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July 20, 2021

VIA ELECTRONIC FILING

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

**Re: Notice of Proposed Rulemaking for Diversity Reporting of Major
Jurisdictional Utilities, Docket No. L-2020-3017284**

Dear Secretary Chiavetta:

Enclosed for filing please find the comments of the Energy Association of Pennsylvania to the Notice of Proposed Rulemaking at the above-referenced docket. Please do not hesitate to contact the undersigned with any questions.

Sincerely,

Donna M.J. Clark

Vice President & General Counsel

CC: Joseph P. Cardinale, Jr., Assistant Counsel, Law Bureau
Rhonda L. Daviston, Assistant Counsel, Law Bureau

Enclosure

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Proposed Rulemaking for Diversity	:	
Reporting of Major Jurisdictional Utilities	:	Docket No.: L-2020-3017284
	:	

**COMMENTS OF THE ENERGY ASSOCIATION OF PENNSYLVANIA IN RESPONSE
TO THE NOTICE OF PROPOSED RULEMAKING FOR DIVERSITY REPORTING**

I. INTRODUCTION

The Energy Association of Pennsylvania (“EAP” or “Association”) submits these comments on behalf of its electric distribution company and natural gas distribution company members¹ in response to the Notice of Proposed Rulemaking for Diversity Reporting of Major Jurisdictional Utilities entered December 17, 2020 by Pennsylvania Public Utility Commission’s (“PUC” or “Commission”) at the above docket (“Diversity Reporting NOPR”).

II. BACKGROUND

On December 3, 2020 the Commission finalized amendment of a Policy Statement on Diversity at Major Jurisdictional Utility Companies, (“Diversity Policy Statement”) 52 Pa. Code §§ 69.801-69.809, updating the original 1995 policy statement to align demographic terms with those used in reporting to federal agencies and with the current composition of the Commonwealth’s diverse citizenship. The Diversity Policy Statement outlined goals for annual reporting to record diversity among utility employees and vendors while encouraging continued

¹ Citizens’ Electric Company; Columbia Gas of Pennsylvania, Inc.; Duquesne Light Company; Leatherstocking Gas Company, LLC; Metropolitan Edison Company; National Fuel Gas Distribution Corp.; PECO Energy Company; Pennsylvania Electric Company; Pennsylvania Power Company; Peoples Natural Gas Company LLC; Peoples Gas Company LLC; Philadelphia Gas Works; Pike County Light & Power Company; PPL Electric Utilities; UGI Utilities Inc.; Valley Energy Inc.; Wellsboro Electric Company; and West Penn Power Company.

expansion and implementation of utility programs to promote diversity. In February 2020, the Commission approved a motion introduced by the Chairman which directed the Law Bureau to begin a rulemaking proceeding by December 31, 2020 to codify the reporting requirement encouraged in the Diversity Policy Statement and create a new regulatory reporting obligation. On December 17, 2020, the Commission entered the instant Diversity Reporting NOPR to begin that process. The Diversity Reporting NOPR seeks to propose a regulation in order “to make diversity reporting by major jurisdictional utilities obligatory, streamlined, and more purposeful.” Diversity Reporting NOPR at p.3.

III. COMMENTS

A. Clearly Separate the Mandated Reporting Requirement from the Guidance Offered by the Policy Statement

The Commission is seeking to create a compliance obligation, i.e., the filing of an annual report, while maintaining the guidance offered by its amended Diversity Policy Statement. The proposed regulations would include definitions recently modified or added to the Diversity Policy Statement but not used in the proposed regulatory language set forth in the Diversity Reporting NOPR. The new regulation would also mandate the use of a specific form to meet the compliance obligation to report workforce diversity although the form itself would remain part of the Diversity Policy Statement. While EAP and its member utility companies fully support the Commission’s goals to both retain the guidelines and flexibility offered by a policy statement and to mandate a reporting requirement, there is concern that the language as proposed blurs the line between policy and regulatory obligation, setting the stage for future confusion for both the regulator and the regulated community.

