

# Comments of the Independent Regulatory Review Commission



## Pennsylvania Public Utility Commission Regulation #57-294 (IRRC #3032)

### Review of Long Term Infrastructure Improvement Plan

January 2, 2014

We submit for your consideration the following comments on the proposed rulemaking published in the October 19, 2013 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (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. Implementation procedures.**

A commentator has suggested that this proposal be amended to specify how the rulemaking will be applied to water and wastewater utilities that already have a Distribution System Improvement Charge (DSIC), as it pertains to the filing of a Long-term Infrastructure Improvement Plan (LTIIIP). We ask the PUC to explain what effect, if any, this rulemaking will have on water and wastewater utilities that already have a PUC-approved DSIC in place.

The same commentator also believes that the PUC should establish a schedule that would provide a phased filing of the various submissions required under this rulemaking by the utilities seeking to implement a DSIC. This approach, according to the commentator, would allow interested parties and the statutory advocates the time to provide a more thorough and meaningful analysis of the submissions. The PUC should consider such an approach and in the final-form regulation submittal, explain why it did or did not adopt a phased filing schedule.

#### **2. Section 121.2. Definitions. – Consistency with law; Clarity.**

##### *Eligible property*

This definition references “property” as defined in 66 Pa.C.S.A. § 1351, relating to definitions. The cited section of the statute does not define the term “property.” The defined term in the statute is “eligible property.” The final-form regulation should be amended accordingly.

##### *Major modification*

Under this definition, a change or deviation to a utility’s previously approved LTIIIP that meets certain criteria is defined as a “major modification.” In order for a modification to be considered

a “major modification,” does it have to meet all four of the criteria found in this definition? This should be clarified in the final-form rulemaking by inserting either the word “or” or “and” at the end of Paragraph (iii).

In addition, commentators have raised several concerns with this definition. For example, they note that the elimination of a certain category of eligible property from an LTIIIP in Paragraph (i) or the extension of time of scheduled repair beyond two years in Paragraph (ii) should not automatically categorize the modification as a “major modification.” They also suggest that the 15% threshold included in Paragraph (iii) is too low because of the timeframes associated with certain projects. In the Preamble to the final-form rulemaking, we ask the PUC to explain why it believes all of the criteria of this definition are reasonable and needed.

### **3. Section 121.3. LTIIIP. – Whether the regulation is consistent with the intent of the General Assembly; Implementation procedures; Need; Clarity.**

Subsection (a) requires utilities to file LTIIIPs and establishes nine elements that must be included in an LTIIIP. We note that the first six paragraphs of this subsection correspond to 66 Pa.C.S.A. §§ 1352(a)(1)—(6). We have two concerns. First, we ask the PUC to explain the need for including three additional elements in a utility’s LTIIIP that are not included in statute and why it believes these additional elements are consistent with the intent of the General Assembly and Act 11 of 2012 (Act 11). The elements relate to workforce management and training, outreach efforts, and additional information to be provided by natural gas distribution companies.

Second, Subsection (a) states that utilities “shall” file an LTIIIP. Similar language can be found in § 121.5 (c), pertaining to modifications to and expiration of an LTIIIP. It is our understanding that an LTIIIP is required only for utilities seeking to impose a DSIC. We suggest that the rulemaking be clarified to state that the filing of an LTIIIP is not mandatory for all utilities and applies only to those utilities seeking to impose a DSIC.

### **4. Section 121.4. Filing and Commission review procedures. – Statutory authority; Implementation procedures; Clarity.**

This section sets forth the filing procedures for LTIIIPs, the public comment period associated with those filings and the manner in which the PUC will review a LTIIIP. Commentators have expressed concern with various provisions of this section.

First, under Subsection (a), a commentator has suggested that the term “parties” be limited to persons who formally participated in the most recent base rate case proceeding. We ask the PUC to clarify what is meant by the term “parties.”

Second, a commentator has suggested that a utility seeking proprietary treatment of certain information under Subsection (b) should have to obtain that approval from the PUC before the filing of an LTIIIP. We ask the PUC to explain when a utility is required to obtain the aforementioned approval and clarify the regulation accordingly.



Third, a commentator believes that the 20-day public comment period included in Subsection (c) does not provide interested parties enough time to review LTIIPs. A similar concern was raised with § 121.5(a), relating to modifications to and expiration of an LTIIP. What factors did the PUC consider when determining that 20-day public comment periods are appropriate for reviewing LTIIPs?

Fourth, commentators are concerned that Subsections (e) and (f) provide the PUC the authority to direct a particular work plan or schedule but Act 11 does not grant such authority. Under these subsections, can the PUC direct a particular work plan or schedule? If so, under what specific statutory authority can this be accomplished?

Finally, Subsection (f) states that the PUC will order a utility to file a new or revised LTIIP if the LTIIP does not meet the criteria of this section. We note that the elements of a LTIIP are found in the preceding section of the rulemaking. Should the regulation reference both §§ 121.3 and 121.4? In addition, several commentators have suggested that Subsection (f) be amended to state that a utility has the right to withdraw an LTIIP. We ask the PUC to consider adding a provision that specifically states a utility has the right to withdraw an LTIIP.

