id. The OCA proposes that the notification expressly include the statutory advocates and be done publicly and directly to the entities that are required to be served with the application so that all parties or potential parties are aware of the acceptance of the filing.

Notice

The Commission next addresses the requirement of notice to address due process considerations. Tentative Implementation Order at 11. In the Tentative Implementation Order, the Commission requires notice to be published in a newspaper and a bill insert in the selling

utility's customers' bills. Tentative Implementation Order at 11. The Commission also states that the Secretary may impose additional notice requirements as may be warranted. Id.

The OCA agrees that the newspaper publication should be done promptly and does not object to the requirement that the proof of publication be filed within 7 days. The OCA proposes that the notice contain specific information about the timing of the proceeding, including that it is an expedited timeline and that testimony of a protestant may be due within four days of the protest deadline. See Tentative Implementation Order at 15. The OCA also proposes that the publication should be done in a newspaper of general circulation in both the selling utility's service area as well as the buying utility's service area. Regarding individual customer notice, the OCA has concerns that a bill insert will take up to 30 days for all of the customers to receive notice of the transaction, which means that the protest period will be concluded about the time that the Commission schedule proposes for intervenor/protestant testimony. In addition, there is no opportunity for a public input hearing built into the tentative schedule. The OCA submits that the customer notice should be given directly to each customer as a separate mailing to ensure that customers receive timely notice of this expedited proceeding.

The OCA proposes that the notice requirement be extended to the buying utility's customers. Section 1329 changes long-standing ratemaking principles such as original cost, AFUDC treatment, and depreciation, and will have an impact not only on the selling utility's customers but also customers of the buying utility. The OCA submits that due process requires that those customers have direct bill insert notice as well.

The OCA also proposes that the stakeholders, including the PUC, the utilities, and the statutory advocates work together to develop standard newspaper and bill insert notices that will be used when a Section 1102 application is filed and requests Section 1329 ratemaking

treatment. Having a standard notice, as with the standard general rate case notice, will be a benefit to all parties involved and will help to accomplish the notice requirements in the expedited timeframe.

Interplay with existing DSIC

Section 1329(d)(4) allows the public utility's existing DSIC, if there is one, to be applied immediately to the selling utility customer's bills. This is a change from the current practice reflected in the Implementation Order for Act 11. Re Implementation of Act 11 of 2012, 299 PUR4th 367 (Pa. PUC 2012)(Act 11 Implementation Order). In the Act 11 Implementation Order, the Commission determined that a DSIC would not be charged to customers acquired through acquisitions until the rates were established by a base rate proceeding including the acquired customers. Act 11 Implementation Order, 299 PUR4th at 395. Therefore, the projects related to the acquired company were not eligible for DSIC inclusion and the revenues were not included in the projected quarterly revenues. Id. The ability of the public utility to seek approval to apply the DSIC to the customers acquired through acquisitions where Section 1329 approval is sought will require changes to existing DSIC tariffs that reflect language consistent with the Act 11 Implementation Order. It also means that the revenues from those customers will need to be included in the DSIC calculation as well as the costs of projects, as discussed below in relation to Section 1329(f).

Section 1329(e) Acquisition by Entity

Section 1329(e) addresses acquisitions by an "entity". Section 1329(g) defines entity as including an affiliate of the entity. As discussed above, it is important to note that Section 1329(e) does not include the six month time deadline and thus must be treated just as any other

Section 1102 application. The OCA does not agree that a Section 1329(e) application should be consolidated with a Section 1102 application. See Tentative Implementation Order at 12. If the Section 1102 application is granted for an entity, then the Commission should address the ratemaking request made pursuant to Section 1329(e). The Commission should not attempt to consolidate a Section 1102 application and proceed on an expedited 6 month time frame as called for in Section 1329(d).

Section 1329(f) Postacquisition Projects

Section 1329 contains a number of changes to accounting and ratemaking for post-acquisition projects. Specifically, the projects that are eligible for the DSIC will be included in the buying utility's DSIC. As discussed above, that is a change from the current requirements. If the post-acquisition projects are included in the DSIC, then the revenues from the acquired customers must also be included in the calculation of the DSIC and the income from the acquired customers must also be considered in the earnings cap test.

Projects that are not eligible for the DSIC "shall accrue allowance for funds used during construction after the date the cost was incurred until the asset has been in service for a period of four years or until the asset is included in the acquiring public utility's next base rate case, whichever is earlier." 66 Pa. C.S. §1329(f)(1). Under current Generally Accepted Accounting Principles (GAAP), allowance for funds used during construction (AFUDC) ends at the time that the plant is used and useful and put into service. Specifically, FAS 34, which addresses capitalized interest, states, "The capitalization period shall end when the asset is substantially complete and ready for its intended use." Statement of Financial Accounting Standards 34. Another ratemaking change is contained in Section 1329(f)(2) which requires post-acquisition plant that is not included in the DSIC to defer depreciation "for book and ratemaking purposes."

