


COMMONWEALTH OF PENNSYLVANIA



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July 15, 2020

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

Re: Application of 52 Pa. Code Section 3.501 to
Certificated Water and Wastewater Utility
Acquisitions, Mergers, and Transfers
Docket No. L-2020-3017232

Dear Secretary Chiavetta:

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

Copies have been served per the attached Certificate of Service.

Very truly yours,

/s/ Christine Maloni Hoover
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Senior Assistant Consumer Advocate
PA Attorney I.D. # 50026
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Enclosures:

cc: Christian McDewell, Law Bureau (**email only**)
Sean Donnelly, Bureau of Technical Utility Services (**email only**)
Certificate of Service

*292129

CERTIFICATE OF SERVICE

Re: Application of 52 Pa. Code Section :
3.501 to Certificated Water and Wastewater : Docket No. L-2020-3017232
Utility Acquisitions, Mergers, and Transfers :

I hereby certify that I have this day served a true copy of the following document, the Office of Consumer Advocate's Comments, upon parties of record 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 15th day of July 2020.

SERVICE BY E-MAIL ONLY

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Dated: July 15, 2020
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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Application of 52 Pa. Code § 3.501 :
to Certificated Water and Wastewater : Docket No. L-2020-3017232
Utility Acquisitions, Mergers, :
and Transfers :

THE OFFICE OF CONSUMER ADVOCATE’S
COMMENTS TO THE
ADVANCED NOTICE OF PROPOSED RULEMAKING

The Office of Consumer Advocate (OCA) submits these Comments in response to the Public Utility Commission’s (PUC’s or Commission’s) April 30, 2020 Order initiating an Advanced Notice of Proposed Rulemaking (ANOPR). The Commission’s Order was published in the Pennsylvania Bulletin on May 16, 2020. 50 Pa. Bull at 2521-23. In the ANOPR, the Commission asks stakeholders to address issues related to 52 Pa. Code § 3.501 and its application to certificated water and wastewater utilities and acquisitions, mergers, and transfers. The Commission states that it is interested in comments addressing whether the documentation requirements required of well-established service providers are too extensive. 50 Pa. Bull at 2522. In addition, the Commission asks what improvements might be made to Sections 3.501 and 3.502 to improve water and wastewater service to Pennsylvania residents through the regionalization of water and wastewater services. 50 Pa. Bull at 2522. The ANOPR includes twenty-one questions.

I. COMMENTS

The OCA's comments and answers to questions are set forth below. The OCA submits that there may be modifications that will make the process more efficient for all stakeholders. The OCA has provided some additional modifications to the existing regulations that will ensure that stakeholders will be provided full access to the proceedings affecting them.

A. Specific Updates to Sections 3.501 and 3.502

1. How might the Commission simplify the requirements of Section 3.501 for well established utilities without hindering the traditional policy goals of Section 3.501 and 3.502?

The OCA submits that establishing different requirements for “well-established utilities” may be possible. First, there needs to be agreement on how to define “well-established”. The OCA does not agree that all certificated water and wastewater utilities should be included in the definition of “well established utilities”. Holding a certificate for a certain amount of time should not be the definition of “well established”. There are certificated water and wastewater utilities that cannot be considered to be financially, technical, and managerially viable.¹ Those certificated, but not viable water and wastewater utilities, should not be included in the “well-established utilities” group. The OCA suggests that the existing definition of financial, managerial, and technical viability be used to analyze whether a certificated utility is “well established” and eligible for simplified filing requirements for Sections 3.501 and 3.502. The analysis of some certificated utilities that may not file on a frequent basis, may need to be refreshed on a regular basis especially if financial, technical, or managerial circumstances have changed. For larger water and wastewater

¹ The Commission defines viability as “A viable water system is one which is self-sustaining and has the commitment and financial, managerial and technical capabilities to reliably meet Commission and Department of Environmental Resources (Department) requirements on a long-term basis.” 52 Pa. Code § 69.701(a)(2).

utilities that file applications on a frequent basis, the analysis may need to be made once a year, and then all applications filed during that year would be done under the simplified requirements.

The concept of “simplified requirements” also needs more specifics. The OCA looks forward to reviewing the suggestions of the water and wastewater utilities and will address those proposals if stakeholders are afforded the opportunity to file Reply Comments.

2. What are the expected benefits of reducing requirements applicable to existing utilities? How would those benefits be passed on to ratepayers?

