

PROPOSED RULEMAKING

DELAWARE RIVER BASIN COMMISSION

[25 PA. CODE CH. 901—903]

Proposed Amendments to the Administrative Manual and Special Regulations Regarding Natural Gas Development Activities; Additional Clarifying Amendments; Public Hearing

Summary: The Commission will hold public hearings and accept written comment on a proposal to amend its *Special Regulations* by the addition of a section on hydraulic fracturing in shale and other rock formations, including: the prohibition of high volume hydraulic fracturing in such formations; provisions related to water use for hydraulic fracturing; and provisions related to the management of produced water from hydraulic fracturing. The Commission also proposes to amend its *Administrative Manual—Rules of Practice and Procedure* by the addition of project review classifications and fees related to the management of produced water from hydraulic fracturing of hydrocarbon bearing rock formations. Minor amendments to the project review classifications unrelated to hydraulic fracturing are also proposed.

Dates:

Written comments: Written comments will be accepted through 5 p.m. on March 30, 2018.

Public hearings:

1. January 23, 2018, 1 p.m. to 4:30 p.m., Waymart, Wayne County, PA
2. January 23, 2018, 6 p.m. to as late as 9:30 p.m., Waymart, Wayne County, PA
3. January 25, 2018, 1 p.m. to 4:30 p.m., Philadelphia, PA
4. January 25, 2018, 6 p.m. to as late as 9:30 p.m., Philadelphia, PA
5. February 22, 2018, 3 p.m. to as late as 7 p.m., Schnecksville, PA
6. March 6, 2018, 1:30 p.m. to 3:30 p.m., via telephone.

Registration to attend hearings: Online registration to attend hearings will remain open until 5 p.m. the day prior to the hearing. (On-site registration will also be available at in-person venues.) Registrants will be afforded opportunities to request speaking time.

Addresses:

Written submissions: Written comments will be accepted through the Commission's online public comment collection system at: <http://dockets.drbc.commentinput.com>. To request an exception to use of the online system based on lack of access to the Internet, please contact: Commission Secretary, DRBC, P.O. Box 7360, West Trenton, NJ 08628.

See SUPPLEMENTARY INFORMATION—Public Process, below, for important additional information concerning the submission of written comments.

The hearing locations are:

1. Ladore Camp, Retreat and Conference Center, 287 Owego Turnpike, Waymart, PA 18472 (Jan. 23)

2. DoubleTree by Hilton Hotel Philadelphia Airport, 4509 Island Avenue, Philadelphia, PA 19153 (Jan. 25)

3. LCCC Community Services Center, 4525 Education Park Drive, Schnecksville, PA 18078 (Feb. 22)

4. By telephone, 866-831-8713 (Mar. 6)

Where to register: To reduce uncertainty on the part of attendees about whether they will have a seat and an opportunity to speak at a public hearing, and to provide for a safe and orderly process, the Commission is requiring registration online or on-site to attend each public hearing. Use of the online, web-based registration system is encouraged, as this system will track and publish in real time the available capacity for each hearing. Key elements of the registration procedure are as follows:

- Online or on-site registration is required to attend each public hearing.
- Online registration to attend will remain open until 5 p.m. the day prior to each hearing.
- On-site registration will be available at all in-person hearing venues.
- Available capacity for each in-person hearing will be posted on the web-based registration system. When users access the system, they will see the number of seats still available or if the venue is at capacity.
- If capacity has been reached for a specific hearing, online registrants will be placed on a waiting list.
- Those who do not register to attend a hearing in advance are advised to check the availability of seats BEFORE planning travel to a hearing.
- Public hearing registrants will be afforded opportunities to request speaking time.
- If more people request to speak than time allows, those not assigned time will be placed on a waiting list.
- If fewer people request to speak than time allows, additional opportunities to request time will be provided on or before the hearing date.
- Elected government officials and their staff will have the opportunity to identify themselves when registering to attend a hearing.
- Written and oral comment will receive equal consideration.

The Commission appreciates the public's participation and input on this important matter. In order to provide as many individuals who wish to speak as possible with an opportunity to do so, each person will be limited to one time slot at one hearing location. Depending on the number who wish to be heard, speakers will be limited to two or three minutes. To ensure that scheduled public hearings meet the objectives of the Commission and the public in a safe and orderly process, it is essential that public hearing procedures are understood and followed. Participants are asked to review all DRBC public hearing procedures at: http://www.state.nj.us/drbc/library/documents/procedures_public-hearings050317.pdf. The Commission's policies related to speaker conduct, audience conduct, safety, security, signs, placards and banners will be in effect at these public hearings.

Updates or changes. Additional opportunities for comment or changes to the public input process will be published on the Commission's website, drbc.net and

through its Twitter account. Members of the public also may sign up through the Commission's website to receive direct notice via email of additions or changes to the information provided in this notice.

See SUPPLEMENTARY INFORMATION—Public Process for additional details concerning the subjects on which the Commission particularly seeks input and the form of written comments.

Supplementary Information:

The Delaware River Basin Commission (DRBC or "Commission") is a regional interstate and federal agency formed by concurrent compact legislation of the four basin states and the federal government in 1961 to manage the water resources of the Delaware River Basin without regard to political boundaries. Its members are, ex officio, the governors of the basin states (Delaware, New Jersey, New York, and Pennsylvania) and the commander of the U.S. Army Corps of Engineers North Atlantic Division, who represents the federal government. Most actions of the Commission, including the adoption of rules to effectuate, apply and enforce the compact, require a majority vote of the Commission's five members.

Background

On September 13, 2017, the Commissioners by a Resolution for the Minutes directed the Executive Director to prepare and publish for public comment a revised set of draft regulations, to include: "(a) prohibitions relating to the production of natural gas utilizing horizontal drilling and hydraulic fracturing within the basin; (b) provisions for ensuring the safe and protective storage, treatment, disposal and/or discharge of wastewater within the basin associated with horizontal drilling and hydraulic fracturing for the production of natural gas where permitted; and (c) regulation of the inter-basin transfer of water and wastewater for purposes of natural gas development where permitted."

In accordance with the Commissioners' September 13 directive, the Commission is proposing amendments to its regulations and comprehensive plan to better provide for the planning, conservation, utilization, development, management and control of the basin's water resources in connection with the hydraulic fracturing of shale and other hydrocarbon bearing formations to produce oil and gas. The Commission proposes to prohibit high volume hydraulic fracturing within the basin to effectuate the comprehensive plan for the immediate and long term development and use of the water resources of the basin, and to conserve, preserve and protect the quality and quantity of the basin's water resources for uses in accordance with the comprehensive plan.

Through a series of policies and regulations establishing and amending its comprehensive plan, the Commission over the past half-century has established in-stream water quality standards throughout the basin, prohibited degradation of groundwater, and provided special protection to the non-tidal segment of the Delaware River to preserve its exceptionally high water quality and water supply values. As the agency through which the five signatory parties to the Compact collectively manage the basin's water resources on a regional basis, the Commission has taken these steps to meet public and private needs for, among other things, drinking water, recreation, power generation, and industrial activity, and to accommodate large out-of-basin diversions by the City of New

York and the State of New Jersey that are authorized by the 1954 decree of the U.S. Supreme Court in the matter of *New Jersey v. New York*.¹

Portions of Pennsylvania and New York comprising about 40 percent of the basin's geographic area are underlain by the Marcellus and Utica shales, geologic strata known to contain natural gas. Although the presence of commercially viable natural gas from these formations within the basin is not known, in regions of Pennsylvania west of the basin divide, oil and natural gas are extracted from the Marcellus and Utica formations by means of directional drilling and hydraulic fracturing using large volumes of water in a process referred to commonly in the region as "high volume hydraulic fracturing" (HVHF).² The South Newark basin formation, which underlies portions of Pennsylvania and New Jersey, may also contain oil and gas deposits capable of development by HVHF. All of the basin areas underlain by the Marcellus and Utica shales, with the exception of a small area of Schuylkill County, Pennsylvania, drain to waters the Commission has designated as "Special Protection Waters", due to their exceptionally high scenic, recreational, ecological, and/or water supply values. The Commission's water quality management policy objective for Special Protection Waters is "that there be no measurable change [in the quality of these waters] except toward natural conditions."³

During hydraulic fracturing, hydraulic fracturing fluid consisting primarily of water and recycled wastewater mixed with chemicals is injected through a well bore into the target rock formation under pressures great enough to fracture the rock. The fracturing fluid typically includes proppants (usually sand), which hold open the newly created fractures, allowing the gas to flow back through them and up the well to the surface. After a well is "stimulated" through hydraulic fracturing, much of the injected fracturing fluid, together with brines that were trapped within the target formation, is conveyed to the surface, where these fluids are collected and managed. The returned fluids, known as "flowback" and "produced water," contain chemicals used in the fracturing mixture, as well as salts, metals, radionuclides, and hydrocarbons from the target rock formation. As discussed in greater detail below, in the Marcellus region in Pennsylvania, the median quantity of water required to stimulate a natural gas well exceeds 4 million gallons for each fracturing event.⁴ A single well may be fractured in multiple stages and/or multiple times,⁵ and as many as twelve wells may be installed on a single well pad.⁶ The volume of water

¹ See *New Jersey v. New York*, 347 U.S. 995 (1954).

² See generally, New York State Department of Environmental Conservation, Final Supplemental Generic Environmental Impact Statement on the Oil, Gas and Solution Mining Regulatory Program—Regulatory Program for Horizontal Drilling and High-Volume Hydraulic Fracturing to Develop the Marcellus Shale and Other Low-Permeability Gas Reservoirs, May 2015 (hereinafter, NYS Final SGEIS). Available at: <http://www.dec.ny.gov/energy/75370.html>

³ Delaware River Basin Water Code (hereinafter, "Water Code") (18 CFR Part 410), § 3.10.3 A.2.

⁴ James L. Richenderfer et al., *Water Use Associated with Natural Gas Development: An Assessment of Activities Managed by the Susquehanna River Basin Commission—July 2008—December 2013*, Pub. No. 299, April 2016 (hereinafter, "SRBC NG Water Use 2016"), p. 39. Available at: http://www.srbcc.net/pubinfo/techdocs/NaturalGasReport/docs/SRBC_Full_Gas_Report_fs306397v1_20160408.pdf

⁵ United States Environmental Protection Agency, *Hydraulic Fracturing for Oil and Gas: Impacts from the Hydraulic Fracturing Water Cycle on Drinking Water Resources in the United States*, Dec. 2016 (EPA-600-R-16-236Fa) (hereinafter, "EPA HF Study 2016"). Exec. Sum., p. 23, n.3 (explaining that in a multi-stage hydraulic fracturing operation, specific parts of the well are isolated and hydraulically fractured until the total desired length of the well has been hydraulically fractured.) Available at: <https://www.epa.gov/hfstudy>. Also see, 18 CFR 806.3 (SRBC regulations for review and approval of projects, defining "hydrocarbon development project" as including "all other activities and facilities associated with . . . the production, maintenance, operation, closure, plugging and restoration of [unconventional natural gas development] wells or drilling pad sites that require water for purposes including but not limited to, re-stimulation and/or re-completion of such wells. . . ." (emphasis added)).

⁶ See e.g., Alex K. Manda et al., *Evolution of multi-well pad development and influence of well pads on environmental violations and wastewater volumes in the*

and wastewater involved is thus significant.

The use of HVHF to extract oil and natural gas from tight shale formations presents risks, vulnerabilities and impacts to the quality and quantity of surface and ground water resources that have been documented extensively, including in comprehensive reports by the New York State Department of Environmental Conservation (NYSDEC)⁷ and the United States Environmental Protection Agency (EPA)⁸, among others. These reports identify the risks to water resources associated with each of the steps in the “hydraulic fracturing water cycle,”⁹ as summarized below. At times, these steps or portions thereof may be identified by the Commission as separate projects. In addition, an EPA technical background document describes industry processes, pollutants generated, risks, and available treatment technologies for produced water from oil and gas extraction.¹⁰ A significant number of data points in this document are provided for the Marcellus formation.

Water acquisition. The acquisition of water for use in HVHF may result in modifications to groundwater levels, surface water levels, and stream flows. The Susquehanna River Basin Commission (SRBC) has reported that for the period 2008 through 2013 an average of 4.3 million gallons of water were injected per fracturing event in natural gas wells within the Susquehanna basin.¹¹ During the same period, 84 percent of injected water was “fresh” water from surface water and groundwater sources, and the remaining 16 percent was recycled produced water or flowback water.¹² According to EPA, the median volume of water used per well fracturing event in Pennsylvania between January 2011 and February 2013 was 4.18 million gallons.¹³ EPA further reports that in at least 10 percent of cases, the water use in Pennsylvania during the same period was over 6.6 million gallons per well.¹⁴ EPA has reported that in the Marcellus formation in Pennsylvania, 82 to 90 percent of the base fluid used for hydraulic fracturing is fresh water that is naturally occurring and that the remaining base fluids (10 to 18 percent) are reused and recycled produced water.¹⁵ Advances in horizontal drilling technology are leading to longer drill paths and the need for more fracturing fluid volumes for each path. According to SRBC, when the industry began lengthening its lateral well bores in 2013, the average amount of water used per fracturing event increased to approximately 5.1 to 6.5 million gallons per fracturing event.¹⁶

Withdrawals from surface and ground water in the amounts required for HVHF may adversely affect aquatic ecosystems and river channel and riparian resources downstream, including wetlands, and may diminish the quantity of water stored in an aquifer or a stream’s capacity to assimilate pollutants. Because HVHF operations may significantly increase the volume of water

withdrawn in a localized area, they may ultimately upset the balance between the demand on water resources and the availability of those resources for uses protected by the Commission’s comprehensive plan, particularly during periods of low precipitation or drought.

