

Comments of the Independent Regulatory Review Commission



Pennsylvania Public Utility Commission Regulation #57-337 (IRRC #3349)

Application of 52 Pa. Code Section 3.501 to Certificated Water and Wastewater Utility Acquisitions, Mergers, and Transfers

December 12, 2022

We submit for your consideration the following comments on the proposed rulemaking published in the August 13, 2022 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (RRA) (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) directs the Pennsylvania Public Utility Commission (PUC) to respond to all comments received from us or any other source.

1. Compliance with the provisions of the RRA or the regulations of this Commission in promulgating the regulation.

According to the PUC, this proposal is intended to streamline requirements for established public utilities that seek to acquire another water or wastewater provider, reduce requirements that are no longer needed, and to update provisions related to acquisitions and accounting obligations.

Section 5.2 of the RRA (71 P.S. § 745.5b) directs this Commission to determine whether a regulation is in the public interest. When making this determination, the Commission considers criteria such as economic or fiscal impact and reasonableness. To make that determination, the Commission must analyze the text of the proposed rulemaking and the reasons for the new or amended language. The Commission also considers the information a promulgating agency is required to provide under §745.5(a) in the regulatory analysis form (RAF).

This Commission's regulations in 1 Pa. Code 305.1(b)(1) require an agency to submit a complete RAF when it delivers a proposed rulemaking. The RAF submitted with this proposal provides answers to all of the questions in the RAF, but some of the answers do not provide enough information to determine if the regulation is in the public interest. We ask the PUC to include additional information to the following sections of the RAF when it submits the final-form regulation:

- Sections 14 and 15, related to the number and types of persons, businesses, small businesses and organizations that will be affected by the regulation. In Section 14, the PUC states it “does not classify public utilities or municipal entities subject to PUC jurisdiction as small or large according to the number of employees or their annual revenues as specified in 13 CFR § 121.201 under 71 P.S. § 745.3.” Although the PUC may not classify public utilities and entities subject to this regulation in that manner, the RRA requires such a classification and that information should be included in the RAF submitted with the final rulemaking. In addition, how many Class A, B and C water and

wastewater utilities are there in the Commonwealth and how many customers do they currently serve?

- Sections 19, 20 and 21, related to a specific cost and or/or savings estimates for the regulated community, local government and state government and how the dollar amounts were derived.
- Section 29, related to a schedule of review of the regulation. The expected effective date of the final-form regulation and the expected date by which compliance with the final-form regulation will be required are particularly important to include because Section 3.503, relating to system of accounts for wastewater utilities, and Section 65.16, relating to system of accounts for water utilities, impose obligations on public utilities that must be completed “1 year from the effective date of this section[s].”

2. Clarity.

Proposed amendments in this rulemaking include references to Class A, Class B and Class C water and wastewater applications and utilities. The terms water system, water supplier, water service, waterworks, wastewater system, wastewater utility and wastewater collection, treatment or disposal provider are also referenced in the rulemaking. The terms appear in several chapters and sections of the rulemaking. The criteria for Class A, Class B and Class C wastewater utilities are included in § 3.503, and the criteria for Class A, Class B and Class C water utilities are included in § 65.16. We ask the PUC to review the inclusion of each of these terms throughout the rulemaking to ensure they are being used in the correct context. If certain terms have the same meaning, we suggest that only one of the terms be used. We also suggest that the PUC define the terms that are being used and include those definitions in the appropriate sections or chapters of the rulemaking.

3. Section 3.501. Certificate of public convenience as a water supplier or wastewater collection, treatment or disposal provider. – Need; Reasonableness; Implementation procedures; Fiscal impact; Adverse effects on prices of goods and services, productivity or competition.

Commentators from the water and wastewater utility industry have provided comments and suggestions on this section that request more flexibility, less reporting and public notification requirements and further streamlining of the application and approval process. In addition, these commentators have suggested that the PUC form a stakeholder working group to resolve concerns they have with the rulemaking. Commentators representing the interests of water and wastewater utility customers have expressed concerns with proposed changes to public notification requirements and the potential impact the rulemaking could have on low-income customers. We acknowledge the efforts of the PUC to involve the regulated community in the development of this proposal thus far via the Advanced Notice of Proposed Rulemaking that was issued in April of 2022. A cornerstone of the RRA is the reaching of consensus among this Commission, the designated standing committees of the General Assembly, interested parties and the promulgating agency. We encourage the PUC to continue their efforts to build consensus and to engage in further discussions with all interested parties that have provided input on this rulemaking.

Subsection a – New applicant, Class B, Class C, and non-acquisition Class A water and wastewater applications.

This subsection requires the submittal of certain information or documentation with applications. A commentator has asked if this subsection applies to simple main extensions to serve existing or proposed developments. We ask the PUC to explain how this rulemaking will be applied to these types of extensions and, if necessary, to amend the rulemaking to clarify how they will be regulated.

A commentator representing the interests of low-income utility customers has suggested that language be added to Subsections (a)(3), relating to customers, and (a)(4), relating to rates, that would require applicants to quantify and analyze the impact of a streamlined transaction on low-income customers. We ask the PUC to quantify the potential fiscal impact these transactions could have on low-income customers and to include that information in the RAF submitted with the final rulemaking. We also ask the PUC to explain what protections are in place to ensure low-income customers are not economically harmed by the rulemaking.

