



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

IN REPLY PLEASE
REFER TO OUR FILE

November 19, 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) **Reply 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

Enclosure: Reply Comments
Certificate of Service

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

ELM/jfm

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

CERTIFICATE OF SERVICE

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

I hereby certify that I am serving the foregoing **Reply Comments** on November 19, 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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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Implementation of Section 1329 of the Public Utility Code	:	Docket No. M-2016-2543193
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**REPLY COMMENTS OF THE
BUREAU OF INVESTIGATION & ENFORCEMENT**

I. INTRODUCTION

The Bureau of Investigation and Enforcement (“I&E”) files these Reply Comments pursuant to the Pennsylvania Public Utility Commission’s (“PUC” or “Commission”) Tentative Supplemental Implementation Order (“TSIO”) entered on September 20, 2018.

II. COMMENTS

Chester County Water Authority (“CCWA”), Herbert, Rowland & Grubic, Inc. (“HRG”), Suez Water Pennsylvania, Inc. (“Suez”), the Office of Consumer Advocate (“OCA”), Aqua Pennsylvania, Inc. (“Aqua”), Pennsylvania American Water Company (“PAWC”), the Pennsylvania Municipal Authorities Association (“PMAA”), and the York Water Company (“York Water”) filed Comments on the Commission’s TSIO. In these Reply Comments, I&E will address the Section 1329 Application Checklist, planned notational voting, Jurisdictional Exceptions, range of values and reasonableness

of the negotiated purchase price, utility valuation expert (“UVE”) testimony, discovery modifications, Technical Utility Services (“TUS”) data requests, and the scope and standard of Commission review of fair market valuations.

A. Checklist for Applications Requesting 1329 Approval

The Commission, in its TSIO, proposed changes to its Section 1329 Application Checklist, and I&E largely agrees with these changes. The OCA suggested in its Comments that applicants should use Bates stamping so that page numbers can be assigned to each page of the filing to produce a cleaner record and create an ease of reference by the parties.¹ Due to the size of these filings, which in the past have proven to exceed 1,400 pages, I&E supports the use of Bates stamping for Section 1329 Applications for purposes of organization and efficiency.

The TSIO also requested in Item 18(d) a copy of the notification sent or which will be sent to affected customers describing the filing and the anticipated effect on rates.² Item 18(d) aligns with the Commonwealth Court’s recent decision in McCloskey v. Pa. P.U.C., 1624 C.D. 2017 (Pa. Commw. October 11, 2018) in which the Court determined that notice of an acquisition un Section 1329 must be given to all ratepayers. In order to obtain clear guidance on the notice requirement, I&E supports the OCA’s proposal to use a collaborative or working group to determine how to implement notice.³

¹ OCA Comments, p. 4.

² TSIO, Appendix A, Item 18(d).

³ OCA Comments, pp 1-2.

In its Comments, PAWC sheds light upon questions facing the PUC in light of the Commonwealth Court's recent decision such as; who is to receive notice, when customers should be notified, and how customers should be notified.⁴⁵ These questions should be addressed in a working group or collaborative setting in order to obtain a resolution suitable for all parties.

Finally, both Suez and York Water expressed concerns over the lengthy Application Checklist requests.⁶ I&E understands that the checklist does require an applicant to provide a great deal of information up front; however, I&E would like to point out that by filing the information sought by the checklist the discovery exchange would be lessened after an application is transferred to the Office of Administrative Law Judge. Further, with the six-month deadline imposed by the statute, it is imperative that the Parties and the ALJ have as much information as possible from the outset of these proceedings in order to provide the Commission with a full and complete record on which to base its decision.

B. Planned Notational Voting

In recognition of the short six-month consideration period of Section 1329 applications, the Commission suggested planned notational voting to remedy a situation

⁴ PAWC Comments, p. 4.

⁵ I&E would like to note that PMAA opined that the issue of timely notification is important and that both existing and acquired ratepayers should be notified of the pending transaction to ensure that they are informed and able to communicate their comments regarding the transaction. PMAA Comments, p. 3, para. 2.

