


COMMONWEALTH OF PENNSYLVANIA



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November 14, 2022

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
Notice of Proposed Rulemaking
Docket No. L-2020-3017232

Dear Secretary Chiavetta:

Attached for electronic filing are the Office of Consumer Advocate's Reply 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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Certificate of Service

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CERTIFICATE OF SERVICE

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

I hereby certify that I have this day served a true copy of the following document, the Office of Consumer Advocate’s Reply 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 14th day of November 2022.

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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
REPLY COMMENTS IN THE
NOTICE OF PROPOSED RULEMAKING

I. INTRODUCTION

The Office of Consumer Advocate (OCA) submits these Reply Comments in response to the Public Utility Commission's (PUC or Commission) December 16, 2021 Order initiating a Notice of Proposed Rulemaking (NOPR).¹ The Commission's Order was published in the Pennsylvania Bulletin on August 13, 2022. 52 Pa.B. at 4926-45. The OCA filed Comments on October 12, 2022. Comments were filed by Aqua Pennsylvania, (Aqua), the Coalition for Affordable Utility Service and Energy Efficiency in Pennsylvania (CAUSE-PA), National Association of Water Companies-Pennsylvania Chapter (NAWC-PA), Pennsylvania-American Water Company (PAWC), and Pennsylvania Municipal Authorities Association (PMAA).

The OCA will respond to the Comments filed by NAWC-PA, Aqua, and PAWC regarding key provisions in the NOPR. The OCA supports the Comments filed by PMAA and CAUSE-PA.

¹ The NOPR follows the Commission's April 30, 2020 Order initiating an Advanced Notice of Proposed Rulemaking (ANOPR). The Commission's Order initiating the ANOPR was published in the Pennsylvania Bulletin on May 16, 2020. 50 Pa.B. at 2521-23. The Commission received Comments from a variety of stakeholders, including the OCA, the Coalition for Affordable Utility Service and Energy Efficiency in Pennsylvania (CAUSE-PA), the Pennsylvania Chapter of the National Association of Water Companies (NAWC), Pennsylvania State Association of Township Supervisors (PSATS) and individual water and wastewater utilities. *See* 52 Pa.B. at 4928.

II. REPLY COMMENTS

The OCA notes at the outset that the water and wastewater utilities appear to be seeking a streamlined, time restricted, checklist-type review by the Commission. *See e.g.*, Aqua Comments at 4, NAWC-PA Comments at 3; PAWC Comments at 5, 7. Looking for efficiencies in the process must be balanced by a recognition that there are legal requirements under the Public Utility Code that must be addressed by the applicant and the Commission.² In addition, there are stakeholders that may have an interest in the proceeding due to the impact of the proposed acquisition which also underlines the importance of the notice and protest periods discussed below. While recognizing the utilities' interests in streamlining the process as part of this NOPR, the Commission must balance the interests of the public as well. For example, PMAA notes that eliminating such requirements reduces the information available to those stakeholders and/or members of the public whose water or wastewater system may be subject to an acquisition by a Commission regulated utility. PMAA Comments at 1. Similarly, reducing information impacts the statutory advocates too as they and Commission staff are reviewing all the applications filed by all the utilities. Having adequate information provided with the application, along with adequate time to review the application are keys to creating a reasonable process to meet the requirements of the Public Utility Code and to protect the public's interest in water and wastewater acquisitions not only the private interests of the acquiring utilities.

CAUSE-PA also raised issues that are important to the consideration of the proposed transfers under this regulation and the impact on rates, especially the impact on low income customers. CAUSE-PA Comments at 1-4. CAUSE-PA proposed additions to the regulation that

²Each proposed transaction under Sections 1102 and 1103 of the Public Utility Code, must affirmatively promote the service, accommodation, convenience, or safety of the public in some substantial way. 66 Pa. C.S. §§ 1102, 1103; *City of York v. Pa. P.U.C.*, 295 A.2d 825, 28 (Pa. Cmwlth. Ct. 1972).

address the impact the water system transfers will have on the rates paid by consumers, and on low-income communities. CAUSE-PA Comments at 8-9.

Proposed 3.501(f) – Protest Period

In its Comments, the OCA urged the Commission to retain the 60-day notice period, rather than shorten it to 30 days because the circumstances proposed in an application can have a large impact on individuals and businesses. OCA Comments at 2-3. The Commission’s concerns about reduced awareness if the protest period were shortened to 15 days as urged by some stakeholders are well-founded. 52 Pa.B. at 4932-33. The Commission recognized that not all protests are filed by “sophisticated protesters” and that shortening the protest period, while also reducing notice requirements “will reduce awareness of applications among the public.” Pa.B. at 4933. The OCA agrees with those concerns and submits that those same concerns would be present with a 30-day notice period. OCA Comments at 2. It is both unnecessary to shorten the time frame and unreasonable to expect the public to be able to respond in 30 days. OCA Comments at 2. Retaining a protest period that is 60 days is a reasonable accommodation to ensure that affected persons, especially those directly impacted by the application, and interested stakeholders have sufficient time to understand the impacts of the application and determine whether it is necessary to file a protest.³ OCA Comments at 2-3.

