



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE
REFER TO OUR FILE

November 2, 2018

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

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

Dear Secretary Chiavetta:

Enclosed please find the Bureau of Investigation and Enforcement's (I&E)
Comments in the above-captioned proceeding.

Copies are being served on parties as identified in the attached certificate of
service. If you have any questions, please contact me at (717) 783-6170.

Sincerely,

Erika L. McLain
Prosecutor
Bureau of Investigation and Enforcement
PA Attorney I.D. No. 320526

ELM/jfm
Enclosure

cc: Bohdan Pankiw (via email only bpankiw@pa.gov)
Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**Implementation of Section 1329
of the Public Utility Code**

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**Docket No.
M-2016-2543193**

**COMMENTS OF THE
BUREAU OF INVESTIGATION & ENFORCEMENT**

I. INTRODUCTION

On April 14, 2016, Governor Wolf signed into law Act 12 of 2016, which amended Chapter 13 of the Pennsylvania Public Utility Code by adding Section 1329 which became effective on June 13, 2016.¹ Act 12 provided a new methodology in which the municipality and acquiring utility set a ratemaking rate base when the application for acquisition is filed with the Pennsylvania Public Utility Commission (“PUC” or “Commission”). Act 12 requires the Commission to use fair market value in setting the ratemaking rate base. The Commission issued a Tentative Implementation Order regarding Section 1329 on July 21, 2016 and a Final Implementation Order on October 27, 2016 to guide stakeholders in the Section 1329 application process.

Recognizing that the procedures and guidelines for Section 1329 proceedings could be improved to create more certainty, improve the quality of valuations and ensure that the process is both fair and efficient, the Commission issued a Tentative

¹ 66 Pa. C.S. §1329.

Supplemental Implementation Order (“TSIO”) on September 20, 2018 and invited interested parties to submit comments within 30 days of its publication in the *Pennsylvania Bulletin*. The Bureau of Investigation and Enforcement (“I&E”) appreciates this opportunity and now provides the following comments.

II. COMMENTS

As a result of informal discussions between Commission staff and affected stakeholders, as well as the experience gleaned from approximately two years in which Section 1329 was applied to appropriate transactions, the Commission has issued its TSIO instructing interested parties to provide formal comments and offer recommendations on its proposals. I&E will address the Application Filing Checklist, planned notational voting, range of values developed by Section 1329 proceedings, and Utility Valuation Expert (“UVE”) direct testimony or Appendix D of the TSIO among other topics.

I&E appreciates all efforts undertaken by Commission staff and affected stakeholders to help tailor the processes and guidelines for Section 1329 applications.

A. Checklist for Applications Requesting 1329 Approval

Specifically, the Commission asked interested stakeholders to comment on whether the proposed revised Application Filing Checklist is too broad, is complete, or should be expanded to include additional items. During informal discussions, the checklist garnered a respectable amount of attention culminating in the changes set forth in the TSIO.

One improvement is the resequencing of the checklist to reflect the chronological order in which an application would follow, this change assists all parties with the organization of these sizeable filings. Also, the checklist recognizes that one document may be used to satisfy more than one checklist item in which it would be appropriate for the applicant to cross-reference to direct attention to where the required information may be found in the filing.

Another major change to the checklist is the requirement of the applicant to respond to Standard Data Requests, item number 4. The Standard Data Requests put forth by Appendix B of the TSIO are based largely on data requests routinely propounded by the statutory advocates. Requiring the buyer and seller to respond to these standard data requests before formal acceptance of the application streamlines the proceeding by allowing interested parties to have access to key information at the outset. It allows the Parties to more quickly pinpoint areas of the Application that require further inquiry and examination, and to tailor discovery to those areas. This addition of standard data requests also relieves some pressure of the six-month consideration period placed on active participants.

Items 13 and 14 of the Application Filing Checklist require the application to include both buyer and seller direct testimony. This requirement disallows the previous practice of filing seller UVE direct testimony on the due date of rebuttal testimony. The time of receipt of the seller UVE direct testimony would inhibit active parties' ability to respond to the direct testimony appropriately. This addition to the checklist benefits active parties so they may have a complete application at the time of formal acceptance.

Although I&E has not spoken of all changes to the checklist, it is our opinion that the revised Application Filing Checklist is complete due to thorough discussions on this topic. Ultimately, the revised checklist will provide the Administrative Law Judge (“ALJ”) and the Commission with a more complete record upon which to base the review of these filings.