⁶ Suez Comments, p. 2 & York Water Comments, p. 1.

when the Public Meeting schedule cuts the consideration period short. As stated in I&E's Comments, I&E supports the use of planned notational voting for Section 1329 applications which would allow parties to benefit from the entire six-month consideration period. As mentioned by the OCA,⁷ I&E agrees that it is important to note that if planned notational voting is to be used, the parties should be notified so that the additional time can be included in the parties' litigation schedules. Litigation schedules are usually established at a Prehearing Conference; however, because of the six-month timeline, if planned notational voting is to be used the parties should be made aware prior to that stage of litigation.

The Commission, in trying to create another remedy to the short consideration period for Section 1329, will allow Technical Utility Services ("TUS") the ability to hold the application up to an additional five calendar days if doing so will avoid a consideration period of 170 days or less. While PAWC and Aqua oppose this measure, it is I&E's position that the benefit of holding the application for an additional five days granting the parties an appropriate amount of time in which to create a comprehensive record outweighs the Companies concerns over the five-day delay of acceptance of an application. Ensuring enough time is set aside to allow the Parties to create a full and complete record for the Commission is in the best interest of all involved in these proceedings.

⁷ OCA Comments, p. 6.

C. Jurisdictional Exceptions

In order to maintain consistency of fair market value appraisals, I&E supported the inclusion of Jurisdictional Exceptions in Appendix C of the TSIO. Although I&E supported the Jurisdictional Exception list, it made clear that the list was not exhaustive and should be considered a living document to be added to and amended as necessary. In contrast, PAWC asserts that future Jurisdictional Exceptions be adopted through a proceeding such as a supplemental implementation order or policy statement and not through specific cases.⁸ I&E disagrees with PAWC and submits that the Jurisdictional Exception list in Appendix C was generated based upon issues in specific cases. As was previously mentioned in I&E's Comments, the list should have the ability to be modified so that when an application sheds light upon a new issue it can potentially be added to the list.⁹ The facts and circumstances surrounding each case may differ greatly. To adopt PAWC's position may severely limit all Parties to these proceedings in their ability to review these filings and make recommendations.

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

The TSIO proposed using a range of values previous Section 1329 proceedings developed as a check on the reasonableness of the negotiated purchase price¹⁰ which I&E opposed in its Comments. Here, Aqua proposes new language in review of reasonableness of a transaction that varies the level of scrutiny an application will receive

⁸ PAWC Comments, p. 12.

⁹ I&E Comments, p. 5.

¹⁰ TSIO, p. 18.

based upon the price of net plant per customer.¹¹ The scrutiny levels are arbitrarily premised upon the notion that applications requesting amounts in excess of \$15,000 should receive a higher level of scrutiny than applications that do not exceed that price point. Aqua's proposal fails to consider that each system to be acquired has differing circumstances, characteristics, and challenges, including size, customer count, compliance with environmental standards, and location, which would impact the net plant per customer. Solely because a system's net plant per customer is valued under \$15,000 does not mean the transaction is more likely to be within the public interest and therefore should receive less investigation and scrutiny. Each acquisition should be analyzed based on its own individual facts and circumstances and should not be allocated to a certain group to be scrutinized and no conclusive determinations should be made simply because of its price of net plant per customer.

E. Utility Valuation Expert Testimony (Appendix D)

I&E strongly supports the requirement imposed by the TSIO that all UVE testimony be provided at the time the application is filed. I&E is aware that PAWC is looking to the Commission for clarification on the rights of the Buyer to challenge Seller testimony when the Seller testimony was submitted with the application.¹² I&E understands that filing Seller's testimony with the application could potentially create an issue if the Buyer wants to challenge the Seller's testimony, being that the Buyer and Seller are two distinct parties to the litigation. However, having the Seller's UVE

¹¹ Aqua Comments, pp. 21-22.

¹² PAWC Comments, p. 3.

testimony at the outset of the proceeding is essential to ensuring that the Parties can fully evaluate these filings. I&E is confident that the Commission will be able to offer a reasonable solution to prevent any such issue from occurring so that all testimony will be filed concurrently with an application.