66 Pa. C.S. § 1329(f)(2). Depreciation normally begins on the date that the plant becomes used and useful and continues over the useful life of plant.

Both of these provisions are major changes to the book and ratemaking treatment of AFUDC and depreciation for the post acquisition projects. In its Tentative Implementation Order, the Commission states, “The acquiring utility will be required to keep proper accounting in separately and appropriately recording these amounts in its business record.” Tentative Implementation Order at 13. There are a number of issues regarding how these exceptions to GAAP will work. The OCA submits that there should be more specificity regarding the separate accounting that the Commission is requiring. The Commission should specify how the post in-service AFUDC will be calculated given the definition states that both debt and equity will be recognized in AFUDC, including whether the actual cost of debt and actual capital structure will be used and what cost of equity will be used. See 66 Pa. C.S. § 1329(g). The OCA submits that there should be a calculation of AFUDC that is agreed to by stakeholders and the PUC.

The Commission must address how the deferral of depreciation will be addressed for book and ratemaking purposes. The Commission must also address how deferred depreciation will work if the utility uses accelerated depreciation for tax purposes. The Commission will also need to address the impact that deferred depreciation has on the determination of the useful life of each item of utility plant.

The OCA submits that the utilities be required to provide an annual report that shows how these specific post-acquisition projects, that are not included in DSIC, are being recorded on the books and for ratemaking purposes. Without such a report, it may be difficult to follow what is happening if the only time that these additional accounting books are seen is in rate cases. An annual report that shows each post acquisition project by plant account and by item within each

plant account, the deferred depreciation accounts, and the post-in service AFUDC would allow the statutory advocates and the Commission to monitor the ongoing accounting differences.

Section 1329(g) Definitions

The OCA's comments regarding the definitions are included in the specific comments above with one addition. Specifically, the definition of selling utility provides, in part:

A water or wastewater company located in this Commonwealth, owned by a municipal corporation or authority that is being purchased by an acquiring public utility or entity....

66 Pa. C.S. § 1329(g). In the Tentative Implementation Order, the Commission uses the word “system” rather than company when referring to the selling utility. Tentative Implementation Order at 1, 2, 3, 10, 11, and 16. Company is not defined elsewhere in Section 1329 or in Title 66. Moreover, it is not defined in Title 1. When a municipal corporation owns utility assets, it is not a company. It also would not appear to apply to a municipal authority's water or wastewater assets. The OCA is not clear as to what specific meaning the phrase “water or wastewater company located in this Commonwealth, owned by a municipal corporation or authority” should be given by the Commission.

Timeline/Checklist

The Tentative Implementation Order contains a timeline and a checklist of materials that need to be attached to the Section 1102 application that seeks approval of Section 1329(d) valuation.² The OCA recognizes that every party and the Commission have to sacrifice time to work within the statutory time frame when a public utility is seeking ratemaking approvals under Section 1329(d)(2). The new statutory requirements will require expediting the schedule in a multitude of ways and throughout the entire process from beginning to end. Without a

² As noted above, the six month timeline only applies to public utilities seeking approval of Section 1329(d) valuation. It does not apply to the Section 1102 application that is also necessary.

meaningful opportunity for hearing, however, the parties will be denied procedural due process. See Fuentes v. Shevin, 407 U.S. 67, 80, 92 S. Ct. 1983, 1994 (1972) ("Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. It is equally fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner.") (internal citations omitted); see also Smith v. Pa. Pub. Util. Com., 192 Pa. Super. 424, 429, 162 A.2d 80, 83 (1960) ("The commission, as an administrative body, is bound by the due process provisions of constitutional law and by the principles of common fairness. Among the requirements of due process are notice and an opportunity to be heard on the issues, to be apprised of the evidence submitted, to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal... Due process also requires the opportunity to argue the case before the deciding tribunal.") (internal citations omitted). See also Nat'l Energy Marketers Ass'n v. New York State Pub. Serv. Comm'n, 2016 NY Slip Op 26233 at 15-16, No. 868-16 (N.Y. Sup. Ct. July 22, 2016). The OCA has a number of proposed additions to the checklist and modifications to the Commission's proposed schedule and procedural rules that would make it more feasible to comply with an expedited timeline.

As to the filing requirements, in addition to what the PUC included in the attachment to the Tentative Implementation Order, the OCA proposes the following:

1. All schedules, studies and workpapers should be provided in a working electronic format with the filing and testimony. No application should be deemed perfected without these and confirmation that all required to be served have the working electronic format.