PMAA also supports retaining the 60-day protest period. Regarding shortening the protest period, PMAA stated, “To do so could adversely impact the public by providing insufficient time

³ It is important to recognize that no individuals, municipalities, or advocates have access to discovery before filing a protest. To the extent stakeholders are seeking information informally, a shorter protest period would severely restrict any informal exchange of information to address initial issues identified with the filing.

to adequately review and evaluate the potential impacts of any application.” PMAA Comments at 2.

Comments filed by NAWC-PA, PAWC, and Aqua⁴ urge the Commission to shorten the protest period to no more than 30 days, and PAWC continues to urge the Commission to consider shortening the protest period to as short as 15 days. PAWC at 4, NAWC-PA at 16. The Comments by NAWC, PAWC, and Aqua do not provide any compelling reason why the protest period should be shortened. A 60-day protest period does not slow down the process of review at the Commission. The Commission’s Bureau of Technical Utility Services (TUS) reviews the application filing during the protest period, so a 60-day notice period does not delay the analysis performed by Commission staff. Retaining a 60-day protest period provides time for stakeholders to learn of the application, review the application, and determine whether to file a protest. Moreover, the data requests that TUS sends to the applicant are informative for stakeholders who may be considering whether to file a protest. Having the opportunity to review and consider the answers to the data requests provides stakeholders with additional relevant information that they cannot obtain without first filing a protest. That review of information provided to TUS would not be available under a shorter protest period. The OCA often reviews the information provided by the utilities to TUS and, *based on that information*, determines that no protest is needed. Shortening the protest period could increase the need for the OCA and others to err on the side of filing a protest that might have been avoided with the benefit of the fuller picture developed by TUS’s review and the 60 days to review the information.

NAWC-PA urges the Commission to continue to use its discretion to further shorten the protest period to something less than 30 days when warranted by circumstances. NAWC-PA

⁴ Aqua supports the comments of NAWC. Aqua Comments at 9.

Comments at 16. The OCA recommends that this proposal be rejected. If there are exigent circumstances that would justify a shortened time, then the applicant can request and support a request for a shortened period. There has been no showing that most of the applications that are filed need to be addressed in a more expedited time frame, or on an emergency basis. For example, an extension of service to a new development is not an emergency; instead, it can be planned for and filed in a timely manner by the water utility as part of the normal planning process for the new development. Moreover, most applications do not involve the proposed acquisition of troubled systems or emergency situations where exigency is required. Although the OCA recognizes that there may be applications involving situations where time is of the essence, the remedy is not to design the regulations to address those situations. Rather, in those situations where time is of the essence, i.e., the exceptional circumstance, the applicant can request expedited treatment.

PAWC's Comments on the protest period, at page 4, urge the Commission to set a protest period of no more than thirty days, with the Secretary having discretion to shorten it to 15-days. In addition, PAWC states that municipal protestants should not be granted "preferential treatment in filing late protests". PAWC Comments at 4. First, as stated above, the OCA does not support the shortening of the protest period to thirty days. Second, the OCA would urge the Secretary to exercise the existing discretion only in limited circumstances. For a protest period to be changeable with each application does not provide clarity and transparency to stakeholders and the affected public. It also could create a situation where the exception (something less than thirty days) swallows the protest period rule.

PAWC opposes "preferential treatment" of late-filed protests by municipalities. PAWC Comments at 4. The OCA submits that the applicant's ability to address late-filed protests is not

impeded and is preserved in accordance with the existing regulations.⁵ The existing language in 3.502(c) specifies the applicant's ability to file motions to strike, to dismiss, or for amplification regarding any protest filed against the application. 52 Pa. Code § 3.502(c). The Commission has not proposed any modifications to subsection (c), nor have any comments proposed modifications to 3.502(c).

Proposed 3.501(f) – Notice requirements

Proposed Section 3.501(f) includes a reduction of the frequency of the publication of the newspaper notice from daily for two consecutive weeks to once a week for two consecutive weeks in a newspaper of general circulation located in the territory covered by the application. 52 Pa.B. at 4933, 4942-44. As stated in the OCA's Comments, although the OCA recognizes that daily newspaper notice might be more difficult to accomplish, other forms of notice must be used. OCA Comments at 3-5. It is not reasonable to assume that two newspaper notices over two weeks is adequate especially when customers get information from utilities in a multitude of ways. Revisions to the notice requirement should include multiple options to ensure customers receive sufficient notice when the water and/or wastewater system that serves them is being acquired. OCA Comments at 4. Those multiple notice methods should include direct notice to the seller's customers either through bill inserts or notice sent to the seller's customers via mail or electronically if the customer has opted for electronic billing, as well as information posted on websites and social media of the buyer and seller. *Id.* The OCA provided specific revisions to the notice language in proposed Section 3.501(f). OCA Comments, Appendix A.