Consumptive use. In contrast with most domestic and commercial water use, most water used for HVHF is used “consumptively,” meaning it is not returned to the basin’s usable ground or surface waters. According to the EPA, water accounts for 90 to 97 percent of all hydraulic fracturing fluids injected into a well for the purpose of extracting natural gas.¹⁷ EPA reports further that produced water, or water that flows from and through oil and gas wells to the surface as a by-product of oil and gas production over a ten-year operations period, makes up only 10 to 30 percent of the fluid injected. Accordingly, EPA estimates that 70 to 90 percent of the water used in high volume hydraulic fracturing is permanently removed from the water cycle.¹⁸ The SRBC’s estimate is higher. SRBC reports that approximately 96 percent of water withdrawn by the natural gas industry is consumptively used in the hydraulic fracturing process and that the balance of the water is consumptively used for other activities at the drilling pads, such as well drilling, preparation of drilling muds and grout, dust control, maintenance operations, and site reclamation.¹⁹ In contrast, the DRBC estimates that 90 percent of water withdrawn for domestic and commercial uses in the Delaware River Basin is returned to basin waters, either by infiltration into aquifers or by discharge to surface waters after treatment at a wastewater treatment facility.²⁰

Chemical use. Although chemical additives generally make up the smallest proportion of the overall composition of hydraulic fracturing fluids, they pose a comparatively high risk to ground and surface water quality relative to proppants and base fluids.²¹ Additives, which can be a single chemical or a mixture of chemicals, are combined with the base fluid to change its properties, including, for example, to adjust pH, increase fluid thickness, reduce friction, or limit bacterial growth. The EPA has identified 1,084 chemicals reported to have been added to hydraulic fracturing fluids between 2005 and 2013.²² The choice of which additives to use depends on the characteristics of the targeted rock formation, and in some cases chemical information is considered Confidential Business Information and not disclosed by the fracturing operator.²³ Based upon EPA’s analysis, the combination of activities and factors more likely than others to result in more frequent or more severe impacts to water resources are spills during the management of hydraulic fracturing fluids and chemicals that result in large volumes or high concentrations of chemicals reaching groundwater resources.²⁴ In May 2015, an EPA study compiled data on and characterized 457 hydraulic fracturing related spills that occurred between January 2006 and April 2012 in eleven states.²⁵ The study attributed these to equipment failure, human error, failure of con-

Marcellus shale (USA), J. Environ. Manage, Sep. 1, 2014, 142:36-45. Available at <https://www.ncbi.nlm.nih.gov/pubmed/24814546>

⁷ See NYS Final SGEIS 2016, supra n.1.

⁸ See EPA HF Study 2016, supra n.5.

⁹ The term “hydraulic fracturing water cycle” is used by the EPA to describe the five stages of this water-intensive activity: water acquisition, chemical mixing, well injection, produced water handling, wastewater disposal and reuse. EPA HF Study 2016, Exec. Sum., pp. 7–9. Extracted at: <https://www.epa.gov/hfstudy/hydraulic-fracturing-water-cycle>

¹⁰ See United States Environmental Protection Agency, Technical Development Document for the Effluent Limitations Guidelines and Standards for the Oil and Gas Extraction Point Source Category, June 2016 (EPA-820-R-16-003) (hereinafter “EPA TDD 2016”). Available at: https://www.epa.gov/sites/production/files/2016-06/documents/uog_oil-and-gas-extraction_tdd_2016.pdf

¹¹ SRBC NG Water Use 2016, p. 39.

¹² Id.

¹³ EPA HF Study 2016, Exec. Sum., p. 11 (Table ES-1).

¹⁴ Id.

¹⁵ EPA TDD 2016, p. 43 (Table C-1).

¹⁶ SRBC NG Water Use 2016, p. 43.

¹⁷ EPA HF Study 2016, Exec. Sum., p. 10.

¹⁸ Id., p. 12 (Fig. ES-4(a)).

¹⁹ SRBC NG Water Use 2016, p. 38.

²⁰ For comparison with climatically similar areas and the world, see Kimberly H. Schaffer and Donna L. Runkle, Consumptive Water-Use Coefficients for the Great Lakes basin and Climatically Similar Areas, U.S. Geological Survey Scientific Investigations Report 2007-5197, p. 13 (Fig. 7). Available at: <https://pubs.usgs.gov/sir/2007/5197/>

²¹ EPA HF Study 2016, Exec. Sum., p. 16

²² Id. A comprehensive review of chemical additives is provided in EPA TDD 2016, pp. 43-47 (Sec. 1.2).

²³ EPA HF Study 2016, p. 5-20 (Text Box 5-2).

²⁴ Id., Exec. Sum., p. 1.

²⁵ U.S. Environmental Protection Agency, Review of State and Industry Spill Data: Characterization of Hydraulic Fracturing-Related Spills, May 2015 (EPA/601/R-14/001)

tainer integrity, and other causes, including but not limited to well communication, weather and vandalism.²⁶ Storage, equipment, well or wellhead, hose or line, and “unknown” were among the identified sources.²⁷ Spills can affect both surface and groundwater resources, both locally and regionally, within the host state and in adjoining states. Pollution from spills and from hydraulic fracturing has occurred in parts of Pennsylvania outside the basin where high volume hydraulic fracturing is occurring.²⁸

Well drilling and construction. Well drilling, well construction and well stimulation associated with HVHF also carry risks for groundwater and surface water resources. These risks include turbidity or other disruptions in local ground water formations and local groundwater wells, and contamination of aquifers by fluids pumped into or flowing from rock formations penetrated by the drilling of the well, particularly in the event of a compromised well casing. Typically, the developable shale formations are vertically separated from potential freshwater aquifers by thousands of feet of sandstones and shales of moderate to low permeability. High-volume hydraulic fracturing is engineered to target the prospective hydrocarbon-producing zone. Although the induced fractures create a pathway to the intended wellbore, they typically do not create a discharge mechanism or pathway beyond the fractured zone where none existed before. However, because the well bore penetrates groundwater aquifers and can be a pathway for fluid movement to existing drinking water and other groundwater resources, the mechanical integrity of the well is an important factor that affects the frequency and severity of potential water resource impacts from pollutants. A well with insufficient mechanical integrity can increase the risk of impacts and allow unintended fluid movement, including into drinking water aquifers. Such defects can arise from inadequate well design or construction or can develop over the well's lifetime, including during hydraulic fracturing.²⁹ In particular, casing and cement can degrade over the life of the well because of exposure to corrosive chemicals, formation stresses, and operational stresses (e.g., pressure and temperature changes during hydraulic fracturing).³⁰ Gas migration can also potentially occur as a result of poor well construction (i.e., casing and cement problems), or through existing abandoned wells or faults, which may be intersected inadvertently by a new oil or natural gas well. The EPA examined these types of pathways for the migration of hydraulic fracturing fluids and liquids and/or gases that exist in the subsurface to affect the quality of subsurface drinking water resources and reported on failures and impacts to water resources in detail.³¹

Wastewater handling and disposal. “Produced water” (including “flowback” water) refers to any water or fluid returned to the surface through the production well as a waste product of hydraulic fracturing. This material may be stored in tanks or other containers on the pad site before it is transferred for off-site treatment and/or disposal. The composition of produced water depends on the composition of the injected hydraulic fracturing fluid and the composition of the target formation. In the Marcellus region, produced water is generated in large quantities and often contains high concentrations of total

dissolved solids (TDS or “salts”) and constituents that may be harmful to human health and the environment. Produced water from HVHF in the Marcellus formation has been found to contain:³²

- Salts, including chloride, bromide, sulfate, sodium, magnesium, and calcium;
- Metals, including barium, manganese, iron, and strontium;
- Naturally-occurring organic compounds, including benzene, toluene, ethylbenzene, xylenes(BTEX), and oil and grease;
- Radioactive materials, including radium; and
- Hydraulic fracturing chemicals and their chemical transformation products.

The disposal of produced water poses a significant risk to the water resources of the basin if the wastewater is not properly managed. The concentration of TDS in produced water can be high enough that if discharged untreated to surface water, the potential exists to adversely affect designated uses of surface water, including drinking water, aquatic life support, livestock watering, irrigation, and industrial use. Because produced water contains high TDS and dissolved inorganic constituents that most publicly owned treatment works and other municipal wastewater treatment facilities are not designed to remove, these constituents can be discharged untreated from such facilities; can disrupt treatment processes, for example by inhibiting biological treatment; can accumulate in biosolids (sewage sludge), limiting their beneficial use; and can facilitate the formation of harmful disinfection byproducts.³³ Where produced water has been discharged to domestic wastewater treatment facilities in the past, elevated concentrations of chloride and bromide have been documented in the receiving waters.³⁴ The discharge of bromide upstream of drinking water intakes has led in documented instances to the formation of carcinogenic disinfection by-products at drinking water utilities.³⁵

The EPA since 1979 has required zero discharge of pollutants to waters of the United States from onshore oil and gas extraction wastewater. In 2016 EPA finalized a rule establishing pretreatment standards for discharges of wastewater from onshore unconventional oil and gas extraction facilities to municipal sewage treatment plants (also known as “publicly owned treatment works” or POTWs).³⁶ The recent EPA rule will protect POTWs from disruptions in their operations that can be caused by these wastewaters. However, the rule does not extend to commercially owned treatment works that primarily treat domestic and commercial wastewater, and it does not address the discharge to POTWs of produced water that has been partially treated at centralized waste treatment facilities. Thus, significant risks associated with the treatment and discharge of produced water remain outside the scope of current federal regulations.

Siting and Landscapes. Certain water resources in the basin have high water resource value because of their

(hereinafter “EPA HF Spill Data 2015”), p. 1. Available at: <https://www.epa.gov/hfstudy/review-state-and-industry-spill-data-characterization-hydraulic-fracturing-related-spills-1>

²⁶ EPA HF Study 2016, p. 5-42

²⁷ *Id.*

²⁸ See generally, NYS Final SGEIS, Ch. X. Available at: http://www.dec.ny.gov/docs/materials_minerals_pdf/fsgeis2015ch10.pdf

²⁹ EPA HF Study 2016, Exec. Sum., p. 24.

³⁰ *Id.*

³¹ *Id.*, pp. 23–29. Also see Main Report, Ch. 6.

³² See generally, EPA TDD 2016, pp. 59–81 (part C.3) for a comprehensive characterization of produced water that includes a significant number of data points for the Marcellus formation.

³³ United States Environmental Protection Agency, Effluent Limitations Guidelines and Standards for the Oil and Gas Extraction Point Source Category, Final Rule, 81 Fed. Reg. 41845, 41847c.

³⁴ William D. Burgos et al., Watershed-Scale Impacts from Surface Water Disposal of Oil and Gas Wastewater in Western Pennsylvania. *Environ. Sci. Technol.*, 2017, 51 (15), pp. 8851–8860. Available at: <http://pubs.acs.org/doi/abs/10.1021/acs.est.7b01696>

³⁵ Kimberly M. Parker et al., Enhanced formation of disinfection byproducts in shale gas wastewater-impacted drinking water supplies. *Environ Sci Technol*. 2014 Oct 7; 48 (19), pp. 11161–9. Available at: <http://pubs.acs.org/doi/abs/10.1021/es5028184>

³⁶ *Id.*, pp. 41485–41857.

excellent water quality or their exceptional ability to perform water supply, ecological, recreational or other water-related functions. The Commission has classified certain of these waters as Special Protection Waters through provisions of its Water Code incorporated in the comprehensive plan.³⁷ The Water Code seeks to maintain or improve the condition of these water resources through regulatory requirements such as prevention of measurable change to existing water quality, evaluation of natural wastewater treatment system alternatives, conditions or limitations on wastewater treatment facilities and control of non-point sources.³⁸

Many high value water resources are associated with and dependent on their surrounding landscapes. Special Protection Waters are located in the upper portion of the basin where forested headwater areas and riparian buffers slow the rate and volume of stormwater runoff, replenish groundwater that serves as a source of drinking water and sustains stream flow, and control the introduction of pollutants into streams. These landscape features are particularly effective at controlling non-point source pollution that may occur following precipitation events.

High volume hydraulic fracturing and the related alteration of landscapes required to support that activity pose risk to high value water resources. It is expected that practically all of the development and related disturbances from high volume hydraulic fracturing would occur in the drainage area of Special Protection Waters.³⁹ Approximately 70 percent of the basin area underlain by the Marcellus and Utica shales (largely in the drainage area of Special Protection Waters) is forested. The average total disturbance associated with a single well pad, including associated access roads and utility corridors, is estimated at 7.7 acres.⁴⁰ Off-site facilities such as gathering lines involve additional disturbances. These landscape changes will reduce forested areas and potentially vegetated buffers, increase non-point source pollution, diminish groundwater infiltration, and risk adversely affecting water quality and quantity in surface and groundwater. Because high volume hydraulic fracturing would most likely occur in headwater areas in the drainage area to Special Protection Waters, the risks of degrading water resources and impairing the effectuation of the comprehensive plan are of particular concern.