The recommendations that follow in this section are aimed at ensuring the Commission’s new reporting requirement remains separate and distinct from the Commission’s existing Diversity

Policy Statement. Regulations carry the force and effect of law, with compliance implications such as civil penalties. Policy Statements, however, are nonbinding, providing guidance and insight as to how an agency may exercise its discretion. As such, policy statements are inherently flexible but are not enforceable as a matter of law.² The Commission certainly recognizes this distinction and aims to maintain flexibility, allowing utilities to develop and implement diversity initiatives that will benefit from a variety of approaches, while mandating a reporting requirement with enough specificity to ensure that the information collected is purposeful.

1. Words Defined in the Proposed Regulation Should Only Be Those Used in the Proposed Regulation

Transitioning from a framework of PUC guidance and voluntary reporting to a new regulatory requirement necessitates clear definitions and expectations for compliance. With this in mind, EAP recommends the Commission remove from its proposed reporting requirement any definitions that are not used in the regulation. The Commission notes that “because the Diversity Policy Statement would be the predicate recommendations for the contents being reported, there are definitions proposed for inclusion in the regulation that would not be otherwise used in the regulation.” Diversity Reporting NOPR at 5. EAP disagrees with this approach. Definitions necessary to understand the Diversity Policy Statement are already contained therein. The inclusion of extraneous definitions in the reporting regulation will only serve to complicate the filings, create ambiguity, and imply a compliance obligation relative to those definitions where none exists. EAP asks that the Commission strike from its proposed regulations any definitions³ not reflected in the regulatory language.

² See *Pennsylvania Human Relations Commission v. Norristown Area School District*, 374 A.2d 671 (Pa. 1977).

³ In Section 51.13, the terms “long-term plan,” “MIL - Minimum Improvement Level,” “Midterm plan,” “Short-term plan” are not referenced in the proposed regulations or contained in the required form. In Section 51.14, none of the words or terms contained therein are referenced elsewhere in the proposed regulations and therefore should not be included.

To be clear, EAP is supportive of the Commission’s proposal in the Diversity Reporting NOPR to collect information describing company initiatives. The report requests “descriptions of” diversity policies and efforts, rather than specific metrics regarding many of those initiatives. This regulatory language supports the ability of utilities to make adjustments in their unique programs designed to increase diversity.

2. Collecting Self-Reported Data from Employees

Clear expectations in data to be reported are also important. The issue of how to compile verifiable data from employees is an area that merits further consideration. The Commission acknowledges the inherent privacy issues surrounding diversity reporting. Diversity Reporting NOPR at 7. This is of particular importance for what the Commission has already recognized as “self-report” categories in workforce demographics, i.e., disability status or LGBTQ. However, there is some concern that the necessary voluntary self-reporting may result in underreporting of these demographics.

Given the importance of collecting robust, accurate data, as well as the need for protecting privacy, EAP respectfully requests that the Commission consider including clarifying language in the final regulations that would explicitly permit utilities to report metrics such as disability or LGBTQ employee composition by indicating that such information is not collected by the utility at this time. Such clarifying language would allow those utilities with disability or LGBTQ data reporting processes in place to provide such information immediately, while at the same time, clarifying the reporting obligations for those utilities which must develop such reporting processes. Ultimately, such a caveat would allow for the data that are reported in this space to be more accurate and precise.⁴

⁴ EAP notes the Commission-requested reporting is based on the EEO-1 form, which requires disclosure on workforce demographics by job category. The EEO-1 form, however, does not include LGBTQ as a reportable

B. Discrete Implementation Recommendations

1. Demographics of Utility Workforce Form Should Be Codified

As raised above, EAP is concerned that the guidelines in the Diversity Policy Statement remain discretionary. In particular, EAP believes the proposed form necessary to comply with the reporting requirement should in fact be included in the regulation. Keeping this form uncoded but otherwise required⁵ opens the form to changes outside the public input process and future confusion as personnel at both the Commission and the utilities change over the coming years. The form, should it be required to successfully meet the reporting obligation, must be codified in some way to maintain clear expectations and avoid any changes that are not vetted through the public regulatory process.⁶

2. Include “LGBTQ” in Section 51.15 (a) (3).

EAP notes that the Commission’s proposed language of Section 51.15 (a) (3) lists the information to be collected as:

The demographic composition of the major jurisdictional utility’s workforce, reporting the number of employees by gender, race and ethnicity, persons with disabilities and veterans, on a form, Demographics of Utility Workforce, to be provided by the Commission.

category. EAP recommends the Commission consider the information for LGBTQ be reported in the aggregate. Reporting LGBTQ information by job category could undermine privacy in the event the category size is small.