The OCA would expect that reducing requirements would reduce the time and expense of making the filing, including outside legal services and technical consultants. However, reduced requirements need to be balanced with timely and comprehensive information that is sufficient to support a Commission determination. If requirements are reduced for some existing utilities, then the reduced professional services costs should result in reduced costs being reflected in rate cases and result in reduced costs being recovered from ratepayers.

3. What, if any, issues arise from allowing existing utilities the option to meet the requirement of 3.501(a)(1)(ii)(A) following the completion of an original cost study after the transaction has closed, in lieu of submitting this information with an application?

If the acquired utility is a Commission-regulated utility, there is no need to wait until after closing because the original cost, by year and major plant category, of used and useful plant in service and related accrued depreciation calculations would already be detailed in the acquired utility’s annual reports on file with the Commission. If the acquired entity is not regulated by the Commission, then it is reasonable to submit this information as an original cost study after the transaction is closed, in lieu of submitting this information with an application.

4. What alternative documentation could be provided as evidence an application complies with the following subsections of Section 3.501:

- **3.501(a)(2)(vi): Providing a copy of county comprehensive plan, municipal comprehensive plan and applicable zoning designations.**

First, this section of the regulation ends with the words, “if requested”, so the subsection already contemplates that there may be certain applications where this information may not be requested. It is not required with all applications. Second, it appears that this information (county comprehensive plans, municipal comprehensive plans and applicable zoning designations) may be available electronically and could be provided as part of an application by supplying the information in electronic format or by providing links to the documents that may be available on county and municipal websites.

- **3.501(a)(3)(ii): Identifying the future number of connections anticipated for the next 10 years.**

It appears that the utility would have this information or could develop it. This information is important because it will be part of a review of the financial, technical, and managerial viability or capability of the entity seeking a certificate of public convenience.

- **3.501(a)(6)(iv): Providing a Pennsylvania Department of Environmental Protection (DEP) 5-year compliance history of other utilities owned or operated, or both, by the applicant, including affiliates, and their parent corporations regarding the provision of utility service.**

The DEP 5-year compliance history of other utilities owned or operated, or both, by the applicant, including affiliates, and their parent corporations is valuable information to have included with the application. The information can provide a wider view of the compliance history of the organization or acquiring entity.

- **What are the costs and benefits of any proposed alternative documentation?**

The OCA submits that the information can be provided electronically to potentially reduce costs. The benefits of potentially reduced costs should be reflected in reduced costs for the acquiring utility. An additional benefit of providing the 5-year compliance history of other utilities

owned or operated by the applicants, including affiliates and the parent corporation, is to permit the Commission and parties to see a full and complete picture of the compliance history beyond the applicant's compliance history. See 52 Pa. Code § 3.501(a)(6)(iii).

- **What potential costs and benefits exist by applying these sections to Class A water utilities when those Class A utilities are solely applying for a certificate of public convenience to acquire a non-certificated water or wastewater service provider?**

If this requirement is limited to applications where a Class A water utility is applying for a certificate of public convenience to acquire a non-certificated water or wastewater provider, then the costs would appear to be the same as under the current regulation (albeit potentially reduced if the information is provided electronically). The benefits would appear to be costs savings related to other applications filed by Class A water utilities but that would need to be balanced with the loss of information in those other applications filed by Class A water utilities.

- 5. What are the potential costs and benefits to the addition of a requirement to Section 3.501(a)(6) requiring the applicant to provide a copy of any DEP-approved Sewage Facilities Planning Modules and/or the current Act 537 Official Sewage Facilities Plan, if applicable? What alternative documentation could be provided to show that an application complies with Act 537 and what are the costs and benefits of these alternatives?**

The OCA does not oppose the applicant providing a copy of any DEP-approved Sewage Facilities Planning Modules and/or the current Act 537 Official Sewage Facilities Plan. The benefit of the information is to permit the stakeholders the opportunity to see the proposed acquisition in the context of the applicable sewage facilities planning modules and/or the current Act 537 plan. If the information is voluminous, the applicant could provide the information in electronic format and that may reduce the cost of providing the information.

- 6. What alternative documentation could be provided by wastewater utilities in an application which assures compliance with the requirements of Section 5 of the**

Pennsylvania Sewage Facilities Act (35 P.S. § 750.5) and what are the costs and benefits of these alternatives?