B. Planned Notational Voting

The Commission’s TSIO acknowledged Section 1329’s short six-month consideration period and proposed that applicants avoid submitting filing on dates where the six-month consideration period stands to run afoul of scheduled Public Meetings. I&E would like to note that recently the applicants have been mindful of the Public Meeting Schedule and filing their applications to line up with a scheduled Public Meeting. I&E appreciates the applicants’ efforts in trying to preserve the six-month consideration period when possible.

The filing, however, is not entirely within the control of the applicants because it must first be reviewed for completeness by the Bureau of Technical Utility Service (“TUS”). In addition, there are months in which only one Public Meeting is scheduled, or a Public Meeting may need to be cancelled or rescheduled. In circumstances when the filing fails to produce a consideration period in excess of 170 days, the TSIO proposed using planned notational voting to consider and adjudicate Section 1329 applications which would allow parties to benefit from the entire six-month period that the law provides.

I&E supports the use of planned notational voting in situations where the consideration period falls short of a full six-months. The time constraint attached to Section 1329 transactions puts a significant burden on litigants to develop a full record for Commission review. When the six-month consideration period is cut short it is nearly impossible to encompass every matter to the extent necessary for a thorough review by the fact finder. In the event the filing date provides for a consideration period less than 170 days, planned notational voting would aid stakeholders in creating a more robust record for review.

C. Jurisdictional Exceptions

The TSIO proposes to establish several jurisdictional exceptions to be applied by the UVES when developing the cost, market, and income valuation approaches as required of Section 1329 appraisals. I&E supports the jurisdictional exceptions listed in the TSIO as well as Appendix C. The exceptions comply with Commission precedent and will reduce variances in the fair market value appraisals for the same property in further Section 1329 applications.

I&E appreciates the Commission's acknowledgement that guidelines are necessary in order to create a consistency of assumptions in UVE appraisals. It is, however; important to mention that while I&E agrees with the current jurisdictional exception list, the list is not exhaustive. The jurisdictional exception list is comprised only of exclusions that interested parties have experienced in Section 1329 applications to date. The list should be considered a living document in which stakeholders can add or amend exclusions that may arise in future applications.

D. Range of Values and Reasonableness of the Negotiated Purchase Price

The TSIO invited stakeholders to discuss the range of values developed to date in Section 1329 proceedings and comment on whether that should be used by the Commission as a check on the reasonableness of the negotiated purchase price (TSIO, p. 18). I&E would strongly discourage the use of a range of values from previous Section 1329 proceedings to become a check on the reasonableness of a negotiated purchase price. The average rate base cost per customer has been different in each of the previous proceedings. Using these range of values to evaluate a negotiated purchase price is arbitrary due to the differing circumstances that lead to each systems value. Each system to be acquired should be assessed on the specific facts and circumstances related to that system to determine an appropriate purchase price and not on the range of rate base values approved in other transactions.

Systems acquired using Section 1329 differ in size, customer count and compliance with environmental standards. Each of these measures has an effect on the average rate base cost per customer. In addition, there have not been enough Section 1329 proceedings to create such a range. Since Section 1329 came into existence, there have only been approximately six applications filed with the Commission. Even if I&E believed a range of reasonableness was appropriate, this is not enough in which to create that range to gauge other applications. The range of values from the previous Section 1329 proceedings should have no bearing on future Section 1329 acquisitions because every transaction must be analyzed based on its own individual facts and circumstances. A Section 1329 acquisition cannot be approved simply because the average rate base cost

per customer is similar to another Section 1329 acquisition approved by this Commission. Approving this sort of methodology could serve to arbitrarily inflate the purchase prices in these transactions, thereby harming ratepayers who pay for the return of and return on this rate base.

E. Utility Valuation Expert Direct Testimony (Appendix D)

In its TSIO, the Commission discusses when UVE direct testimony should be submitted and what the testimony should cover (TSIO, p. 22-24). The Order instructs the seller and buyer to file UVE direct testimony as part of the Application as established by Application Checklist numbers 13 and 14. Previously, the seller's UVE direct testimony was not introduced at the outset of the case and instead was submitted on the same date as rebuttal testimony. The late introduction of testimony prejudiced the parties' ability to address issues within that piece of testimony and left the Parties guessing as to how the UVE ultimately reached the valuation they did. Further, it shortened the time for analysis of the application as what typically would be considered direct testimony was left until the rebuttal stage. I&E believes that all testimony supporting the application should be introduced with the application giving all parties a fair opportunity for thorough investigation of the transaction.