#### **5. Section 121.5. Modifications to and expiration of an LTIIP. – Implementation procedures; Clarity.**

This section sets forth the procedures for modifying a PUC-approved LTIIP and filing a new LTIIP prior to the expiration of the filed plan. Subsection (b) states that minor modifications to an LTIIP will be addressed concurrent with the review of a utility's Annual Asset Optimization plan (AAO plan). A commentator has noted that this concurrent review will not be possible if a utility's DSIC has not been approved by the PUC. We ask the PUC to explain how this provision will be implemented.

#### **6. Section 121.6. AAO plan filings. – Implementation procedures; Clarity.**

The elements of and the procedures for filing AAO plans are addressed in this section. Commentators have raised several concerns with this section.

First, under Subsection (a), an AAO plan must be filed with the PUC on or before March 1<sup>st</sup>. Commentators have expressed concerns with the filing date. One commentator has suggested that a more appropriate time for filing an AAO plan would be three months after the end of the 12-month period used by a utility in its LTIIP. As the PUC develops the final-form rulemaking, we ask it to consider this recommendation. We believe it would provide the PUC with more accurate information, address the concern about the March 1<sup>st</sup> deadline and provide interested parties a more meaningful timeframe for reviewing AAO plans on a staggered basis.

Second, Subsection (b)(3) requires an AAO plan to include a utility's system reliability data for the prior five years. Commentators have raised several concerns with this provision. First they note that this requirement goes beyond the scope of Act 11 and 66 Pa.C.S.A. § 1356. Second, they question the need to include this information in an AAO plan because electric utilities supply similar information under § 57.195, related to reporting requirements, of the PUC's

existing regulations. Third, they question the relevance of this type of information for utilities other than electric utilities. We agree with the concerns raised and ask the PUC to explain how this provision is consistent with Act 11 and why this information is needed.

Third, under Subsection (e), an AAO plan will be deemed approved absent any major modifications to an LTIIIP, adverse comments or PUC action within 60 days of the filing. Commentators believe the inclusion of “adverse comments” in this provision is inappropriate because the filing of an AAO plan is for informational purposes and is not intended to be an adversarial proceeding. In the Preamble to the final-form rulemaking, we ask the PUC to explain the rationale for this provision and why it is appropriate that the filing of “adverse comments” could delay the approval of an AAO plan.

**7. Section 121.7. Periodic review of an LTIIIP. – Reasonableness; Implementation procedures.**

Commentators provided two suggestions on how this section of the rulemaking could be implemented. One commentator suggested that if the PUC finds a utility’s implementation of an LTIIIP to be deficient, the utility should have the option to withdraw the LTIIIP and suspend the corresponding DSIC. They ask the PUC to add language to the final-form rulemaking to allow this action. Another commentator suggested the section be amended to state the five-year review of an existing LTIIIP could be satisfied by the review of new proposed LTIIIP. In the context of these suggestions, we ask the PUC to explain why the language of this section is reasonable.

**8. Section 121.8. Enforcement of LTIIIP implementation. – Statutory authority; Consistency with law; Reasonableness.**

Subsection (c) states the following:

The remedies for noncompliance with an approved LTIIIP may include civil penalties, revocation of the DSIC and other remedies as may be appropriate based on the record developed in the enforcement proceeding.

We note that Act 11 provides the PUC with the authority to promulgate regulations on this matter as follows:

The regulations shall ensure that a distribution system improvement charge *shall* terminate if the commission determines that the utility is not in compliance with the approved plan.  
66 Pa. C.S.A. § 1352(b)(2). [Emphasis added.]

Commentators raise three concerns with this subsection. One commentator notes that, under the statute, noncompliance with an LTIIIP requires a DSIC to be discontinued and the regulation provides the PUC discretion in this matter. Others believe that Act 11 does not grant the PUC the authority to impose civil penalties. A third commentator questions the reasonableness of imposing penalties and believes the potential for penalties would discourage infrastructure



development. We ask the PUC to explain its statutory authority for this provision and how it is consistent with Act 11. We also ask the PUC to explain why the imposition of penalties is reasonable.

#### **9. Determining whether the regulation is in the public interest.**

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 regulation 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).

We ask the PUC to revise its response to Question #15 of the RAF in order to ensure that the new criteria required by Act 76 of 2012 related to small businesses are met. The PUC should provide a citation to the relevant provisions of the federal definition of small business that were reviewed in the development of the rulemaking and an analysis of their applicability or inapplicability to the regulation.

#### **10. Miscellaneous clarity.**

- Under § 121.4 (b), the reference to § 5.423 is not accurate. That section of the PUC's existing regulations is currently reserved.
- As noted by a commentator, the phrase "major changes" in § 121.5(b) should be amended to the defined term "major modification."