Section 3.501(a)(9) currently requires a wastewater applicant to demonstrate compliance with section 5 of the Pennsylvania Sewage Facilities Act (35 P.S. § 750.5). Providing the Act 537 Plan in electronic format may reduce the cost of providing the required information. The OCA is unsure of what alternative documentation could be provided that would inform the Commission and stakeholders that the wastewater utility is in compliance with Section 5 of the Pennsylvania Sewage Facilities Act.

7. Should Section 3.501(a)(6) be revised to include providing evidence of DEP Chapter 105 Permits for water systems that have or will have impoundments with dams or reservoirs in accordance with DEP regulations in 25 Pa. Code § 105?

Yes. The information about current or planned impoundments with dams and reservoirs would be part of providing a complete picture of the current and/or future service, including future capital projects. The information related to impoundments with dams or reservoirs could be provided in electronic format.

8. What alternative documentation could be provided by applicants to satisfy the present requirements of Section 3.501(a)(7) and what are the costs and benefits of these alternatives?

Section 3.501(a)(7) requires the applicant submit a letter addressing “all of the applicable requirements or mandates” of the listed government entities. The letter also must append copies of certifications issued by the listed government entities confirming that the application does or does not meet those entities applicable requirements or mandates.

Section 3.501(a)(7) lists the following governmental entities: the Department of Environmental Protection (a)(7)(i), the Delaware River Basin Commission, the Susquehanna River Basin Commission , the Ohio River Basin Commission and the Great Lakes Commission (a)(7)(ii),

any Statewide water plan, including any local watershed areas (a)(7)(iii), and any officially adopted county comprehensive plans, municipal comprehensive plans, and applicable zoning designations, including any necessary amendments (a)(7)(iv).

The OCA is not sure what alternatives are available to seeking and receiving a certification issued by each of the governmental entities. The OCA suggests that an affidavit from the applicant that states that they are in compliance and in good standing with each applicable governmental entity may be sufficient for Class A utilities that file a large number of applications each year.

9. Should Section 3.501(d) be revised to use a less than 60-day protest period for an application either in limited circumstances or in all circumstances?

No. The OCA does not support shortening the protest period. The circumstances presented in an application could have a large impact on individuals and businesses. Providing a protest period that is 60 days is a reasonable accommodation to ensure interested stakeholders and persons impacted by the application have sufficient time to understand the impacts of the application and determine whether it is necessary to file a protest. In addition, as discussed below, in Question 13, shortening the protest period would be unreasonable, especially in situation where people are being required to connect to the system, *e.g.*, due to a local ordinance.

10. Should Section 3.501(d) be revised to require publication of the notice of an application once a week for two consecutive weeks in a newspaper of general circulation located in the territory covered by the application, rather than the requirement in Section 3.501(d) to publish daily for two consecutive weeks?

No. Providing less notice is not consistent with due process requirements. If the requirement for the frequency of newspaper publication is lowered and the protest period is shortened, as addressed in Question 9 above, the OCA submits that it would adversely impact the due process provided to those potentially impacted by the proposed application. The OCA submits that notice could be provided by additional methods, such as bill insert. The notices used in

applications filed under Section 1329 and 1102 of the Public Utility Code could be used as examples of how to structure notice for an application, rather than a case filed under Section 1308 of the Public Utility Code.

The OCA proposes the following revision to Section 3.501(d):

(d) *Notice.* The application will be docketed by the Secretary of the Commission and thereafter forwarded for publication in the *Pennsylvania Bulletin* with a 60-day protest period. The applicant shall also publish notice of application as supplied by the Secretary, daily for 2 consecutive weeks in one newspaper of general circulation located in the territory covered by the application and shall submit proof of publication to the Commission. In addition, the utility or applicant shall individually notify existing customers **and customers of the selling entity** of the filing of the application **by bill insert or direct mailing**.

11. Should applicants be required to provide evidence that anticipated subdivisions and land developments to be served by the utility in the requested service territory have been granted preliminary and final plan municipal approval?

The OCA does not have a position on this question.

12. Parties should discuss the extent to which Section 3.501 should apply to applications filed pursuant to Section 1329 of the Public Utility Code, 66 Pa.C.S. § 1329, and the Commission’s Section 1329 Application Filing Checklist, and what changes to Section 3.501 might be made in order to better comport with 66 Pa.C.S. § 1329.