Uncertainty. The comprehensive EPA and New York DEC studies cited above report multiple instances of damage to water resources associated with all stages of the natural gas development process, and importantly, both sources emphasize the degree of uncertainty regarding potential future effects. The EPA report states:

“Cases of impacts were identified for all stages of the hydraulic fracturing water cycle. Identified impacts generally occurred near hydraulically fractured oil and gas production wells and ranged in severity, from temporary changes in water quality to contamination that made private drinking water wells unusable. . . However, significant data gaps and uncertainties in the available data prevented us from calculating or estimating the national frequency of impacts on drinking water resources from activities in the hydraulic fracturing water cycle. The data gaps and

uncertainties described in this report also precluded a full characterization of the severity of impacts.”⁴¹

The New York State DEC study asserts:

“. . . a broad range of experts from academia, industry, environmental organizations, municipalities, and the medical and public health professions commented and/or provided their analyses of high-volume hydraulic fracturing. The comments referenced an increasing number of ongoing scientific studies across a wide range of professional disciplines. These studies and expert comments evidence that significant uncertainty remains regarding the level of risk to public health and the environment that would result from permitting high-volume hydraulic fracturing in New York, and regarding the degree of effectiveness of proposed mitigation measures. In fact, the uncertainty regarding the potential significant adverse environmental and public health impacts has been growing over time.

. . . .

“Potential significant adverse impacts on water resources exist with regard to potential degradation of drinking water supplies; impacts to surface and underground water resources due to large water withdrawals for high-volume hydraulic fracturing; cumulative impacts; stormwater runoff; surface spills, leaks and pit or surface impoundment failures; groundwater impacts associated with well drilling and construction and seismic activity; [and] waste disposal. . . .”⁴²

Additional detail regarding damages to water resources and the risks, vulnerabilities and impacts to surface and ground water resources associated with HVHF can be found in the cited reports.

Related Statutory and Regulatory Provisions

The proposed rules regarding hydraulic fracturing arise from the following provisions, among others, of the Commission’s organic statute, the Delaware River Basin Compact (“Compact”),⁴³ and determinations that have been codified in the Delaware River Basin Water Code and incorporated into the Commission’s comprehensive plan:

- “The signatory parties [to the Compact] recognize the water and related resources of the Delaware River Basin as regional assets vested with local, state, and national interests, for which they have a joint responsibility.”⁴⁴
- Approximately 15 million people “. . . of the United States. . . [rely on water] from the Delaware River Basin. . . and the. . . economic development of the entire region and the health, safety, and general welfare of its population are and will continue to be vitally affected by the use, conservation, management, and control of the water and related resources of the Delaware River Basin.”⁴⁵
- “The commission may assume jurisdiction to control future pollution and abate existing pollution in the waters of the basin, whenever it determines after investigation and public hearing upon due notice that the effectuation of the comprehensive plan so requires.”⁴⁶

³⁷ See Water Code § 3.10.3 A.2, 18 CFR Part 410.
³⁸ *Id.*
³⁹ See DRBC map at: [http://www.nj.gov/drbc/library/documents/maps/SPW-Marcellus Shale.pdf](http://www.nj.gov/drbc/library/documents/maps/SPW-Marcellus%20Shale.pdf)
⁴⁰ E.T. Stonecker et al., *Landscape Consequences of Natural Gas Extraction in Allegheny and Susquehanna Counties, Pennsylvania, 2004–2010*; U.S. Department of the Interior U.S. Geological Survey, *Open-File Report 2013–1025*, p. 19 (Table 2) (converted to acres).

⁴¹ EPA HF Study 2016, Exec. Sum., p. 2.
⁴² NYS Final SGEIS 2016, pp. 1, 13.
⁴³ United States Public Law 87-328, Approved Sept. 27, 1961, 75 Statutes at Large 688; 53 Delaware Laws, Ch. 71, Approved May 26, 1961; New Jersey Laws of 1961, Ch. 13, Approved May 1, 1961; New York Laws of 1961, Ch. 148, Approved March 17, 1961; Pennsylvania Acts of 1961, Act. No. 268, Approved July 7, 1961.
⁴⁴ *Id.*, Part I, 1st Whereas clause.
⁴⁵ *Id.*, 8th Whereas clause.
⁴⁶ *Id.*, § 5.2.

- “The waters of the Delaware River Basin are limited in quantity and the basin is frequently subject to drought warnings and drought declarations due to limited water supply storage and streamflow during dry periods. Therefore, it shall be the policy of the Commission to discourage the exportation of water from the Delaware River Basin.”⁴⁷

- “[T]he basin waters have limited assimilative capacity and limited capacity to accept conservative substances without significant impacts. Accordingly, it also shall be the policy of the Commission to discourage the importation of wastewater into the Delaware River Basin that would significantly reduce the assimilative capacity of the receiving stream on the basis that the ability of Delaware River Basin streams to accept wastewater discharges should be reserved for users within the basin.”⁴⁸

- “It is the policy of the Commission that there be no measurable change in existing water quality except towards natural conditions in waters considered by the Commission to have exceptionally high scenic, recreational, ecological, and/or water supply values. Waters with exceptional values may be classified by the Commission as either Outstanding basin Waters or Significant Resource Waters.”⁴⁹

- “It is the policy of the Commission to give no credit toward meeting wastewater treatment requirements for wastewater imported into the Delaware basin.”⁵⁰

- “The underground water resources of the basin shall be used, conserved, developed, managed, and controlled in view of the need of present and future generations, and in view of the resources available to them. To that end, interference, impairment, penetration, or artificial recharge shall be subject to review and evaluation under the Compact.”⁵¹

- No substances or properties which are in harmful or toxic concentrations or that produce color, taste, or odor of the water shall be permitted or induced by the activities of man to become ground water.”⁵²

- “[T]he Commission may establish requirements, conditions, or prohibitions which, in its judgment, are necessary to protect ground water quality.”⁵³

- “The Commission has determined that allocations of the waste assimilative capacity of the Delaware River Estuary are necessary to maintain stream quality objectives in Zones 2, 3, 4 and 5 for the following pollutants: (a) acute toxicity; and (b) chronic toxicity.”⁵⁴

- “The Commission [has determined] that allocations of the waste assimilative capacity of the Delaware River Estuary are necessary to maintain stream quality objectives in Zones 2 and 3 for the following pollutants: (a) 1, 2 dichloroethane; (b) tetrachloroethane”⁵⁵

Summary of Proposed Rules

Prohibition. Section 5.2 of the Compact authorizes the Commission to “assume jurisdiction to control future pollution. . . in the waters of the basin, whenever it determines after investigation and public hearing upon due notice that the effectuation of the comprehensive plan so requires.” It further authorizes the Commission to control pollution from industrial or other waste originating

within a basin state so that the pollution does not “injuriously affect the waters of the basin as contemplated by the comprehensive plan.” The Commission may also adopt rules, regulations and standards to control future pollution. Considering the totality of the risks that HVHF poses to basin water resources, the Commission proposes in Section 440.3(b) of the draft rule to determine that controlling pollution by prohibiting high volume hydraulic fracturing in the basin is required to effectuate the comprehensive plan, avoid injury to the waters of the basin as contemplated by the comprehensive plan and protect the public health and preserve the waters of the basin for uses in accordance with the comprehensive plan.

Water exports. The transfer of surface water, groundwater, treated wastewater or mine drainage water, at any rate or volume, for utilization in hydraulic fracturing to produce oil and gas outside the Delaware River Basin is proposed to require Commission approval. Currently, exports of water from the basin of less than the daily average quantity of 100,000 gallons are deemed to have no substantial effect on the basin’s water resources and are thus not reviewed by the Commission under section 3.8 of the Compact. The Commission has a longstanding policy of discouraging exportations of water on the grounds that the availability of water to meet in-basin needs is limited and low-flow and drought conditions are frequent. Unlike regulated withdrawals for domestic, commercial and industrial water supplies, withdrawals of large quantities of water for hydraulic fracturing to produce oil and gas have the potential, if unregulated, to occur through de-centralized, periodic and transient means and thus to adversely affect headwater streams and minimum flows of surface and groundwater, and to impair uses protected by the Commission’s comprehensive plan. The proposed rule will make all proposed exports of water for oil and gas extraction subject to the requirement that alternatives involving no exportation be analyzed and that the water resource, economic and social impacts of the proposal be evaluated.

Wastewater. As set forth above, the data available on produced water (including flowback) from hydraulically fractured wells in the Marcellus formation indicate that this waste stream is unlike other industrial and domestic waste streams treated and discharged in the Delaware River Basin, and that it poses significant risks to human health and the environment if improperly handled. Under the proposed rules, the “produced water” from the hydrocarbon-bearing strata during oil and gas extraction is broadly defined to include untreated produced water, diluted produced water, and produced water mixed with other wastes. The rule provides that this material may not be transferred to, treated by or discharged from or to a new or existing wastewater treatment facility located within the Delaware River Basin, at any volume or rate, except in accordance with an approval in the form of a docket issued by the Commission to the owner or operator of the wastewater treatment facility or in accordance with a state permit issued pursuant to a duly adopted administrative agreement between the Commission and the host state. The rule further provides that produced water may not be treated within the basin except at a centralized waste treatment facility (CWT) as that term is defined by the EPA in 40 CFR part 437 and may not be discharged within the basin without treatment at a CWT. Because current EPA regulations governing treatment by CWTs do not include limitations for pollutants commonly found in produced water, such as total dissolved solids,

⁴⁷ Water Code, § 2.30.2.

⁴⁸ *Id.*

⁴⁹ *Id.*, § 3.10.3. A.2.

⁵⁰ *Id.*, § 2.30.6.

⁵¹ *Id.*, § 2.20.6.

⁵² *Id.*, § 3.40.5 B.1.

⁵³ *Id.*, § 3.40.5 B.3.

⁵⁴ DRBC Resolution No. 2000-4, “Be it resolved” par. 4.

⁵⁵ *Id.*, “Be it resolved” par. 1.

barium, bromide, radium and strontium,⁵⁶ the proposed rule also places conditions on the treatment and discharge of wastewater or effluent resulting from the treatment of produced water by a CWT (“CWT wastewater”) before the CWT wastewater can be discharged to basin waters or to another treatment facility within the basin.

The Commission already has in place a policy to discourage the importation of wastewater into the basin due to the limited capacity of the basin’s waters to assimilate waste. Proposals to import produced water and CWT wastewater into the basin will be subject to this policy and to the requirements that alternatives involving no importation be analyzed and that the water resource, economic and social impacts of the proposal be evaluated.

Under the proposed rules, projects involving the treatment and discharge of produced water within the basin must meet the more stringent of applicable federal, state and DRBC requirements. Additional effluent limitations are proposed to apply to such projects for TDS, whole effluent toxicity, and a set of “pollutants of concern” identified on the basis of produced water characterizations provided by EPA in a 2016 technical document.⁵⁷ The majority of the EPA’s primary and secondary drinking water standards are also proposed as treatment levels for produced water discharged to a receiving waterbody designated for use as a public water supply. Treatability studies will be required to ensure that pollutant loads from natural gas wastewater are thoroughly characterized and that treatment ensures these pollutants are effectively reduced or eliminated, such that applicable effluent limits, stream quality objectives, protected uses, and in the case of Special Protection Waters, the “no measurable change” objective, are attained. Because the proposed rule requires treatment to “background concentrations” for pollutants of concern in many instances, the Commission is simultaneously publishing draft guidance on acceptable methods for determining background concentrations of these pollutants.

Other changes. Revisions to the Commission’s thresholds for review set forth at 18 CFR 401.35 are proposed to establish that certain activities relating to hydraulic fracturing in hydrocarbon-bearing formations are deemed to constitute projects having a substantial effect on water resources of the basin and are thus subject to review under Section 3.8 of the Compact. These include: the importation, treatment, or discharge to basin land or water of “produced water” as defined by the rule; and the exportation of water from the basin for uses related to hydraulic fracturing. Although certain additional activities and facilities on a well pad site could be separately identified by the Commission as projects, in light of the proposed prohibition, no changes to existing rules are proposed in this regard at this time. Minor changes are concurrently proposed to existing thresholds for the Commission’s review of leachate discharges and wetlands.

To provide for appropriate fees to cover the cost of reviews of new classes of projects deemed to require the Commission’s approval, changes are also proposed to section 401.43 (regulatory program fees).

⁵⁶ United States Environmental Protection Agency, Final 2014 Effluent Guidelines Program Plan, July 2015 (EPA-821-R-15-002), p. 5-4 (sec. 5.3.2). Available at: https://www.epa.gov/sites/production/files/2015-09/documents/final-2014-effluent-guidelines-program-plan_july-2015.pdf. A detailed EPA study of the CWT industry focused on facilities accepting oil and gas extraction wastewaters is ongoing. See Preliminary 2016 Effluent Guidelines Program Plan, June 2016 (EPA-821-R-16-001), p. 6-1 (sec. 6.1).

⁵⁷ See EPA TDD 2016, pp. 59–81 (Part C.3).

Executive Director Determinations

The final regulations relating to natural gas development when adopted will supersede and replace the Executive Director’s Determinations issued on May 19, 2009, June 14, 2010 and July 23, 2010.