I&E, as part of the informal discussions on the TSIO, helped develop a list of information to be included in UVE testimony. The recommendations for the testimony have been included in the Commission's Appendix D to the TSIO. It is important that UVE testimony cover the substantive issues within Appendix D to streamline the process and reduce the need for discovery. If UVE testimony adheres to Appendix D as a

baseline, then parties will be able to quickly determine whether the applicants have met minimum compliance with Section 1329.

It is important for I&E analysts to know how a valuation of a certain system was reached by a UVE so that they can determine whether the transaction was performed in accordance with the USPAP standards. Appendix D asks that the UVE identify how they determined a value under the cost, income, and market approach and to provide an explanation for the weighting given to each of these approaches. The weighting methodology used by the UVE can have a significant impact on the resulting acquisition price and should be supported thoroughly by the UVE.

F. Discovery Modifications

The Commission's TSIO did not create a standard Section 1329 discovery modification but instead encouraged the applicants to propose changes to the discovery rules and conditions (TSIO, pp. 16-17). While I&E understands the hesitation to establish a standard discovery deadline for Section 1329 applications, it is appreciative of the encouragement to the Office of Administrative Law Judge to impose appropriate discovery modifications if the applicants do not propose such modifications on their own. Due to the difficult schedules of these transactions, the standard discovery response time of 20 days² is inappropriate. I&E has frequently filed a Motion to Expedite Discovery before the Prehearing Conference is held in these proceedings. However, this is not always the most efficient means to expedite discovery as a ruling cannot be made on the

² 52 Pa. Code § 5.342(d).

Motion until an ALJ is appointed. With the average turnaround time from a Section 1329 Prehearing Conference to non-company direct testimony being 5 days, leaving very little time for the Parties to receive additional information through discovery continued cooperation amongst the Parties regarding modifications to the Commission's discovery rules is essential. I&E would suggest a discovery conference take place soon after acceptance of an application so that modifications can be established at the outset.

Although discovery conferences have not occurred in the Section 1329 applications filed to date, I&E believes it is important to recognize the willingness of utilities in recent Section 1329 proceedings to voluntarily agree to discovery modifications before such modifications have been approved by the assigned ALJ. Specifically, Aqua, Pennsylvania American Water Co., and Suez have agreed to turn discovery responses to the propounding party in 5 days, which has been tremendously helpful to I&E's review of these filings. I&E appreciates the willingness of these utilities to voluntarily shorten the response period and encourages similar cooperation in future proceedings.

Each Section 1329 application poses different questions with differing levels of complexities which may warrant different discovery modifications. While a standard for a discovery deadline has not been established, I&E would thank the Commission for acknowledging the issue and encouraging the ALJ to impose modifications if the parties did not propose them on their own.

G. Uniform Standards of Professional Appraisal Practice (USPAP)

When UVEs appraise systems to be purchased under Section 1329, they are to evaluate the system to determine fair market value using the USPAP.³ The Appraisal Standard Board updates the USPAP every two years and the revisions take effect on January 1 of even numbered years. The Commission has interpreted the language of Section 1329(a)(3) to mandate that UVEs verify the use of the USPAP edition which was effective when the UVE developed and submitted the appraisal. The TSIO further explains, appraisals based on outdated or expired USPAP editions cannot support valuations under Section 1329 and will not be accepted as competent evidence.

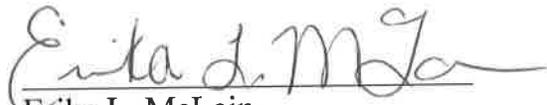
I&E supports the Commission's interpretation of Section 1329(a)(3). It is crucial that UVEs use the most recent version of the USPAP in order to evaluate a system being acquired under Section 1329. A UVE fair market value appraisal of a system has a direct impact on the ratepayers of that utility. The use of an outdated USPAP would call into question the accuracy of that appraisal. By using the most recent version of the USPAP, the UVE ensures that the appraisal was conducted using the best-known practices in the industry.

³ 66 Pa. C.S. §1329(a)(3).

III. CONCLUSION

As mentioned previously, I&E appreciates the time and effort put forth by all interested parties and the Commission to improve Section 1329 procedures in the TSIO. I&E is confident that the additional guidance provided by the TSIO on Section 1329 will improve the efficiency and reduce litigation regarding these transactions.

Respectfully submitted,



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Dated: November 2, 2018

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

CERTIFICATE OF SERVICE

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

I hereby certify that I am serving the foregoing **Comments** on November 2, 2018, in the manner and upon the persons listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party):

Served via First Class and Electronic Mail

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