The filing requirements for applications that are filed under Section 1329 have been developed through two implementation orders. Implementation of Section 1329 of the Public Utility Code, Final Implementation Order, Docket No. M-2016-2543193 (Order entered October 27, 2016); Implementation of Section 1329 of the Public Utility Code, Tentative Supplemental Implementation Order, Docket No. M-2016-2543193 (Order entered September 20, 2018). The OCA submits that the contents of the Section 1329 Application Filing Checklist should not be modified as part of this proceeding.

13. Parties should discuss whether applicants should follow additional processes and procedures regarding property owners that would be required to connect to an

applicant's system upon application approval but which have not requested service from the utility, including, but not limited to, property owners located in municipalities which have adopted a mandatory connection ordinance.

Customers who are going to be connected upon application approval but who have not requested service should receive direct notice from the acquiring utility. This notice would be provided as set forth in Section 3.501 (d), as revised above. If a mandatory connection ordinance has been adopted, this notice should be provided in addition to any notice that is required by the municipality when it adopted the mandatory connection ordinance. The notice should provide information about the mandatory connection ordinance, if applicable, what the rates will be, and how the impacted property owners can object to the application.

14. Parties should discuss if an acquiring utility should identify the existence of lead service lines (LSLs) or damaged wastewater service laterals (DWSLs) and the projected costs to remove LSLs or replace DWSLs within the territory to be acquired.

Yes, an acquiring utility should identify the existence of lead service lines (LSLs) or damaged wastewater service laterals (DWSLs) and the projected costs to remove LSLs or replace DWSLs within the territory to be acquired. Disclosure of this information will inform the parties and the Commission in determining whether there are affirmative public benefits and provide an accurate picture of the acquired system.

15. Parties should propose any changes to Section 3.502 they deem relevant.

The OCA submits that the regulation should indicate that a protest form is provided on the Commission's website. See, e.g., 52 Pa. Code § 3.501(e). The regulation and the instructions on the Commission's website should make it clear that a protest is not required to be on the form to be a valid protest. The OCA proposes the following addition to Section 3.502:

§ 3.502. Protests to applications for certificate of public convenience as a water supplier or wastewater collection, treatment or disposal provider.

(a) *Protests generally.* A person objecting to the application shall file with the Secretary and serve upon the applicant or applicant's attorney, if any, a written protest which must contain the following:

- (1) The applicant's name and the docket number of the application.
- (2) The name, business address and telephone number of the protestant.
- (3) The name, business address, Pennsylvania attorney identification number and telephone number of the protestant's attorney or other representative.
- (4) A statement of the nature of the protestant's interest in the application.

A standard protest form is provided on the Commission's website. Use of this specific form is not required.

(b) *Participation in a proceeding.* Upon the filing of a timely protest the protestant will be allowed to participate in the proceeding as a party intervenor. Statutory advocates participate in any proceeding based on their statutory right of participation.

(c) *Motions.* A protest will be treated as a pleading; and the applicant may, within 20 days after the closing date for the filing of protests, file motions to strike, to dismiss, or for amplification as provided in § 5.101 (relating to preliminary motion).

(d) *Protests: time of filing.* A protest shall be filed within the time specified in the notice appearing in the *Pennsylvania Bulletin*, which shall be at least 60 days from the date of publication thereof except when the need for the proposed service or other exigent circumstances supports a request for a shorter protest period. Failure to file the protest in accordance with this subsection shall be a bar to subsequent participation in the proceeding, except if permitted by the Commission for good cause shown or as provided in § 5.71 (relating to initiation of intervention).

B. The Commission's Goals of Regionalization and Consolidation

1. Parties should discuss how the Commission's goals of regionalization and consolidation may be further improved to promote the acquisition of systems with fewer than 3,300 connections by larger more viable systems.

The OCA submits that the Commission has numerous tools to address regionalization and consolidation, including Sections 523, 529 and 1327 of the Public Utility Code. In addition, the Policy Statement on Acquisition Incentives provides a number of possible acquisition incentives. 52 Pa. Code § 69.711. The OCA submits that the statutory provisions and the policy statement have operated to assist with regionalization and consolidation over the decades that they have

existed. The OCA would note that there has been a great deal of regionalization and consolidation prior to and since the enactment of the statutory provisions and the policy statement. Both regionalization and consolidation continue to occur under the current statutory and regulatory framework. Although the OCA does not have specific regulatory language to further improve regionalization and consolidation, the OCA remains committed to continue working with stakeholders and the Commission on additional regionalization and consolidation efforts. Regionalization and consolidation should be done in a manner that brings the appropriate and necessary efficiencies. At this time, a comprehensive process for achieving such regionalization and consolidation has not been well-developed. Further discussions regarding gaining the efficiencies of regionalization and consolidation would be reasonable.