Public Process

Key dates and addresses for the public hearings and submission of written comments are set forth at the top of this notice, along with details regarding registration to attend public hearings. Additional information concerning the substance of comments and the format of written comments follows:

Substance of comments. The Commission expressly seeks comment on the effects the proposed rules may have within the basin on: water availability, the control and abatement of water pollution, economic development, the conservation and protection of drinking water supplies, the conservation and protection of aquatic life, the conservation and protection of water quality in Special Protection Waters, and the protection, maintenance and improvement of water quantity and quality basinwide. Comment is also requested on whether use of base fluids other than water for HVHF is practical within the basin and if so, how it should be addressed in these rules, and on any alternatives to the proposed rules that the commenters would like the Commission to consider, as well as on draft guidance published simultaneously with the rules for determining background concentrations of certain pollutants. The Commission welcomes and will consider any other comments that concern the potential effects of the draft rules on the conservation, utilization, development, management and control of the water and related resources of the Delaware River Basin. Comments on matters not within this scope may not be considered.

Submission of written comments. Written comments along with any attachments may be submitted through the Commission’s web-based comment system (<http://dockets.drbc.commentinput.com>) until 5:00 P.M. on March 30, 2018. All materials should be provided in searchable formats, preferably in .pdf searchable text. Non-digitized voluminous materials such as books, journals or collected letters/petitions will not be accepted. Digital submissions of these, as well as articles and websites, must be accompanied by a statement containing citations to the specific findings or conclusions the commenter wishes to reference. Notably, a picture scan of a document may not result in searchable text.

Requests for exceptions to the submission of comments using the web-based system will be granted based on lack of access to the Internet and may be addressed to: Commission Secretary, DRBC, P.O. Box 7360, West Trenton, NJ 08628. Comments received through a method other than the designated on-line method, including via email, fax, postal/delivery services or hand delivery, will be included in the rulemaking record if an express exception has been granted.

Additional information

Detailed information about the public process, including links to the proposed rule text and draft guidance are available on the Commission’s website, drbc.net.

For the reasons set forth in the preamble, the Delaware River Basin Commission proposes to amend title 18, chapter III of the *Code of Federal Regulations*, as set forth below. The amendments to 18 CFR part 401 are proposed to be incorporated by reference in the *Pennsylvania Code* at 25 Pa. Code Ch. 901. New part 440 is

proposed to be incorporated by reference as new chapter 903 of title 25 of the *Pennsylvania Code*. 25 Pa. Code 901.5 is proposed to be re-designated as chapter 902 of the *Pennsylvania Code*.

(Editor's Note: In the amendments to §§ 401.35 and 401.43 set forth below, new text appears in bold face with underscore, and text to be deleted appears in bold face within brackets. Because all of part 440 comprises proposed new rule text, boldface, brackets and underscore are not used to signify changes for that part.)

PART 401—RULES OF PRACTICE AND PROCEDURE

§ 401.35 Classification of projects for review under Section 3.8 of the Compact.

(a) Except as the [**Executive Director**] **Commission** may specially direct by notice to the project owner or sponsor, [**or as a state or federal agency may refer under paragraph (c) of this section,**] a project in any of the following classifications will be deemed not to have a substantial effect on the water resources of the basin and is not required to be submitted under Section 3.8 of the Compact:

* * * * *

(2) A withdrawal from ground water [**for any purpose**] when the daily average gross withdrawal during any 30 consecutive day period does not exceed 100,000 gallons;

* * * * *

(4) **Except as provided at paragraph (b)(18) of this section, [T]**the construction of new domestic sewage treatment facilities or alteration or addition to existing domestic sewage treatment facilities when the design capacity of such facilities is less than a daily average rate of 10,000 gallons per day in the drainage area to Outstanding basin Waters and Significant Resource Waters or less than 50,000 gallons per day elsewhere in the basin; and all local sewage collector systems and improvements discharging into authorized trunk sewage systems;

(5) **Except as provided at paragraph (b)(18) of this section, [T]**the construction of new facilities or alteration or addition to existing facilities for the direct discharge to surface or ground waters of industrial wastewater having design capacity of less than 10,000 gallons per day in the drainage area to Outstanding basin Waters and Significant Resource Waters or less than 50,000 gallons per day elsewhere in the basin; except where such wastewater contains toxic concentrations of waste materials;

* * * * *

(15) Draining, filling or otherwise altering marshes or wetlands when the area affected is less than 25 acres; provided; however, that areas less than 25 acres shall be subject to Commission review and action [(i)] where neither a state nor a federal level review and permit system is in effect; [**requiring action by the Commission, or (ii) when a Commissioner or the Executive Director determines that the final action of a state or federal permitting agency may not adequately reflect the Commission's policy as to wetlands of the basin. In the case of a project affecting less than 25 acres for which there has been issued a state or federal permit, a determination to undertake review and action by the Commission shall be**

made no later than 30 days following notification of the Commission of such permit action. The Executive Director, with the approval of the Chairman, may at any time within the 30-day period inform any permit holder, signatory party or other interested party that the Commission will decline to undertake review and action concerning any such project;]

(16) **Except as provided at paragraph (b)(19) of this section, [T]**the diversion or transfer of water from the Delaware River Basin (exportation) whenever the design capacity is less than a daily average rate of 100,000 gallons;

* * * * *

(18) **Except as provided at paragraph (b)(18) of this section, [T]**the diversion or transfer of wastewater into the Delaware River Basin (importation) whenever the design capacity is less than a daily average rate of 50,000 gallons; and

(19) **To the extent allowed in the basin (see prohibition at § 440.3(b) of this title), projects involving hydraulic fracturing, unless no state-level review and permit system is in effect;**

* * * * *

(b) * * *

[(14) **Regional wastewater treatment plans developed pursuant to the Federal Water Pollution Control Act;]**

(14[5]) **Leachate treatment and disposal projects associated with landfills and solid waste disposal facilities in the basin; [Landfills and solid waste disposal facilities affecting the water resources of the basin;]**

(15[6]) State and local standards of flood plain regulation;

(16[7]) Electric generating or cogenerating facilities designed to consumptively use in excess of 100,000 gallons per day of water during any 30-day period; and

(17[8]) Any other project that the [**Executive Director**] **Commission** may especially direct by notice to the project sponsor or land owner as having a potential substantial water quality impact on waters classified as Special Protection Waters.

(18) **The importation, treatment, or discharge to basin land or water of "produced water" or CWT wastewater as those terms are defined in § 440.2 of this chapter.**

(19) **The transfer, diversion or exportation of water from the basin at any volume or rate for uses related to "hydraulic fracturing" as that term is defined in § 440.2 of this chapter.**

(c) **Regardless of whether expressly excluded from review by paragraph (a) of this section, any project or class of projects that in the view of the Commission could have a substantial effect on the water resources of the basin may, upon special notice to the project sponsor or landowner, be subject to the requirement for review under section 3.8 of the Compact. [Whenever a state or federal agency determines that a project falling within an excluded classification (as defined in paragraph (a)**

of this section) may have a substantial effect on the water resources of the basin, such project may be referred by the state or federal agency to the Commission for action under these Rules.]

[(d) Except as otherwise provided by § 401.39 the sponsor shall submit an application for review and approval of a project included under paragraph B. above through the appropriate agency of a signatory party. Such agency will transmit the application or a summary thereof to the Executive Director, pursuant to Administrative Agreement, together with available supporting materials filed in accordance with the practice of the agency of the signatory party.]

* * * * *

§ 401.43 Regulatory program fees.

* * * * *

(b) * * *

(1) [**Docket a**] Application fee. Except as set forth in paragraph (b)(1)(iii) of this section, the [**docket**] application fee shall apply to:

* * * * *

(iii) Exemptions. The [**docket**] application fee shall not apply to:

* * * * *

(2) Annual monitoring and coordination fee.

(i) Except as provided in paragraph (b)(2)(ii) of this section, an annual monitoring and coordination fee shall apply to each active water allocation or wastewater discharge approval issued pursuant to the *Compact* and implementing regulations, regardless of whether the approval was issued by the Commission in the form of a

docket, permit or other instrument, or by a Signatory Party Agency under the One Permit Program rule (§ 401.42). [**The fee shall be based on the amount of a project's approved monthly water allocation and/or approved daily discharge capacity.**]

(3) * * *

(v) a project involves treatability studies for the discharge of wastewater.

(4) * * *

(iii) Modification of a DRBC approval. Following Commission action on a project, each project revision or modification that the Executive Director deems substantial shall require an additional [**docket**] application fee calculated in accordance with paragraph (e) of this section and subject to an alternative review fee in accordance with paragraph (b)(3) of this section.

* * * * *

(c) Indexed adjustment. On July 1 of every year, beginning July 1, 2017, all fees established by this section will increase commensurate with any increase in the annual April 12-month Consumer Price Index (CPI) for Philadelphia, published by the U.S. Bureau of Labor Statistics during that year.⁵⁸ In any year in which the April 12-month CPI for Philadelphia declines or shows no change, the [**docket**] application fee and annual monitoring and coordination fee will remain unchanged. Following any indexed adjustment made under this paragraph (c), a revised fee schedule will be published in the *Federal Register* by July 1 and posted on the Commission's website. Interested parties may also obtain the fee schedule by contacting the Commission directly during business hours.

* * * * *

(e) * * *

TABLE 1 TO § 401.43—[**DOCKET**] APPLICATION [**FILING**] FEES

| <i>Project Type</i> | [Docket] <i>Application Fee</i> | <i>Fee Maximum</i> |
|----------------------|---|---|
| Water Allocation | \$405 per million gallons/month of allocation ¹ , not to exceed \$15,190 ¹ . Fee is doubled for any portion to be exported from the basin. | Greater of: \$15,190 or Alternative Review Fee |
| Wastewater Discharge | Private projects: \$1,013 ¹ Public projects: \$506 ¹ Projects involving wastewater treatability studies: \$5,000¹ | Alternative Review Fee |
| Other | 0.4% of project cost up to \$10,000,000 plus 0.12% of project cost above \$10,000,000 (if applicable), not to exceed \$75,951 ¹ | Greater of: \$75,951 ¹ or Alternative Review Fee |

¹ Subject to an annual adjustment in accordance with paragraph (c) of this section.

⁵⁸ Consumer Price Index—U/Series ID: CWURA102SA0/Not Seasonally Adjusted/ Area: Philadelphia-Wilmington-Atlantic City, PA-NJ-DE-MD/Item: All items/Base Period: 1982-84=100.

TABLE 2 TO § 401.43—ANNUAL MONITORING AND COORDINATION FEE

| | <i>Annual Fee</i> | <i>Allocation</i> |
|----------------------|----------------------|----------------------------------|
| Water Allocation | \$304 ¹ | < 4.99 mgm |
| | \$456 ¹ | 5.00 to 49.99 mgm |
| | \$658 ¹ | 50.00 to 499.99 mgm |
| | \$835 ¹ | 500.00 to 9,999.99 mgm |
| | \$1,013 ¹ | > or = to 10,000 mgm |
| | <i>Annual Fee</i> | <i>Discharge Design Capacity</i> |
| Wastewater Discharge | \$304 ¹ | < 0.05 mgd |
| | \$618 ¹ | 0.05 to 0.99[1] mgd |
| | \$830 ¹ | 1 to 9.99[10] mgd |
| | \$1,013 ¹ | > or = to [≥]10 mgd |

¹ Subject to annual adjustment in accordance with paragraph (c) of this section.

* * * * *

(Editor’s Note: Because all of part 440 comprises new proposed rule text, boldface, brackets and underscore are not used in this part.)

SUBCHAPTER B—SPECIAL REGULATIONS

PART 440—HYDRAULIC FRACTURING IN SHALE AND OTHER FORMATIONS

- Sec. 440.1 Purpose, authority and relationship to other requirements
- 440.2 Definitions
- 440.3 High volume hydraulic fracturing
- 440.4 Exportation of water for hydraulic fracturing
- 440.5 Produced water

§ 440.1 Purpose, authority and relationship to other requirements.

(a) *Purpose.* The purpose of this part is to protect and conserve the water resources of the Delaware River Basin. To effectuate this purpose, this section establishes standards, requirements, conditions and restrictions to prevent or reduce depletion and degradation of surface and groundwater resources and to promote sound practices of water resource management.

(b) *Authority.* This part implements Sections 1.5, 3.6(b), 3.8, 4.1, 5.2, 7.1, 13.1 and 14.2(a) of the Delaware River Basin Compact.

(c) *Comprehensive plan.* The Commission has determined that the provisions of this part are required for the immediate and long range development and use of the water resources of the basin and are therefore incorporated into the Commission’s comprehensive plan.

(d) *Relationship to other Commission requirements.* The provisions of this part are in addition to all applicable requirements in other Commission regulations, dockets and permits.

Upon the effective date of this rule, the Executive Director Determinations dated May 19, 2009, June 14, 2010 and July 23, 2010, to the extent not already superseded by the Commission’s Resolution dated December 8, 2010, are no longer operative.

(e) *Severability.* The provisions of this part are severable. If any provision of this part or its application to any person or circumstances is held invalid, the invalidity will not affect other provisions or applications of this part, which can be given effect without the invalid provision or application.