⁵ The form is referenced, and given a title “Demographics of Utility Workforce”, in proposed Section 51.15(a)(3) and (b) however the Commission notes in the NOPR that it would “not be codified.” p.6 and Appendix A.

⁶ EAP notes that in the past, the desire of the Commission to maintain flexibility has led to expansion of reporting requirements and changes to requested data to include information not collected by the regulated entity. This occurs routinely with the “LIURP Codebook,” which is neither codified nor referenced in regulation but deemed necessary by staff to complete the reporting obligation at 52 Pa. Code § 58.15 and 52 Pa. Code § 54.75 (electric utilities) / 52 Pa. Code § 62.5 (natural gas utilities). Further, while EAP recognizes the Commission’s broad authority to request information and reports under 66 Pa. C. S. § 501(b) and § 504, the Commission cannot become a superboard of the private companies it regulates by directing particular initiatives or hiring practices via its policy statement or reporting requirements. See, *Northern Pennsylvania Power Company v. Pennsylvania Public Utility Commission*, 333 Pa. 265, 5 A.2d 133 (1939); *National Assoc. for Advancement of Colored People v. Pennsylvania Public Utility Com.*, 290 A.2d 704 (Pa. Cmwlth. 1972).

However, the form to be used in reporting includes, and the regulations specifically mention, LGBTQ status. EAP suggests the regulatory language be amended to include an LGBTQ designation in the list of demographic information reported as described in this section.

3. Move Reporting Deadline to March 31

Additionally, the Commission's Diversity Reporting NOPR proposes to require major jurisdictional utilities to file annual diversity reports with the Commission's Secretary by March 1 of each year.⁷ EAP recommends the Commission change this deadline to March 31 of each year to better align with other reports utility companies file annually. Under the Commission's jurisdiction, this includes annual PUC reports such as those governing Universal Service Programs (52 Pa. Code §§ 54.71–54.78, §§ 62.1-62.8).

4. Clarify First Report Due March Following Full Calendar Year After Effective Date

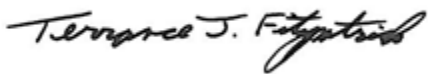
Finally, EAP recommends the Commission make a clear effective date for this new report. Historically, utilities may not have been collecting the type of information now being requested in this proposed report. For example, many of EAP's members do not currently collect information from employees concerning LGBTQ or disability designation either at the time of employment or in an annual survey, and, when the information is solicited, the employee option to respond is voluntary. Utilities will be working to build processes and systems and to train employees to collect this information. Building such processes, to ensure meaningful data, takes time. EAP proposes that the first report under these new regulations be due no earlier than March 31, 2023 for calendar year 2022 information or the March following a full calendar year after the effective date of the regulations.

⁷ Proposed new Section 51.15(a), referencing Diversity Policy Statement Section 69.809.

IV. CONCLUSION

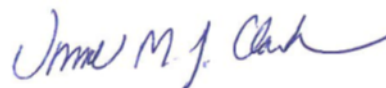
The Association appreciates the opportunity to offer input on the proposed diversity reporting requirement and asks that the Commission favorably consider its suggestion to clearly delineate the requirements of a new reporting regulation and the policy recommendations and guidelines as contained in the existing Diversity Policy Statement. A clear separation between what is recommended and what is required makes compliance straightforward and allows for creativity and experimentation in efforts to increase diversity. The varied strategies allowed under the flexibility contained in the Policy Statement – as separate and apart from a reporting requirement – maintains the goal of diversity as more than just a “checkbox” or metric to meet; instead, it remains an ongoing action. EAP and its member companies look forward to continued work with the Commission and stakeholders to improve diversity in the utility workforce and among vendors.

Respectfully submitted,



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Date: July 20, 2021