- 2. Parties should discuss the development of safety net programs to deal with nonviable or abandoned water systems as referenced in 52 Pa. Code § 69.701(b)(5). Specifically, parties should address the prospect of creating a fund dedicated to covering costs associated with receivership proceedings conducted pursuant to Section 529 of Public Utility Code, 66 Pa.C.S. § 529.**

The OCA submits that the costs of receivership pursuant to Section 529 should be addressed within the context of the specific Section 529 proceeding. The facts of each case in which a receiver is appointed can differ greatly and what would work in one situation may not work in another situation. Among other issues with a fund dedicated to covering costs associated with receivership proceedings, it is unclear where the money for the fund would come from and who would be responsible for administering the fund.

- 3. Should the Commission consider seeking to modify the 1993 Memorandum of Understanding between the Commission and the Department of Environmental Protection? If so, in what ways? Should the scope of the memorandum be broadened to also include wastewater service?**

Yes, either the scope of the memorandum could be broadened to include wastewater or a separate memorandum that addresses wastewater would be reasonable.

C. Cross-Connections and Back Flow Prevention

4. What methods within the Commission's jurisdiction might be used to reduce or eliminate the presence of contaminants such as lead, PFOA/PFOS and Legionella from the drinking water supplies of systems subject to approval under Sections 3.501 and 3.502?

If an application presents information related to the acquired company that presents issues such as lead, PFOA/PFOS or Legionella, then the Commission has the authority under Sections 1501 and 1505 of the Public Utility Code to address improvements to the acquired system so that the service is adequate, efficient, safe and reasonable. 66 Pa. C.S. §§ 1501, 1505. In addition, the Commission could require a plan for improvement as a condition to granting the application. Section 1103 explicitly allows the Commission to impose conditions upon the issuance of a Certificate of Public Convenience. 66 Pa. C.S. § 1103(a). Section 1103(a) of the Code provides: “The Commission, in granting such a certificate, may impose such conditions as it may deem to be just and reasonable.” Pursuant to this existing authority, the OCA submits that the Commission may wish to consider the imposition of conditions in order to ensure that service is adequate, efficient, safe and reasonable and to ensure that the public interest standard is met.

2. Whether the Commission should exercise its authority pursuant to 66 Pa.C.S. §§ 501 and 504 to require public utilities to provide copies of current cross-connection control programs approved by the Department of Environmental Protection pursuant to 25 Pa. Code § 109.709(b) for systems subject to approval under Sections 3.501 and 3.502.

The OCA submits that it is reasonable to ask the acquiring utility to provide its current cross-connection control program and for the acquired utility to provide its plan. The information would provide additional information that is helpful to the Commission and stakeholders in

reviewing the application. The information directly impacts all customers connected to the system and would need to be reflected in the proposed tariff language. The information can be provided in an electronic format, as discussed above.

3. Whether it would be reasonable for the Commission to condition approval of acquisition applications filed pursuant to 66 Pa.C.S. § 1102(a)(3) and 52 Pa. Code §§ 3.501 and 3.502 upon implementation of a DEP-approved cross-connection control program and/or a Commission-approved cross-connection control plan.

The OCA submits that it is reasonable to condition approval of an acquisition application on compliance with DEP requirements to ensure safe, adequate, and reliable service. See 66 Pa. C.S. §§ 1103, 1501, 1505.

D. Other matters

All parties that have participated in applications, by reviewing or by filing a protest, have dealt with the numerous exhibits and attachments that are part of the application. The applications do not always use the same references. The OCA submits that all applications filed under Section 1102 of the Public Utility Code should be Bates numbered to make it easier to reference portions of the application by the parties, Commission staff, and the Administrative Law Judges. Use of Bates numbering would also permit references to the application and associated materials to be more consistent. The Bates numbering function is available in Adobe products and can be added to the PDF of the materials that will constitute the application and its exhibits and attachments. The use of Bates numbering will be an improvement in the application process by permitting easier reference to materials and avoiding potentially confusing references to the exhibits and attachments, while not adding to the costs of producing the PDF for filing.

II. CONCLUSION

The OCA appreciates the opportunity to provide these comments on the Commission's Advanced Notice of proposed Rulemaking regarding 52 Pa. Code §§ 3.501 and 3.502.

Respectfully Submitted,

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DATED: July 15, 2020
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