(f) *Coordination and avoidance of duplication.* In accordance with and pursuant to section 1.5 of the Delaware River Basin Compact, to the fullest extent it finds feasible and advantageous the Commission may enter into an Administrative Agreement (Agreement) with any basin state or the federal government to coordinate functions and eliminate unnecessary duplication of effort. Such Agreements will be designed to: effectuate intergovernmental cooperation, minimize the efforts and duplication of state and Commission staff resources wherever possible, ensure compliance with Commission-approved requirements, enhance early notification of the general public and other interested parties regarding proposed activities in the basin, indicate where a host state’s requirements satisfy the Commission’s regulatory objectives and clarify the relationship and project review decision making processes of the states and the Commission for projects subject to review by the states under their state authorities and by the Commission under Section 3.8 and Articles 6, 7, 10 and 11 of the Compact.

§ 440.2 Definitions.

For purposes of this part, the following terms and phrases have the meanings provided. Some definitions differ from those provided in regulations of one or more agencies of the Commission’s member states and the federal government.

Basin—the area of drainage into the Delaware River and its tributaries, including Delaware Bay.

Centralized waste treatment (CWT) facility—as defined by EPA at 40 CFR 437.2(c), any facility that treats (for disposal, recycling or recovery of material) any hazardous or non-hazardous industrial wastes, hazardous or non-hazardous industrial wastewater, and/or used material received from off-site. “CWT facility” includes both a facility that treats waste received exclusively from off-site and a facility that treats wastes generated on-site as well as waste received from off-site.

Commission—the Delaware River Basin Commission (DRBC) created and constituted by the Delaware River Basin Compact.

Conservative Substances—pollutants that undergo no or minimal transformation or decay in a water body or groundwater, except by dilution.

CWT wastewater—For purposes of this part, “CWT wastewater” means any wastewater or effluent resulting from the treatment of produced water by a CWT.

Docket—a legal instrument issued by the Commission approving, or approving as modified, a project having a substantial effect on water resources of the basin. The approval may modify the project by imposing conditions to prevent the project from substantially impairing or conflicting with the Commission’s comprehensive plan.

Domestic wastewater—liquid waste that contains pollutants produced by a domestic residence or residences or by a non-residential facility that generates wastewater with the same characteristics as residential wastewater.

Executive Director—the Executive Director of the Delaware River Basin Commission.

Flowback—Fluids returned to the surface through an oil or gas well once hydraulic fracturing pressure is released. Flowback can also refer to the stage of well completion in which fluids are returned to the surface through the well after fracturing is performed.

Groundwater—includes all water beneath the surface of the ground.

High-volume hydraulic fracturing (HVHF)—hydraulic fracturing using a combined total of 300,000 or more gallons of water during all stages in a well completion, whether the well is vertical or directional, including horizontal, and whether the water is fresh or recycled and regardless of the chemicals or other additives mixed with the water.

Hydraulic Fracturing—a technique used to stimulate the production of oil and natural gas from a well by injecting fracturing fluids down the wellbore under pressure to create and maintain induced fractures in the hydrocarbon-bearing rock of the target geologic formation.

Fracturing fluid(s)—a mixture of water (whether fresh or recycled) and/or other fluids and chemicals or other additives, which are injected into the subsurface and which may include chemicals used to reduce friction, minimize biofouling of fractures, prevent corrosion of metal pipes or remove drilling mud damage within a wellbore area, and propping agents such as silica sand, which are deposited in the induced fractures.

Person—any natural person, corporation, partnership, association, company, trust, federal, state or local governmental unit, agency, or authority, or other entity, public or private.

Pollutants—any substance which when introduced into water resources, including surface water or groundwater, degrades natural or existing water quality, including but not limited to: dredge spoils, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemicals and chemical wastes, biological materials, radioactive materials, methane, heat, wrecked or discarded equipment, rock, sand, sediment, cellar dirt, and industrial, municipal or agricultural waste as well as any substance defined as a pollutant, contaminant or hazardous substance by any federal or state statute or regulation.

Pollutants of concern—conservative, radioactive, toxic or other substances that are potentially present in produced water, consisting of all parameters listed in the EPA Technical Development Document for the Effluent Limitations Guidelines and Standards for the Oil and Gas Extraction Point Source Category (June 2016), specifically all pollutants for produced water listed in Tables C-11, C-13, C-15, C-17, and C-19.

Produced water—the water that flows out of an oil or gas well, typically including other fluids and pollutants and other substances from the hydrocarbon-bearing strata. Produced water may contain “flowback” fluids, fracturing fluids and any chemicals injected during the stimulation process, formation water, and constituents leached from geologic formations. For purposes of §§ 401.35(b)(18) and 440.5, the term “produced water” encompasses untreated produced water, diluted produced water, and produced water mixed with other wastes.

Wastewater treatment facility—any facility treating and discharging wastewater.

Water resource(s)—water and related natural resources in, on, under, or above the ground, including related uses of land, which are subject to beneficial use, ownership or control within the hydrologic boundary of the Delaware River Basin.

§ 440.3 High volume hydraulic fracturing (HVHF)

(a) *Determination.* The Commission has determined that high volume hydraulic fracturing poses significant, immediate and long-term risks to the development, conservation, utilization, management, and preservation of the water resources of the Delaware River Basin and to Special Protection Waters of the basin, considered by the Commission to have exceptionally high scenic, recreational, ecological, and/or water supply values. Controlling future pollution by prohibiting such activity in the basin is required to effectuate the comprehensive plan, avoid injury to the waters of the basin as contemplated by the comprehensive plan and protect the public health and preserve the waters of the basin for uses in accordance with the comprehensive plan.

(b) *Prohibition.* High volume hydraulic fracturing in hydrocarbon bearing rock formations is prohibited within the Delaware River Basin.

§ 440.4 Exportation of water for hydraulic fracturing

As set forth in Section 2.30 of the Water Code (incorporated by reference at part 410 of this chapter), it is the policy of the Commission to discourage the exportation of water from the Delaware River Basin. Accordingly, the diversion, transfer or exportation of water from sources within the basin to support hydraulic fracturing outside the basin is discouraged. The transfer of surface water, groundwater, treated wastewater or mine drainage water, at any rate or volume, for utilization in hydraulic fracturing of hydrocarbon bearing rock formations outside the basin requires Commission approval in the form of a docket and shall be subject to the evaluation described by section 2.30.4 of the Water Code.

§ 440.4 Produced water

(a) *Related Commission Policies.*

(1) It is the policy of the Commission to discourage the importation of wastewater into the basin (see Section 2.30.2 of the Delaware River Basin Water Code, incorporated by reference at part 410 of this chapter).

(2) It is the policy of the Commission to give no credit toward meeting wastewater treatment requirements for wastewater imported into the basin (see Section 2.30.6 of the Delaware River Basin Water Code incorporated by reference at 18 CFR Part 410).

(3) The Commission has determined (see Resolution 2000-4) that allocations of the waste assimilative capacity of the Delaware River Estuary are necessary to maintain stream quality objectives for acute toxicity and chronic

toxicity in Water Quality Zones 2, 3, 4 and 5 and for 1,2 dichloroethane and tetrachloroethene in Water Quality Zones 2 and 3.

(4) It is the policy of the Commission that there be no measurable change in existing water quality except towards natural conditions in waters considered by the Commission to have exceptionally high scenic, recreational, ecological, and/or water supply values. Waters with exceptional values may be classified by the Commission as either Outstanding basin Waters or Significant Resource Waters. (See section 3.10.3.2 of the Delaware River Basin Water Code, incorporated by reference at part 410 of this chapter).

(5) Effluents shall not create a menace to public health or safety at the point of discharge. (See Section 3.10.4 of the Delaware River Basin Water Code, incorporated by reference at part 410 of this chapter).

(6) The underground water resources of the basin shall be used, conserved, developed, managed, and controlled in view of the needs of present and future generations, and in view of the resources available to them. To that end, interference, impairment, penetration, or artificial recharge shall be subject to review and evaluation under the Compact. (See section 2.20.6 of the Delaware River Basin Water Code, incorporated by reference at part 410 of this chapter).

(b) *Approval required.* Produced water and CWT wastewater as defined in this part may not be imported into the basin except by a new or existing wastewater treatment facility located within the basin, and may not be transferred to, treated by or discharged from or to a new or existing wastewater treatment facility located within the basin, at any volume or rate, except in accordance with an approval in the form of a docket issued by the Commission to the owner or operator of the wastewater treatment facility pursuant to Section 3.8 of the Compact or in accordance with a state permit issued pursuant to a duly adopted administrative agreement between the Commission and the host state.

(c) *Alternatives and impact assessment.* Any project involving the importation of produced water or CWT wastewater into the basin shall be subject to the requirement that alternatives involving no importation must be analyzed and the water resource, economic and social impacts of the project evaluated, as described in section 2.30.4 of the Commission's Water Code.

(d) *Compliance with existing rules.* In addition to the requirements in this part, all discharges within the basin of produced water and CWT wastewater as defined in this part must comply with applicable DRBC Water Quality Regulations (incorporated by reference at part 410 of this chapter), state regulations and federal regulations. If a conflict exists among the applicable regulations, the more stringent requirement shall apply to these discharges.

(e) *Treatment facilities.*

(1) Produced water as defined in this part

(i) may not be treated within the basin except at a centralized waste treatment facility (CWT) as that term is defined by the U.S. Environmental Protection Agency in 40 CFR part 437 (to convert it to CWT wastewater); and pursuant to an approval issued in accordance with section 440.5(b) of this part.

(ii) may not be discharged within the basin without treatment at a CWT.

(2) CWT wastewater as defined in this part may be discharged only:

(i) directly by the CWT pursuant to an approval issued in accordance with section 440.5(b) of this part; or

(ii) indirectly by a CWT to a wastewater treatment facility within the basin (via sewer, truck or other means) pursuant to an approval issued in accordance with section 440.5(b) of this part,

(iii) provided that the discharge meets the requirements of sections 440.5(f) through (h) of this part.

(f) *Treatability studies.* The Commission shall not issue any required docket or approval for the treatment of produced water or the discharge of CWT wastewater unless the project sponsor has identified each proposed source of the produced water or CWT wastewater and has submitted to the Commission a treatability study (or studies) prepared by a professional engineer licensed in the state(s) in which the treatment and discharge facilities are located, demonstrating that:

(1) an analysis, characterization and quantification of all pollutants of concern, as that term is defined in section 440.2 of this part, has been conducted and the results submitted to the Commission;

(2) the acute and chronic toxicity of the waste, measured as Whole Effluent Toxicity (WET), have been evaluated;

(3) the treatment technologies and applicable design criteria to be used to meet all requirements of section 440.5(g) of this part have been identified;

(4) the produced water (or CWT wastewater) will not pass through or interfere with the facility's treatment process, and the resulting effluent will meet all applicable limits;

(5) the classification, treatment and disposal of residuals from the facility, if any, will not be adversely affected; and

(6) the discharge will not cause or contribute to an exceedance of applicable water quality criteria or stream quality objectives or impair the existing or protected use of the receiving water.

(g) *Additional effluent requirements.* Except as provided in paragraph (h) of this section, the following requirements shall apply within the basin to effluent resulting from the treatment of produced water or CWT wastewater. In any instance in which these requirements are deemed to conflict, the more stringent shall apply:

(1) For total dissolved solids (TDS):

(i) the effluent shall not exceed background or 500 mg/l, whichever is less,

(ii) provided, however, that in waters that drain to Delaware River Water Quality Zones 4 through 6, the resulting effluent shall not exceed 1,000 mg/l, or a concentration established by the Commission that is compatible with designated water uses and stream quality objectives.

(iii) The Commission will publish guidance on acceptable methods for determining background TDS concentrations.

(2) For waters for which the protected or designated uses include "public water supplies" or "drinking water", the effluent shall not exceed the more stringent of EPA's or the host state's

(i) primary drinking water standards for inorganic chemicals, organic chemicals (excluding acrylamide and epichlorohydrin) and disinfection byproducts; and

(ii) secondary drinking water standards (excluding color, corrosivity, and odor).

(3) For whole effluent toxicity (WET), the effluent shall not exceed: 0.3 toxic units (acute) and 1.0 toxic units (chronic).

(4) For pollutants of concern as defined in Section 440.2 of this part:

(i) For waters that drain to Special Protection Waters, the effluent shall not exceed the background concentration of each pollutant in the receiving water.

(ii) For waters that do not drain to Special Protection Waters:

(A) If pollutant-specific numeric water quality criteria exist, the effluent concentration for the pollutant shall not exceed the numeric criteria.

(B) If pollutant-specific numeric water quality criteria do not exist, the effluent shall not exceed the background concentration of the pollutant in the receiving water or cause an exceedance or violation of any existing narrative criteria.

(C) The Commission will publish guidance on acceptable methods for determining background concentrations for pollutants of concern.

(5) The Commission may require the discharger to perform such monitoring and reporting as the Commission deems necessary to ensure compliance with established numeric effluent limits and to support the development of additional numeric limits if needed.

(h) *Point of compliance.*

(1) The effluent limitations are to be met at the point of discharge to basin waters.

(2) To ensure that all conditions, requirements and standards under this rule are met, the Commission may impose additional monitoring requirements or other conditions on any CWT within the basin that discharges CWT wastewater as defined in this part to another wastewater treatment facility in the basin.

(3) A mixing zone may be considered for any pollutant for which a mixing zone is permitted in the Delaware River Estuary by the DRBC Water Quality Regulations (incorporated by reference at part 410 of this chapter).

Dated: January 2, 2018

PAMELA M. BUSH, J.D., M.R.P.,
Secretary

Fiscal Note: 68-60. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION

PART V. DELAWARE RIVER BASIN COMMISSION

CHAPTER 901. GENERAL PROVISIONS

§ 901.1. Rules of Practice and Procedure.

