

Comments of the Independent Regulatory Review Commission



Pennsylvania Public Utility Commission Regulation #57-332 (IRRC #3304)

Diversity Reporting for Major Jurisdictional Utilities; Notice of Proposed Rulemaking

August 18, 2021

We submit for your consideration the following comments on the proposed rulemaking published in the June 5, 2021 *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. Clarity.

This rulemaking adds §§ 51.11 –51.15 to 52 Pa. Code Chapter 51. It will require major jurisdictional utilities to file an annual report with the PUC describing their diversity program activity. Section 51.12 defines terms applicable to employee and vendor diversity. Section 51.13 defines terms for reporting employee statistics. Section 51.14 defines terms for reporting vendor statistics. These three sections state the definitions are applicable to §§ 51.11 and 51.15 and the PUC’s Diversity Policy Statement at 52 Pa. Code §§ 69.801 – 69.809. In the Preamble, the PUC explains that including definitions for the regulation and the Policy Statement in one place establishes uniform terms for adherence to the regulation and the Policy Statement and avoids the potential for disjunction between one set of definitions for the regulation and a separate set for the Policy Statement. We have several questions and concerns with this approach and the three sections for definitions.

First, the definitions in all three sections are applicable to this regulation and the entirety of the Policy Statement and none of the definitions in a particular section are repeated in another section. What is the need for three separate sections for definitions? To improve the clarity of the regulation, we suggest that §§ 51.12 –51.14 be combined into one section for definitions.

Second, the PUC acknowledges that some of the terms defined in §§51.12 – 51.14 are not used in the substantive sections of the rulemaking. However, those definitions are used in the Policy Statement and also the Demographics of Utility Workforce form that must be filed with the PUC. A commentator has stated that including unused terms in the rulemaking creates a compliance obligation that does not exist. We point out that the inclusion of definitions in a regulation that are not used in that regulation conflicts with guidance provided in § 2.12 of the *PA Code & Bulletin Style Manual*. That section, relating to definitions, states the following: “If a definition

does not serve a purpose or is not used in the chapter, do not include it.” We suggest that the PUC follow the guidance above and delete terms that are not specifically used in §§ 51.11 and 51.15 of the regulation or the annual report.

Third, the use of substantive provisions in definitions is inconsistent with § 2.11(e) of the *PA Code & Bulletin Style Manual*. The last sentence in each of the following definitions is substantive and should be moved to the body of the regulation or Policy Statement; LGBTQ, person with disabilities, and operate.

Fourth, the PUC states in the Preamble that Policy Statement § 69.809, related to fillings, will no longer be needed after this regulation becomes effective. If the Policy Statement is amended to delete § 69.809, the definition section or sections of the final regulation should be amended to reflect the correct citation to Policy Statement.

2. Implementation procedures.

Commentators have raised two issues related to implementation of the rulemaking that merit further consideration and explanation by the PUC. First, commentators have suggested that the documentation and reports that are required to be filed with the PUC be confidential. How will the documentation and reports be treated by the PUC? Will the public have access to the information? This should be explained in the Preamble to the final-form regulation.

Second, some commentators are not currently collecting the information that will be required to be reported. They state that they will need time to establish processes to collect the required data. These commentators have suggested the implementation of the regulation begin with the collection of data for the time period of January 1, 2022 through December 31, 2022 and that the reporting obligation begin with the filing of a utilities annual report in 2023. We ask the PUC to consider this suggestion and amend the implementation timeline as suggested by commentators or explain why it is not reasonable or appropriate to do so.

3. Section 51.12. Definitions applicable to employee and vendor diversity. – Implementation procedures; Clarity.

Diversity

A commentator states this definition includes concepts of equity and inclusion, but these concepts are not specifically named. They suggest that this definition be amended from “diversity” to “diversity, equity and inclusion” and that the amended definition be used throughout the regulation. If the PUC believes these amendments would increase workforce diversity and participation by diverse groups at major jurisdictional utilities, we suggest that the final-form regulation be amended accordingly.

Major jurisdictional utility

The last sentence of this definition states that the term, “. . . includes major telecommunications utilities with 50,000 or more access lines.” A commentator states that 66 Pa. C.S. §§ 3104(f) and

3105(e) limit the reports the PUC can require from local exchange telecommunications companies. We ask the PUC to explain how the reporting requirements of this rulemaking are consistent with the statutory provisions cited by the commentator in the Preamble to the final-form rulemaking.

LGBTQ and Person with disabilities

A commentator has suggested that language be added to these definitions that indicate self-identification “shall be confidential and voluntary on the part of the employee.” We ask the PUC to consider this suggestion. If the language is added to the regulation, it should be added to the body of the regulation because the use of substantive provisions in definitions is inconsistent with § 2.11(e) of the *PA Code & Bulletin Style Manual*.

4. Section 51.13. Definitions for reporting employee statistics. – Clarity.

Black or African-American

This term is defined as follows: “A person having origins in any of the black racial groups of Africa.” A commentator has noted that the other racial groups defined in this section include the phrase “not Hispanic or Latino” in parentheses after the named group. The commentator suggests that “not Hispanic or Latino” be added to this term or deleted from the definitions of the other racial groups. If the PUC believes the suggestions of the commentator improve the clarity of the regulation and the Demographics of Utility Workforce form that must be filled under § 51.15(a)(3), we encourage this change to be made to the final-form rulemaking.

5. Section 51.15. Diversity reporting requirements. – Statutory authority; Implementation procedures; Clarity.

Subsection (a)(3) specifies the type of information that must be reported on the Demographics of Utility Workforce form. A commentator suggests the subsection be amended to include the defined term “LGBTQ” because that term is used on the noted form. We agree with the commentator and ask the PUC to ensure that all categories of information required by the Demographics of Utility Workforce form be included in this subsection of the regulation.

Subsection (c) states the following: “The Commission will use all available remedies to ensure compliance including fines.” What is the PUC’s statutory authority for requiring compliance with this regulation and the possible imposition of fines for non-compliance? That authority should be cited in the final-form regulation and the Preamble. Also we recommend that the type of possible corrective action or enforcement and the amount of potential fines be included in the final-form regulation.