F. Discovery Modifications

While PAWC supports the TSIO's refusal to establish universal modified discovery rules, it proposes that the Commission establish a presumption that a seven-day discovery response period is reasonable absent good cause.¹³ In the TSIO, the Commission was hesitant to impose a standard response deadline and instead encouraged the parties to propose suitable modifications to discovery.¹⁴ The TSIO recognizes that each application is independent which can warrant differing modifications which is the reason why the Commission did not impose a universal rule for modifications. The requirement of showing good cause in order to lessen the discovery response time would place an unnecessary burden on the parties, for this reason I&E would oppose PAWC's proposal that a seven-day response time is reasonable.

G. TUS Data Requests

Suez and PAWC raise concerns over the need to respond to TUS data requests after an application has been assigned to the Office of Administrative Law Judge ("OALJ"). Suez and PAWC assert that the TUS data requests are often duplicative of

¹³ PAWC Comments, p. 11.

¹⁴ TSIO, p. 16

those received by protestants or other parties.¹⁵ I&E submits that to ensure that the Parties are aware of the TUS data requests, TUS could simply serve the data requests on I&E, OCA, and OSBA. When the application is assigned to OALJ the six-month consideration period begins. If the applicant is no longer required to answer the TUS data requests after the reassignment to OALJ, to receive the responses the parties would then have to re-serve the applicant with the same or similar questions within the short litigation window. In order to address PAWC's concerns without delaying parties' receipt of information, I&E asks the Commission to direct the applicants to answer the TUS data requests so that the same questions would not have to be regenerated and served as discovery by the parties to the proceeding within the mandated six-month time frame.

H. Scope and Standard of Commission Review of Fair Market Valuations

In its Comments, PAWC asks the Commission to adopt a more limited scope of review of Section 1329 applications that requires a party proposing an adjustment to demonstrate an Adjustment Ground such as; the UVE made a mathematical or factual error, abused its discretion under USPAP, or committed fraud, acted illegally or in bad faith.¹⁶ PAWC further explains that the Commission should not consider an adjustment if none of the Adjustment Grounds are established.¹⁷

¹⁵ PAWC Comments, p. 9 & Suez Comments, p. 2.

¹⁶ PAWC Comments, p. 14.

¹⁷ *Id.*

I&E strongly rejects limiting the scope of review of Section 1329 applications by placing arbitrary restrictions upon the types of adjustments that the Commission may consider. First, by way of additional context, the Commission correctly rejected the limited scope of review that PAWC advocated in the Aqua/New Garden proceeding.¹⁸ There PAWC raised the same argument in an Amicus Curiae Brief asking the Commission to adopt the scope of review it again advocated here.¹⁹ In its rejection of PAWC's argument, the Commission correctly acknowledged that "it is unclear how such illicit actions would be uncovered without the ability of the Commission to investigate and analyze the bases of the UVE appraisals."²⁰ I&E submits that the same logic translates here, as imposing artificial limitations upon adjustments would deprive the Commission of information necessary to fully evaluate UVE appraisals. Importantly, PAWC provides no authority for the limitations it seeks to impose; therefore, the limitations appear to be arbitrary in that they seek to impose a hurdle that was not contemplated by the General Assembly or the Commission.

¹⁸ Aqua/New Garden Section 1329 Case, Docket No. A-2016-2580061, p. 35, footnote 6 (Order entered June 29, 2017).

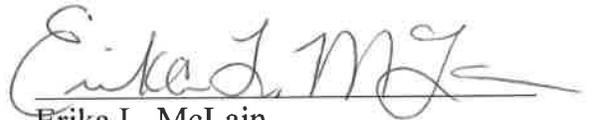
¹⁹ Aqua/New Garden Section 1329 Case, Docket No. A-2016-2580061, PAWC Amicus Curiae Main Brief, pp. 11-15.

²⁰ Aqua/New Garden Section 1329 Case, Docket No. A-2016-2580061, p. 35 (Order entered June 29, 2017).

III. CONCLUSION

I&E appreciates this opportunity to file its reply to other interested stakeholders' comments on the Commission's Tentative Supplemental Implementation Order. I&E looks forward to further collaboration with the Commission and interested stakeholders to continue to improve procedures and guidelines of Section 1329 applications.

Respectfully submitted,



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Dated: November 19, 2018