⁵ Protests are a pleading. 52 Pa. Code §§ 1.8, 3.502(C). Protests generally, including the content and timing are covered in 52 Pa. Code §§ 5.51-53.

PMAA also expressed its position that reducing public notice requirements for the 3.501 applications “could result in those members of the public potentially affected by the application to miss such notice.” PMAA Comments at 2. PMAA stated:

Instead of increasing the possibility that members of the public will miss notice of an application, the Commission’s goal should be to ensure that as many members of the public potentially impacted by an application be given timely and sufficient notice in order to review the application.

PMAA Comments at 2. The OCA supports PMAA’s position that the goal should be to ensure that the public that is potentially impacted by an application be given timely and sufficient notice.⁶

The OCA also provided its position regarding notice to property owners in the service territory proposed to be acquired. In municipalities that have mandatory connection ordinances, the Commission addressed that situation by adding an additional sentence that requires “the notice provided under this section shall include conspicuous notice that such an ordinance applies.” 52 Pa.B. 4934-35, 4944. The OCA supports the conspicuous notice requirement for those property owners. OCA Comments at 4. The OCA recommended that the proposed regulation require the seller water or wastewater system⁷ to send direct notice to property owners in municipalities where there is a mandatory connection requirement. *Id.* In its Comments, PAWC opposes requiring a conspicuous notice in areas covered by a mandatory connection ordinance. PAWC Comments at 6. PAWC states that such notice is not required because “property owners have already had an opportunity to participate in the political process when the mandatory connection ordinance was adopted.” *Id.* There is no support provided for PAWC’s statement. The date the ordinance was enacted compared to the date the homeowner bought the house, and the understanding of what a mandatory

⁷ The OCA has made a simplifying assumption that these are municipal systems.

connection ordinance means as a proposed sale is imminent are among the factors that are unknown and that undermine PAWC's generalized statement. Notice is important in those situations precisely because the buyer and seller do not know exactly what the residents and future customers know about the sale of the system. If notice is provided to all customers of the selling utility, then there is no "second notice" that is required, contrary to PAWC's assertions.

Proposed additions to 3.501(a)(3) and (4)

CAUSE-PA proposed additions to 3.501(a)(3) and (4) that require basic information on the number of low income customers in the service territory to be acquired or transferred. CAUSE-PA Comments at 8. The information simply requires that the applicant use the income categories related to the Federal Poverty Level (FPL). *Id.* The OCA agrees with CAUSE-PA that this additional information would be helpful to the Commission and to the stakeholders in understanding the impacts of the application. In addition, the information, based on census data, is information that the acquiring utility reasonably can provide. The acquiring utility should want to know this information to better integrate these acquired customers into its existing programs.

CAUSE-PA also proposed that the applicant utilities provide an analysis of the impact that the acquisition will have on existing programs and participants. CAUSE-PA Comments at 8-9. CAUSE-PA recommended this analysis at the time of the application because it will "help ensure that the proposed transactions are not contrary to public interest by harming low income communities." CAUSE-PA Comments at 9. The OCA agrees with CAUSE-PA that this additional information would be helpful to the Commission and to the stakeholders in understanding the impacts of the application. For example, the considerations of whether the existing low income programs are adequate to address the needs within the acquired service territory (proposed

3.501(a)(4)(iii)(C)) are important to see from the acquiring utility to better understand further analysis and steps it may need to take.

3.501(b)(1)(i) – Inventory of lead service lines and damaged wastewater service laterals

NAWC-PA, Aqua, and PAWC oppose the language contained in the NOPR that requires the Class A water/wastewater utility to conduct an inventory of lead service lines and damaged wastewater service laterals of the seller’s system and to include it in the application. NAWC-PA Comments at 8-10; Aqua Comments at 5-6; PAWC Comments at 6-7. NAWC-PA acknowledges that the Class A water/wastewater utility can provide “known lead service lines and known damaged wastewater service laterals” from the seller’s system. *Id.* at 10. The OCA submits that, at a minimum, if the selling utility has information or has conducted an inventory of lead service lines and/or damaged wastewater service laterals, that information should be provided as part of the application.

III. CONCLUSION

The OCA appreciates the opportunity to provide these Reply Comments on the Commission's Notice of Proposed Rulemaking regarding 52 Pa. Code § 3.501.

Respectfully Submitted,

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DATED: November 14, 2022
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