2. On part 4 of the Checklist, the two appraisals are required to be provided. All workpapers, schedules, and any materials relied on to perform the appraisals should be provided.
3. On part 7 of the Checklist, the documentation justifying the fee amounts for the UVEs should include the contract or agreement between the buying utility, or entity and the UVE and all invoices provided pursuant to the contract or agreement.
4. On part 16 of the Checklist, at least one full year of data regarding gallons pumped and gallons sold (or gallons treated for a wastewater system) should be required.
5. On part 18 of the Checklist, in addition to copies of budgets, actual expenditures for at least one year should be provided.
6. On part 19 of the Checklist, the following additional information should be required:
 - a. For water system acquisitions, recent inspection reports of the paint conditions of all painted steel storage tanks that have not been repainted within the past 15 years;
 - b. For water systems that own one or more dams, the last date that the dams were inspected by a dam safety engineer and whether or not improvements must be made to comply with dam safety laws, as well as cost estimates of any necessary improvements;
 - c. For water systems, the latest annual Chapter 110 submission to DEP;
 - d. For water systems, a recent system wide leak detection survey with estimated costs and time frame to reduce UFW to less than 20%;
 - e. For water systems, identification of the number of isolation valves that have not been successfully exercised within the past 2 years;
 - f. For water systems, the average age of customer meters;

- g. For wastewater systems, a copy of the latest annual Chapter 94 submission to DEP; and
- h. For wastewater systems, the dates that each treatment tank has been drained, inspected and repaired as necessary.
- i. Information that would support the entity or public utility's claim that it is technically, financially and managerially fit.
- j. #5 in checklist should ensure that the purchase price should be limited to the price associated with the assets used to provide public utility service. The purchase price could include cash equivalents that should be deducted from the purchase price. There also could be an assumption of debt that would increase the purchase price. There also could be a purchase of receivables. If non-regulated assets are being purchased, such assets should be separated from the regulated assets and the related purchase price so that the only the regulated assets figure is what is considered for inclusion in rate base.

Timeline

The OCA also has a number of proposed modifications to the timeline that would assist the stakeholders in having sufficient time to prepare testimony and prepare for hearings on the proposed application, and thus have the proposed timeline meet the requirements of procedural due process. The OCA submits that these changes should be included in the Implementation Order and implemented automatically upon the filing of an application seeking Section 1329(d) relief so that no party would have to request these modifications at a prehearing conference. Given the proposed timeline where the prehearing is on day 34 and testimony is due two days

later, there would be no meaningful modifications if the parties had to wait until the prehearing for these proposed modifications to begin. The OCA proposes at least the following:

Buyer Utility or Entity and Selling Utility should be required to notify the Commission and the statutory advocates when they enter into the service contracts for the UVEs and the licensed engineer so that the Commission and the statutory advocates can prepare for the filing of the application.

Protective Orders: A standard protective order should be in place prior to the filing of the application (Tentative Implementation Order at 16) and should cover discovery and testimony. This would eliminate the possibility of an application being filed that would include proprietary information and the attendant delay in receiving a full and complete copy while a protective agreement is worked out among the parties. There is no time for that to occur with the shortened time frame.

All discovery deadlines for a Section 1329(d) request should be shortened from 20 days for responses to 5 days. Similarly, the time period for objections should be shortened to 2 days.

No discovery should be permitted to be propounded on protestants until the protestants file direct testimony.

Standard data, in addition to what is included in the checklist, should be provided with the filing of the application in which Section 1329(d) relief is requested. The OCA has provided suggested additional data above.

Procedural Changes

In the Tentative Implementation Order, the Commission states that its proposed timeline assumes that there is a public meeting 15 days prior to the end of the six month deadline.

Tentative Implementation Order at 14. In order to provide all parties and the Commission with as much time to develop the record and make a determination, the OCA submits that the Commission should consider scheduling a special public meeting as close to the end of the six month deadline as possible when a Section 1329(d) request is made as part of a Section 1102 application. Specifically, a public meeting that is 15 days before the end of the six month time frame removes almost two weeks of valuable time from developing a full and complete record for Commission review. In addition, there may be holidays that impact the schedule as well

which would disrupt the assumption of a public meeting within 15 days of the end of the six month time frame and would further shorten the time for meaningful review.

The OCA also suggests that the parties waive reply briefs in order to gain 10-14 days in the proposed timeline that could be used to prepare useful and meaningful testimony for the Commission's consideration. Alternatively, the Commission could waive a recommended decision and have the case go directly to the Commission. This would provide 37 days proposed for the recommended decision (see Tentative Implementation Order at 15) for additional time to conduct needed discovery and develop the record with testimony and hearings. Only if the parties get a meaningful opportunity to conduct discovery, review the case and develop the issues in testimony can the PUC be assured of a full and complete record that allows for reasoned decision making.

Conclusion

The OCA thanks the Commission for the opportunity to provide Comments on the Tentative Implementation Order. The OCA respectfully requests that the Commission carefully consider the points and issues it raises in these Comments and to adopt those points in its Final Order. The OCA looks forward to continuing to work with the Commission, Staff, and stakeholders on these important issues.

Respectfully Submitted,



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