The rules of practice and procedure as set forth in 18 CFR Part 401 [(2017)] (2018) are hereby incorporated by reference and made a part of this title.

§ 901.5. [**Groundwater protection area, Southeastern Pennsylvania.**] (Reserved and renumbered).

[**The Basin Regulations, Groundwater Protection, Southeastern Pennsylvania, as set forth at 18**

CFR Part 430 (1999), are hereby incorporated by reference and made part of this title.]

(*Editor's Note:* Chapters 902 and 903 are proposed to be added and printed in regular type to enhance readability.)

CHAPTER 902. GROUNDWATER PROTECTION AREAS

Sec.

902.1. Groundwater protection area, Southeastern Pennsylvania.

§ 902.1. Groundwater protection area, Southeastern Pennsylvania.

The basin regulations, groundwater protection, Southeastern Pennsylvania, as set forth in 18 CFR Part 430 (2018), are hereby incorporated by reference and made part of this title.

CHAPTER 903. HYDRAULIC FRACTURING IN SHALE AND OTHER FORMATIONS

Sec.

903.1. Hydraulic fracturing in shale and other formation.

§ 903.1. Hydraulic fracturing in shale and other formation.

The hydraulic fracturing in shale and other formation regulations, as set forth in 18 CFR Part 440 (2018), are hereby incorporated by reference and made part of this title.

[Pa.B. Doc. No. 18-57. Filed for public inspection January 12, 2018, 9:00 a.m.]

OFFICE OF ATTORNEY GENERAL

[37 PA. CODE CHS. 301 AND 311]

Unfair Market Trade Practices; Automotive Industry Trade Practices

The Office of Attorney General (OAG), Public Protection Division, proposes to amend Chapter 301 (relating to automotive industry trade practices) and add Chapter 311 (relating to unfair market trade practices) to read as set forth in Annex A.

A. Effective Date

This proposed rulemaking will go into effect upon final-form publication in the *Pennsylvania Bulletin* and will be retroactive to January 1, 2000.

B. Contact Person

For further information on this proposed rulemaking, contact Tracy W. Wertz, Chief Deputy Attorney General, Antitrust Section, or Joseph S. Betsko, Senior Deputy Attorney General, Antitrust Section, Office of Attorney General, Strawberry Square, 14th Floor, Harrisburg, PA 17120, (717) 787-4530. This proposed rulemaking is available on the Office of Attorney General's web site at www.attorneygeneral.gov.

C. Statutory Authority

This rulemaking is proposed under the authority of section 3.1 of the Unfair Trade Practices and Consumer Protection Law (act) (73 P.S. § 201-3.1), regarding the statutory rulemaking authority of the OAG, section 506 of The Administrative Code of 1929 (71 P.S. § 186), regarding general rulemaking authority, and sections 918 and 919 of The Administrative Code of 1929 (71 P.S. §§ 307-2 and 307-3) read in pari materia with the act.

D. Purpose and Background

This proposed rulemaking is designed to improve, enhance and update the OAG's unfair methods of competition and unfair or deceptive acts or practices regulations. The specific purpose of this proposed rulemaking is described in more detail under the summary of proposal.

E. Summary of Proposal

The OAG enforces and administers the act. The OAG has determined that it is necessary for the enforcement and the administration of the act to amend the existing automotive industry trade practices regulations to provide adequate protections to consumers regarding the inspection of motor vehicles and the written disclosure of certain attributes of a motor vehicle's roadworthiness. The OAG has also determined that it is necessary for the enforcement and the administration of the act to add regulations concerning unfair market trade practices and to clarify false advertising.

The OAG has long taken the policy position that unfair market trade practices constitute unfair methods of competition and unfair or deceptive acts or practices in violation of the act in line with Federal jurisprudence interpreting section 5 of the Federal Trade Commission Act (FTCA) (15 U.S.C.A. § 45). During and following a public hearing on Senate Bill 848 from the 2013-14 session before the Senate Judiciary Committee on June 25, 2013, the OAG heard comments from Senate Judiciary Committee members and bill opponents that the proposed legislation would be redundant to the act and that the OAG should use the act to address the unfair market trade practices. After conducting extensive legal research, the OAG agrees with the comments.

Presently, consumers in this Commonwealth have been disadvantaged by the lack of a clear articulation of Commonwealth law that makes it easy to understand that consumers can recover regardless of whether they have dealt directly or indirectly with the defendant or defendants for injury resulting from anticompetitive conduct. For example, the *Relafen* court significantly discounted Pennsylvania consumer recovery in a settlement. *In re Relafen Antitrust Litigation*, 225 F.R.D. 14, 23-24 (D. Mass. 2004). The OAG has determined that a new regulation under the act will remedy this unfair vacuum in consumer protection.

Pennsylvania courts have held that section 5 of the FTCA is virtually the same as section 3 of the act (73 P.S. § 201-3) and that Pennsylvania courts may look to decisions under the FTCA for guidance in interpreting the act. *Com., by Creamer v. Monumental Properties, Inc.*, 459 Pa. 450, 462, 329 A.2d 812, 818 (1974); and *Pirozzi v. Penske Olds-Cadillac-GMC, Inc.*, 605 A.2d 373, 376 (Pa. Super. 1992). Pennsylvania courts have interpreted that a violation of Federal or State statutes aligned with the purpose of the FTCA and the act constitutes a violation of the act since the act is "broad enough to encompass all claims of unfair and deceptive acts or practices in the conduct of any trade or commerce." *Ash v. Continental Ins. Co.*, 593 Pa. 523, 530 (2007). Section 5(a)(1) of the FTCA provides that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful." The OAG determines that it logically follows that a violation of section 5 of the FTCA constitutes a violation of the act because this conclusion incontrovertibly falls within the scope of the General Assembly's basic policy choice in section 3 of the act that "[u]nfair methods

of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce...are hereby declared unlawful."

The United States Supreme Court has held that section 5 of the FTCA protects consumers from unfair competitive practices regardless of the effect on competition unlike the Federal antitrust laws. *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239 (1972). Rulings under the FTCA have held antitrust violations to constitute an unfair and deceptive practice. *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 454, 106 S. Ct. 2009, 2016, 90 L. Ed. 2d 445 (1986); *FTC v. National Lead Co.*, 352 U.S. 419, 428-30 (1957); *FTC v. Cement Inst.*, 333 U.S. 683, 688, 68 S. Ct. 793, 797, 92 L. Ed. 1010 (1948); and *Ciardi v. F. Hoffman-La Roche, Ltd.*, 762 N.E.2d 303 (Mass. 2002).

The OAG has taken notice of *Lisa Hunt v. Bayer Corp.*, Feb. Term 2005, No. 1038 (Phila. Com. Pl.), where the court recognized price-fixing to be a violation of the act. The OAG has also taken notice of *In re Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litig.*, 64 F.Supp.3d 665 (E.D. Pa. 2014), where the court held that anticompetitive schemes are redressable under the act. The OAG has also taken notice of *Commonwealth v. TAP Pharmaceutical Products, Inc.*, 885 A.2d 1127 (Pa. Cmwlth. 2005), where the court recognized that purchasers may recover monetarily regardless of whether the defendant or defendants were dealt with directly or indirectly. Further, the OAG has taken notice of *Com. ex rel. Zimmerman v. Nickel (Nickel)*, 26 Pa. D. & C. 3d 115, 120, where the court held that "an act or practice need not be deceptive in order to be declared 'unfair.'" The court in *Nickel* looked to *FTC v. Sperry and Hutchinson Co.*, 405 U.S. 233, 244-45 n. 5 (1972), for guidance on what constitutes unfairness.

The OAG is aware of the holding in *Commonwealth v. Golden Gate Nat'l Senior Care LLC (Golden Gate)*, 158 A.3d 203 (Pa. Cmwlth. 2017) where the court did not liberally construe the act and, in so doing, added pleading requirements which the General Assembly did not see fit to include. Specifically, the *Golden Gate* court emphasized the judicial shorthand of "false advertising" and engrafted a requirement of advertising which is not found in section 2(4)(v) of the act (73 P.S. § 201-2(4)(v)). The *Golden Gate* court imported language from section 43(a)(1)(B) of the Lanham Act (15 U.S.C.A. § 1125(a)(1)(B)), which expressly requires "commercial advertising or promotion." The General Assembly did not expressly require commercial advertising in section 2(4)(v) of the act. The *Golden Gate* court relied on the Lanham Act, the construction of which is shaped by the fact that only direct competitors, not consumers, have standing to sue. "Virtually all of the courts that have considered what categories of plaintiffs have standing under § 43(a) have recognized, indeed emphasized, that that section was intended to protect commercial interests." *Guarino v. Sun Co., Inc.*, 819 F.Supp. 405, 407 (D.N.J. 1993), *aff'd sub nom.* See also *Serbin v. Ziebart Int'l Corp., Inc.*, 11 F.3d 1163 (3d Cir. 1993).

The OAG notes *Kelly v. Penguin Putnam, Inc.*, 2000 WL 33711074, at *2 (Pa. Com. Pl. Nov. 29, 2000), which stated "'false advertising' is judicial shorthand for the practice that § 201(2)(4)(v) prohibits: falsely representing the characteristics of goods or services. The resolution of a § 201(2)(4)(v) claim does not depend on any other definition of advertisement." The OAG further notes that the Pennsylvania Supreme Court's affirmation of the elements for section 2(4)(v) of the act as set forth in *DiLucido v. Terminix Int'l, Inc. (DiLucido)*, 450 Pa. Super.

393, 401, 676 A.2d 1237, 1240—41 (1996), and *Com. v. Hush-Tone Indus., Inc. (Hush-Tone)*, 4 Pa. Cmwlth. 1, 21 (1971), is presently controlling authority for section 2(4)(v) of the act. *DiLucido*, 450 Pa. Super. at 1240. *Weinberg v. Sun Co., Inc. (Weinberg)*, 740 A.2d 1152, 1167 (Pa. Super. 1999), *aff'd in part, rev'd in part*, 565 Pa. 612, 777 A.2d 442 (2001) (Supreme Court reversed only as to its holding that reliance is required in a private action under the act). The courts in *DiLucido* and *Hush-Tone* modeled the elements for section 2(4)(v) of the act on FTCA jurisprudence. *Weinberg*, 740 A.2d at 1168; *Hush-Tone*, 4 Pa. Cmwlth. at 21-22.

There must be “some representation.” *FTC v. Patriot Alcohol Testers, Inc.*, 798 F.Supp. 851, 855 (D. Mass. 1992). “Most deception involves written or oral misrepresentations, or omissions of material information. Deception may also occur in other forms of conduct associated with a sales transaction. The entire advertisement, transaction or course of dealing will be considered. The issue is whether the act or practice is likely to mislead, rather than whether it causes actual deception.” *In re Cliffdale Associates, Inc.*, 103 F.T.C. 110, 1984 WL 565319, at *46 (1984). Considering that the Federal Trade Commission standard that is applied to false advertising or any act of representing in the context of section 2(4)(v)—(vii) of the act is consistent with the purpose of protecting the public interest, the OAG determines that this approach is the most appropriate model for the act.

The OAG proposes to codify these rulings and determinations, and to further define what constitutes unfair methods of competition and unfair or deceptive acts or practices under the act which are necessary for the enforcement and administration of the act. Because this proposed rulemaking codifies, in large part, conduct found to be in violation of the so-called catch-all provision of the act and section 5 of the FTCA and because of the compelling nature of the public interest in the remedial quality of the act, this proposed rulemaking, if approved on final-form rulemaking, will apply retroactively to January 1, 2000. This is tempered by the 6-year statute of limitations for private actions under the act. 42 Pa.C.S. § 5527(b) (relating to six year limitation); *Gabriel v. O'Hara*, 368 Pa. Super. 383, 396, 534 A.2d 488, 495 (1987).

The OAG proposes to define “rebate,” “person in interest” and “moneys or property, real or personal” as used in section 4.1 of the act (73 P.S. § 201-4.1). Based on practical experience, the OAG has observed that the payment of rebates do not negate the harm. Therefore, rebates do not constitute a defense to the award of a permanent injunction, payment of costs and restitution, and a civil penalty. The OAG also seeks to clarify the meaning of “person in interest” to reflect that the Commonwealth is not precluded to recover restoration under section 4.1 of the act to resolve confusion regarding the term inherent in *Golden Gate*. The Pennsylvania Supreme Court considered and issued opinions contemporaneously in *Com. v. TAP Pharmaceutical Products (TAP Pharma.)*, 626 Pa. 1, 94 A.3d 350 (2014), and *Meyer v. Cmty. Coll. of Beaver Cty.*, 625 Pa. 563, 568, 93 A.3d 806, 809 (2014) (*Meyer II*). Through these two cases, the Pennsylvania Supreme Court considered whether a governmental entity, namely the Commonwealth, could recover under section 4.1 of the act and whether a governmental entity could be liable under the act. The Pennsylvania Supreme Court held in *TAP Pharma.* that the Commonwealth was likely not harmed by the unfair or deceptive trade practice once rebates were considered and remanded the case back to the Commonwealth Court

to determine whether there was any financial harm to be restored after considering rebates. The Pennsylvania Supreme Court's protracted analysis on the rebate issue, to determine if there were any damages to award, establishes that the Pennsylvania Supreme Court necessarily considered the Commonwealth to be a “person in interest.” Otherwise, the remand would have been for nothing. As *TAP Pharma.* and *Meyer II* are two sides of the same coin, it is clear that the Pennsylvania Supreme Court passed at the opportunity to exclude governmental entities from restoration under section 4.1 of the act which is conclusively implicit in its *TAP Pharma.* holding. This proposed rulemaking clarifies the term to include the Commonwealth.