Subsection b – Class A water and wastewater acquisition applications.

This new subsection applies to applicants that currently provide service which seek a certificate of public convenience to acquire public water distribution or wastewater collection, treatment or disposal systems. It details the information that must be supplied with the application. The Preamble submitted with the rulemaking discusses comments posed by the PUC in the ANOPR and commentator responses to those questions. However, the Preamble does not provide a specific rationale or explanation of the need for the information to be included with the application. We note that many of the comments received on this subsection from industry representatives either question the need for certain information or provide alternatives to the information requested. In the Preamble to the final-form regulation, we ask the PUC to provide an explanation of the need for the information that is being requested in each of the seven paragraphs of this subsection. We also ask the PUC to consider and respond to the questions and recommendations of the commentators, including the suggestion to include a waiver provision for documentation that is not available or does not exist.

Subsection (b)(1), related to plant in service, requires applicants to provide an inventory or estimate of lead service lines (LSLs) and damaged wastewater service laterals (DWSLs) of the water or wastewater systems they intend to acquire. Commentators from the industry oppose this provision because they believe it creates additional delays. They also believe it would be difficult to provide the required information because, at the time of application, they do not own the system they intend to acquire. They also question the PUC's belief that an experienced utility can develop an inventory of LSLs and DWSLs based on the age of the system and due diligence. Commentators that represent customers believe the information being required is vital because the acquiring system needs to understand the potential costs to replace or fix the LSLs or DWSLs. They believe those costs will ultimately be passed on to the customers through increased utility rates. In the Preamble to the final regulation, we ask the PUC to explain in greater detail how acquiring utilities can provide the inventory or estimate that is required. Would a lack of this information prevent the PUC from approving a transaction under this subsection? Are there any statutory or regulatory provisions that would lessen any potential cost increases in the form of higher rates that may be passed on to customers? We ask that this also be explained in the Preamble submitted with the final rulemaking.

Subsection c – Metering verification.

This subsection requires an applicant seeking to provide water service to include verification that the water sources and customers are metered in accordance with Section 65.7, relating to metered service. Similar to our concern above, the Preamble to this rulemaking does not explain the rationale for this provision and commentators have questioned the need for it. In addition, Section 65.7 requires metered service for water service to customers, but it does not require meters for water sources. In the Preamble to the final regulation, we ask the PUC to explain the rationale for this subsection and to explain how an applicant can comply with the metering of water sources.

Subsection (f) – Notice.

Amendments to this subsection decrease the protest period from 60 days to 30 days. The requirement to publish notice of an application in a newspaper of general circulation located in the territory covered by the application is also amended from “daily for 2 consecutive weeks” to “once a week for 2 consecutive weeks.” The Office of Consumer Advocate (OCA) opposes both of these amendments because they believe it will adversely impact a person’s ability to be informed and to participate in the review of the application by those it will affect. OCA also offers suggestions for additional methods of public notification and information to be included in the notifications. In the Preamble to the final regulation, we ask the PUC to explain the rationale for the shortened protest period and the decreased notification requirements published in newspapers. We also ask the PUC to explain how the benefits of these particular amendments, a more streamlined application process, outweigh the potential negative impact of less participation by the public and interested parties in the review of applications.

4. Section 3.502. Protests to applications for certificate of public convenience as a water supplier or wastewater collection, treatment or disposal provider. – Reasonableness; Implementation procedures; Clarity.

Subsection (d) is being amended to shorten the protest period from 60 days to 30 days. Commentators, including the OCA opposes this change for the same reasons noted above. We ask the PUC to address this issue in its response to comments on this section of the rulemaking.

In addition, Subsection (d) is being amended to allow the protest period to be extended for “good cause shown.” In determining whether good cause has been shown, this subsection states the PUC “will take into account whether scheduling a municipal meeting has caused hardship for a timely protest.” Is the scheduling of a municipal meeting the only reason a protest could be extended? In the Preamble to the final-form regulation, we ask the PUC how it will implement this “good cause” provision.

5. Section 3.503. System of accounts for wastewater utilities. – Clarity.

In the Preamble to this proposed rulemaking, the PUC states this new section is “simply a placeholder reference until such time as the proposed revisions to Chapter 66 of the Commission’s regulations are final.” The PUC’s Chapter 66, regulations, relating to wastewater service, were included in PUC regulation #57-330 (Rulemaking to Implement Act 120 of 2018) (IRRC #3298). That rulemaking was approved by this Commission on May 19, 2022. It was published as a final rule in the *Pennsylvania Bulletin* on July 23, 2022. Since Chapter 66 has been promulgated, we encourage the PUC to delete this section from the final-form regulation and move it to Chapter 66.

In addition, Subsection (d) of this section and Subsection (d) of Section 65.16, relating to system of accounts for water utilities, state that public utilities subject to this section shall have until “1 year from this the effective date of this section” to convert to the most recent system of accounts of the National Association of Regulatory Utility Commissioners. We ask the PUC to amend the quoted language in both subsections to allow the Legislative Reference Bureau to insert a specific date of compliance when this rulemaking is published as a final regulation.

6. Miscellaneous clarity.

The first and second sentences of §3.501(f) are repetitive. The first sentence should be deleted.