The OAG also proposes to define “fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding,” “deceptive conduct” and “unfair conduct” in line with the OAG's original arguments to the Pennsylvania Supreme Court that the catchall “was designed to cover generally all unfair and deceptive acts or practices in the conduct of trade or commerce” to which the Pennsylvania Supreme Court unambiguously stated “[w]e agree.” *Com., by Creamer v. Monumental Properties, Inc.*, 459 Pa. 450, 478, 329 A.2d 812, 826 (1974). Moreover, the definitions are in line with the original legislative intent from 1968 “that this package gives Pennsylvania the strongest consumer-protection laws in the States,” *Legislative Journal: House of Representatives*, 1968 Sess. vol. 1, no. 40, at 1231 (July 8, 1968). The Pennsylvania Supreme Court has consistently mandated that the act is to be liberally construed to effect its object of preventing unfair or deceptive practices. *Com., by Creamer v. Monumental Properties, Inc.*, 459 Pa. 450, 460 (Pa. 1974). Because the act is a statute that must be liberally construed to effectuate its objective to prevent unfair or deceptive business practices, the definition of “unfair methods of competition” and “unfair or deceptive acts or practices” as provided in section 2(4) of the act should not be considered exhaustive. See *Blizzard v. Floyd*, 149 Pa. Cmwlth. 503, 505-06, 613 A.2d 619, 621 (Pa. Commw. Ct. 1992). In other words, for a statute that must be liberally construed, a definition of a term and any enumeration therein should not be considered exhaustive. See *Blizzard v. Floyd*, 149 Pa. Cmwlth. 503, 505-06, 613 A.2d 619, 621 (Pa. Cmwlth. Ct. 1992).

The OAG further takes notice of the 1976 amendments to the act which deleted the very restrictive civil investigative demand authority and retained the definition of “documentary material” while granting the OAG rulemaking authority. A principle of statutory construction is to ascertain legislative intent and to give effect to all provisions of a statute. 1 Pa.C.S. § 1921 (relating to legislative intent controls); *Com., Dept. of Environmental Resources v. Butler County Mushroom Farm*, 499 Pa. 509, 513, 454 A.2d 1, 3 (1982); *Hospital Association of Pennsylvania v. MacLeod*, 487 Pa. 516, 524 (1980). Sections 918 and 919 of The Administrative Code of 1929, as supplemented by Section 204(d) of the Commonwealth Attorneys Act (CAA) (71 P.S. § 732-204(d)), authorize the OAG to issue subpoenas to investigate commercial and trade practices and to require the production of documentary material related to those practices. By reading The Administrative Code of 1929 and the act as one since both relate to protecting consumers from detrimental practices in the conduct of trade and commerce, this proposed rulemaking would give effect to the retained definition which is used nowhere else in the act. 1 Pa.C.S. § 1932 (relating to statutes in pari materia); *Com., Dept. of Environmental*

Resources v. Butler County Mushroom Farm, 499 Pa. 509, 517-20 (1982); and *Girard School District v. Pittenger*, 481 Pa. 91, 100 (1978).

The OAG further takes notice of *In re Lorazepam & Clorazepate Antitrust Litigation*, 205 F.R.D. 369, 386 (D.D.C. 2002), for the proposition that the OAG can release consumer claims under the act sounding in antitrust or unfair methods of competition under section 204(c) of the CAA. The Federal court found that the CAA granted the OAG the functional equivalent of *parens patriae* powers to permit the OAG to represent citizens and to settle and release their claims for violations of State and Federal antitrust law.

The heading of Part V is proposed to be amended to reflect that the OAG administers the consumer affairs program that was once administered by the formerly autonomous Pennsylvania Bureau of Consumer Protection. Consequently, the powers and duties in section 918 of The Administrative Code of 1929 are the powers and duties of the Attorney General under section 204(d) of the CAA. It logically follows that the Attorney General is authorized to investigate practices occurring in trade or commerce under section 918(1) of The Administrative Code of 1929 and to issue subpoenas under section 919(a) of The Administrative Code of 1929, once The Administrative Code of 1929 and the CAA are read together.

“The operative provision of the Unfair Trade Practices and Consumer Protection Law provides: ‘Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce...are hereby declared unlawful.’” *Gabriel v. O’Hara*, 368 Pa. Super. 383, 391, 534 A.2d 488, 492 (1987). The operative provision of the act provides the General Assembly’s basic policy choice which guides this proposed rulemaking. The OAG proposes to amend Chapter 301 and add Chapter 311 to read as set forth in Annex A.

Proposed § 301.2(6) (relating to advertising and sales presentation requirements) requires a motor vehicle dealer to inspect a motor vehicle not more than 30 days prior to the sale of the motor vehicle.

Proposed § 301.4(10) (relating to general provisions—motor vehicle dealer) clarifies that compliance with § 301.2(5) is still required notwithstanding any use of “AS IS” under § 301.4(9).

Proposed § 311.3(a) (relating to general provisions—unfair market trade practices) prohibits all contracts, combinations and conspiracies intended to impose resale price maintenance restraints.

Proposed § 311.3(b) prohibits all contracts, combinations and conspiracies between competitors for the purpose of price-fixing.

Proposed § 311.3(c) prohibits all contracts, combinations and conspiracies between competitors to allocate markets, reduce output or allocate customers.

Proposed § 311.3(d) prohibits all contracts, combinations and conspiracies intended to tie the sale of a commodity or service upon the purchase of another commodity or service.

Proposed § 311.3(e) prohibits all contracts, combinations and conspiracies for the purpose of reciprocal dealings.

Proposed § 311.3(f) prohibits all contracts, combinations and conspiracies to effectuate a group boycott.

Proposed § 311.3(g) prohibits actual monopolization.

Proposed § 311.3(h) prohibits attempted monopolization.

Proposed § 311.3(i) prohibits joint monopolization.

Proposed § 311.3(j) prohibits incipient conspiracies to monopolize.

Proposed § 311.3(k) codifies the holdings in *Ash v. Continental Ins. Co.*, 593 Pa. 523, 530 (2007), and *Com., by Creamer v. Monumental Properties, Inc.*, 459 Pa. 450, 478 (1974), that the general prohibition provision is intended to cover generally all unfair and deceptive acts or practices in the conduct of trade or commerce.

Proposed § 311.4 (relating to misrepresentation) realigns the construction of representing and advertising in line with FTCA jurisprudence and the plain language of the act.

Proposed § 311.5 (relating to catchall) codifies the holdings in *Ash v. Continental Ins. Co.*, 593 Pa. 523, 530 (2007), and *Com., by Creamer v. Monumental Properties, Inc.*, 459 Pa. 450, 478 (1974), that the catchall is to cover generally all unfair and deceptive acts or practices in the conduct of trade or commerce.

Proposed § 311.6 (relating to nonexhaustivity) codifies the holdings in *Ash v. Continental Ins. Co.*, 593 Pa. 523, 530 (2007), and *Com., by Creamer v. Monumental Properties, Inc.*, 459 Pa. 450, 478 (1974), that the general prohibition provision is intended to cover generally all unfair and deceptive acts or practices in the conduct of trade or commerce and that the *per se* violations, however enumerated, do not limit or otherwise circumscribe the basic policy choice in the general prohibition provision.

Proposed § 311.7 (relating to trade and commerce) codifies the holding in *Com. v. Percudani*, 844 A.2d 35, 48 (Pa. Cmwlth. 2004), *as amended* (Apr. 7, 2004), *opinion amended on reconsideration*, 851 A.2d 987 (Pa. Cmwlth. 2004), that a buyer-seller relationship is not relevant in the context of the definitions of “trade” and “commerce.”

Proposed § 311.8 (relating to enforcement) implements the inherent investigative function of enforcement to gather documentary material, as defined by the act, and made necessary to satisfy the “reason to believe” standing requirement under section 4 of the act (73 P.S. § 201-4).

Proposed § 311.9 (relating to payment of costs and restitution) reflects the economic reality that the payment of rebates do not reduce the amount to be restored to a person in interest under section 4.1 of the act.

Proposed § 311.10 (relating to direct or indirect recovery) is designed to be in accord with and based on the definitions of “trade” and “commerce” under the act and codify the holding of *TAP Pharma. and Valley Forge Towers South Condominium v. Ron-Ike Foam Insulators, Inc.*, 393 Pa. Super. 339, 574 A.2d 641, 645 (Pa. Super. 1990), *affirmed*, 605 A.2d 798 (Pa. 1992).

Proposed § 311.11 (relating to civil penalty) sets the amount of the civil penalty for a violation of the act within the statutory limit and is to be assessed for each violation in accord with 1 Pa.C.S. § 1930 (relating to penalties for each offense).

Proposed § 311.12 (relating to private action) limits private actions to actual harm.

Proposed § 311.13 (relating to interpretation) interprets section 204(c) of the CAA as providing the functional equivalent of *parens patriae* authority to settle on behalf of consumers for claims brought under the proposed

regulation and to interpret the powers and duties in The Administrative Code of 1929 as supplemented by the CAA.

Proposed § 311.14 (relating to retroactivity) applies Chapter 311 retroactively to January 1, 2000. Consumer claims are subject to a 6-year statute of limitations under 42 Pa.C.S. § 5527(b).

F. Paperwork

This proposed rulemaking will not increase paperwork and will not create new paperwork requirements.

G. Benefits, Costs and Compliance

Through this proposed rulemaking, consumers will be further protected from unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce by unscrupulous businesses. The clear articulation of the proposed unfair trade practices regulations will make the regulations easier to understand by the public and will facilitate compliance.

This proposed rulemaking will not have adverse fiscal impact on the Commonwealth or its political subdivisions. This proposed rulemaking will not impose new costs on the private sector or the general public.

H. Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on December 27, 2017, the OAG submitted a copy of this proposed rulemaking and a copy of a Regulatory Analysis Form to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House and Senate Judiciary Committees. A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, IRRC may convey comments, recommendations or objections to the proposed rulemaking within 30 days of the close of the public comment period. The comments, recommendations or objections must specify the regulatory review criteria in section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b) which have not been met. The Regulatory Review Act specifies detailed procedures for review prior to final publication of the rulemaking by the OAG, the General Assembly and the Governor.

I. Public Comments

Interested persons are invited to submit written comments, objections or suggestions about this proposed rulemaking to the Antitrust Section, Office of Attorney General, Strawberry Square, 14th Floor, Harrisburg, PA 17120 within 30 days after publication of this proposed rulemaking in the *Pennsylvania Bulletin*. Comments submitted by facsimile will not be accepted.

Comments also may be submitted by e-mail to antitrust@attorneygeneral.gov. If an acknowledgement of electronic comments is not received by the sender within 2 working days, the comments should be retransmitted to ensure receipt. Electronic comments submitted in any other manner will not be accepted.

J. Public Hearing

The OAG will hold a public hearing for the purpose of accepting comments on this proposed rulemaking at 10 a.m. on February 12, 2018, in the Large Conference Room, 14th Floor, Strawberry Square, Harrisburg, PA 17120.

Individuals wishing to present testimony at the hearing shall, at least 1 week in advance of the hearing, notify Lisa Long, Office of Attorney General, 14th Floor, Strawberry Square, Harrisburg, PA 17120, (717) 787-4530. Oral

testimony will be limited to 10 minutes for each witness. Witnesses shall submit three written copies of statements at the hearing. Each organization shall designate one witness to present testimony on its behalf.

Persons with a disability who wish to attend the hearing and require an auxiliary aid, service or other accommodation to participate should contact Lisa Long at (717) 787-4530 to discuss how their needs may be accommodated.

JOSH SHAPIRO, Attorney General

Fiscal Note: 59-9. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 37. LAW

PART V. [BUREAU OF CONSUMER PROTECTION] OFFICE OF ATTORNEY GENERAL CHAPTER 301. AUTOMOTIVE INDUSTRY TRADE PRACTICES

§ 301.1. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

Advertisement—An oral, written or graphic statement which offers for sale a particular motor vehicle or motor vehicle goods and services or which indicates the availability of a motor vehicle or motor vehicle goods and services, including a statement or representations made in a newspaper, periodical, pamphlet, circular, other publication or on radio or television; contained in a notice, handbill, sign, billboard, poster, bill, catalog or letter; **placed on a web site, in a mobile application, on a social media outlet or on any other electronic platform;** or printed on or contained in a tag or label which is attached to merchandise.

* * * * *

§ 301.2. Advertising and sales presentation requirements.

With respect to an advertisement or sales presentation offering or making available for sale a new or used motor vehicle or maintenance service or repair on a new or used motor vehicle, the following will be considered unfair methods of competition and unfair or deceptive acts or practices:

* * * * *

(5) The representation in an advertisement or sales presentation that a motor vehicle or motor vehicle goods or services are of a particular style, model, standard, quality or grade if they are of another or if the representation conflicts with a written notice or disclosure required under this chapter. For the purposes of this chapter, a motor vehicle which is offered for sale is represented to be roadworthy, and the advertiser or seller shall disclose **in writing** prior to sale the following conditions if the advertiser or seller knows or should know that the conditions exist in the motor vehicle:

- (i) Frame bent, cracked or twisted.
- (ii) Engine block or head cracked.
- (iii) Vehicle unable to pass State inspection.
- (iv) Transmission damaged, defective or so deteriorated as to require replacement.
- (v) Vehicle flood damaged.

(vi) Differential damaged, defective or so deteriorated as to require replacement.

(6) A motor vehicle dealer or advertiser may not offer a motor vehicle for sale unless a certified inspection mechanic designated by the motor vehicle dealer has inspected the motor vehicle in accordance with 67 Pa. Code Chapter 175 (relating to vehicle equipment and inspection). The inspection may not occur more than 30 days prior to the sale of the motor vehicle by the motor vehicle dealer.

[(6)] (7) The making of a representation or statement of a fact in an advertisement or sales presentation if the advertiser or salesperson knows or should know that the representation or statement is false and misleading or if the advertiser or salesperson does not have sufficient information upon which a reasonable belief in the truth of the representation could be based.

[(7)] (8) The advertising by a motor vehicle dealer or repair shop of a motor vehicle for sale or of a motor vehicle repair or maintenance service in which the advertisement does not disclose the business name and address of the advertiser or the word "dealer."

[(8)] (9) The advertising by a motor vehicle dealer or repair shop of the price or specific dollar amount of a motor vehicle or motor vehicle repair or maintenance service unless the price includes charges of any type which are necessary or usual prior to delivery of the vehicle or service to a purchaser, including but not limited to charges for freight, handling and vehicle preparation but excluding taxes and registration and licensing costs in the case of a new or used motor vehicle and including all parts and labor in the case of motor vehicle service. If a manufacturer advertises the price of a new motor vehicle and the name of a specific motor vehicle dealer is mentioned in the advertisement, the advertised price shall include charges for freight, handling and dealer preparation which charges are necessary or usual prior to delivery of the vehicle to a purchaser by the named motor vehicle dealer.

[(9)] (10) The advertising by a motor vehicle dealer of a motor vehicle for sale at a specified price if the price does not include equipment with which the models of motor vehicles are minimally equipped by the manufacturer unless the advertisement clearly and conspicuously discloses that the equipment is not included in the advertised price.

[(10)] (11) The use, by a motor vehicle dealer or manufacturer in an advertisement for the sale of motor vehicles, of such terms as "standard factory equipment" or "fully equipped" or words of similar meaning; except that an advertiser is not prohibited from identifying certain specified equipment as standard factory equipment if such is in fact true.

[(11)] (12) The advertising by a motor vehicle dealer or manufacturer of a motor vehicle for sale in which the year, make, model and series, if the advertised motor vehicle has a designated model or series, are not clearly disclosed.

[(12)] (13) The advertising by a motor vehicle manufacturer, dealer or repair shop in which the advertisement states directly or by implication that the price of the motor vehicle or motor vehicle maintenance or repairs advertised is a reduction from the usual price, including but not limited to those advertisements which contain

either a specific dollar amount of reduction or a percentage of reduction from usual selling price, unless the price from which a reduction is indicated is the usual price at which the advertised goods or services, or both, have been sold or offered for sale. For the purposes of this paragraph, the terms "sale," "discount," "price cut," "special," "savings," and other similar words or phrases shall be deemed to indicate a price reduction advertisement.

[(13)] (14) The advertising by a motor vehicle manufacturer, dealer or repair shop of a price reduction in the sale of a motor vehicle or motor vehicle maintenance or repair services unless the advertised sale price constitutes a bona fide substantial reduction from the usual selling price or the advertisement discloses the actual dollar amount of reduction or percentage of reduction.

[(14)] (15) The advertising by a motor vehicle manufacturer, dealer or repair shop of a price reduction in the cost of motor vehicles or motor vehicle maintenance or repair services for which the manufacturer, dealer or shop in whose name the advertisement is placed does not maintain records necessary to establish the usual selling price of the motor vehicles, goods or services upon which the price reduction is advertised. The records shall be maintained for a period of 60 days following the termination of the offer and shall be made available for inspection by the Bureau upon demand during business hours. The failure of a manufacturer, dealer or repair shop to substantiate the usual selling price through documentation shall constitute a presumption that the price reduction advertisement was not predicated upon a reduction from the usual selling price and that the claimed reduction was neither substantial nor bona fide as required in paragraph [(13)] (14).

[(15)] (16) The use, by a motor vehicle dealer in an advertisement for the sale of motor vehicles of such terms as "at wholesale" or other similar phrases.

[(16)] (17) The advertising by a motor vehicle dealer or repair shop of the immediate availability of a new motor vehicle or motor vehicle goods and services with the intent not to supply reasonably expectable public demand unless the advertisement discloses a specific limitation of quantity.

[(17)] (18) The advertising by a motor vehicle dealer of a specific motor vehicle offered for sale where no advertised vehicle is in the stock of the advertiser on the date of placing the advertisement unless the advertisement states "Not in Stock" or "Order Yours Now" or other phrases of similar import which will clearly indicate that the vehicles are not available for immediate delivery and the period of time in which delivery will be made.

[(18)] (19) The advertising by a motor vehicle manufacturer, dealer or repair shop of a sale or promotion in connection with the sale of a motor vehicle or motor vehicle maintenance or repair services unless the advertisement clearly and conspicuously discloses the expiration date, if any, and other conditions of the sale or promotion, including but not limited to whether the supply of vehicles or other sale goods is limited and, if so, in what manner.

[(19)] (20) The advertising or presenting for sale by a motor vehicle dealer of a motor vehicle previously used as an "executive" or "demonstrator", or with any prior usage which is required to be noted on a Pennsylvania Certificate of Title or which appears on the title of a state

through which the dealer has acquired ownership unless the advertiser or salesperson clearly and conspicuously discloses the prior usage.

[(20)] (21) The advertising by a motor vehicle dealer of a motor vehicle for sale at a price or price comparison which represents less than the total cash price to be paid by a retail purchaser unless the advertisement clearly and conspicuously discloses that the price is offered with reference to a trade-in or other method of price reduction and discloses the amount of such allowance. A set-off, discount, trade-in allowance, or other price reduction shall be shown as a specific dollar reduction from the advertised price required in this paragraph and shall be incorporated with the advertised price.

[(21)] (22) The advertising by a motor vehicle dealer of the price which will be paid by the dealer for trade-in vehicles unless the price of the motor vehicles offered for sale by the dealer to the owner of a trade-in vehicle is within the range of prices at which the dealer usually sells the vehicles and is not increased because of the amount offered for the trade-in vehicle.

[(22)] (23) The advertising by a motor vehicle dealer of a specific price to be paid by the dealer for trade-in vehicles unless either the advertised price will be paid for trade-in vehicles, regardless of their condition or age or unless the advertisement clearly and conspicuously discloses conditions which trade-in vehicles shall meet before the price is paid.

[(23)] (24) The advertising by a motor vehicle dealer that a range of prices, such as, "up to \$700" or "as much as \$700," will be paid by the dealer for trade-in vehicles unless the advertisement clearly and conspicuously discloses the criteria which the dealer uses to determine the amount to be paid for a particular vehicle.

[(24)] (25) The advertising or presenting for sale by a motor vehicle manufacturer, dealer or repair shop in which a warranty or guaranty is referred to or offered unless the manufacturer, dealer or repair shop complies with all requirements of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act (15 U.S.C.A. §§ 2301—2312) and 16 CFR Parts 700—703 (relating to rules, regulations, statements and interpretations under the Magnuson-Moss Warranty Act).

[(25)] (26) The use in an advertisement or sales presentation by a motor vehicle manufacturer, dealer or repair shop of the term "satisfaction guaranteed or your money back," "free trial period," or other similar phrases when the advertiser or salesperson does not intend to promptly make a full refund or fails to make full refund within a reasonable period of time not to exceed 5 days. A reasonable conditions or limitations on such offer must be clearly and conspicuously disclosed at the time of making the offer.

[(26)] (27) The advertising by a motor vehicle dealer or repair shop that it will perform a "tune-up" on a motor vehicle unless the specific work to be performed is set forth and, if a price is advertised, unless the advertisement clearly and conspicuously discloses whether the advertised price includes parts or labor, or both.

§ 301.4. General provisions—motor vehicle dealer.

(a) With regard to a motor vehicle dealer, the following will be considered unfair methods of competition and unfair or deceptive acts or practices:

* * * * *

(9) Where no express warranty is given, attempting to exclude the implied warranties of merchantability and fitness for a particular purpose in the sale of a motor vehicle purchased primarily for personal, family or household purposes unless the following notice in at least 20-point bold type is prominently affixed to a window in the motor vehicle so as to be easily read from the outside and is brought to the attention of the prospective purchaser by the seller:

This vehicle is sold *without* any warranty. The purchaser will bear the *entire expense* of repairing or correcting any defects that presently exist and/or may occur in the motor vehicle unless the salesperson promises *in writing* to correct such defect or promises *in writing* that certain defects do not exist.

This paragraph prohibits the use of the term "AS IS" unless the sales contract, receipt, agreement or memorandum contains the following information in a clear, concise and conspicuous manner on the face of the document; the notice shall be in addition to the window statement required by this paragraph and may not contradict an oral or written statement, claim or representation made directly or by implication with regard to the quality, performance, reliability or lack of mechanical defects of a motor vehicle which is offered for sale:

AS IS

THIS MOTOR VEHICLE IS SOLD AS IS *WITHOUT ANY WARRANTY* EITHER EXPRESSED OR IMPLIED. THE PURCHASER WILL BEAR THE *ENTIRE EXPENSE* OF REPAIRING OR CORRECTING ANY DEFECTS THAT PRESENTLY EXIST OR THAT MAY OCCUR IN THE VEHICLE.

(10) When a motor vehicle is not roadworthy at the time the motor vehicle is offered for sale, using the term "AS IS" as set forth in this section does not satisfy the written disclosure requirement in § 301.2(5) (relating to advertising and sales presentation requirements).

[(10)] (11) Failing to forward to the proper Commonwealth agency amounts and forms tendered by a purchaser, such as sales tax and transfer and registration fees, within the time prescribed by law.

(b) If the sales presentation and agreement of sale has been effected in a language other than English, the written information, notice and disclosures required by subsection (a) shall be given in the principal language in which the sale was transacted as well as English.

(Editor's Note: The following chapter is proposed to be added and printed in regular type to enhance readability.)

CHAPTER 311. UNFAIR MARKET TRADE PRACTICES

| | |
|---------|---|
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| 311.2. | Definitions. |
| 311.3. | General provisions—unfair market trade practices. |
| 311.4. | Misrepresentation. |
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§ 311.1. Scope.

This chapter establishes what are determined to be unfair methods of competition and unfair or deceptive acts or practices by a person engaged in trade or commerce, but may not be interpreted to limit the power of the Attorney General to determine that another practice is unlawful under the act.

§ 311.2. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

Act—Unfair Trade Practices and Consumer Protection Law (73 P.S. §§ 201-1—201-9.3).

Commodity—Real or personal property, or any other thing of value that is bought, leased or sold.

Communication—Every manner or means of disclosure, transfer or exchange, and every disclosure, transfer or exchange of ideas or information, whether orally, by document or electronically, or whether face to face, by telephone, mail, personal delivery, electronic transmission or otherwise.

Deceptive conduct—A method, act or practice including that which has the capacity or tendency to deceive.

Designee—An authorized deputy attorney general of the Office of Attorney General.

Documentary material—The original or a copy of designated documents, including writings, drawings, graphs, charts, photographs, electronically-created data and other compilations of data, in addition to the term as defined in section 2 of the act (73 P.S. § 201-2).

Market structure—The interrelationship of sellers and buyers at all levels of distribution of a commodity or service including manufacturers, suppliers, distributors, wholesalers and retailers.

Marketing—Process or technique of promoting, selling and distributing a commodity or service.

Person—The term as defined in section 2 of the act.

Puffery—Boastful claim which is:

(i) Transmitted or otherwise published over television, radio or Internet as a paid advertisement intended for mass distribution.

(ii) Expressly conveyed as not intended to be information material to a transaction decision.

(iii) Understood by the target audience as not intended to be information material to a transaction decision.

(iv) Characterized by broad, vague and commendatory language in the form of an opinion regarding a commodity or service as distinguished from claims asserting levels of service or measurable attributes of commodities.

Rebate—A partial refund of the cost of a commodity or service to incentivize the sale of that commodity or service.

Service—

(i) An activity, not covered by the definition of “commodity,” which is performed in whole or in part for the purpose of financial gain.

(ii) The term does not include labor performed by natural persons as employees of others.

Trade and commerce—The term as defined in section 2 of the act.

Transaction—The exchange or transfer of a commodity or service.

Unfair conduct—A method, act or practice, without necessarily having been previously considered unlawful, which violates public policy as established by any statute, common law, or otherwise within at least the penumbra of any common law, statutory, or other established concept of unfairness; or which causes substantial injury to a victim.

§ 311.3. General provisions—unfair market trade practices.

With respect to a person engaged in trade or commerce, all of the following are considered unfair methods of competition and unfair or deceptive acts or practices:

(1) A contract, combination or conspiracy between two or more persons at different levels of market structure to fix minimum prices for a commodity or service at one or more levels of market structure.

(2) A contract, combination or conspiracy between two or more persons at the same level of market structure to fix or otherwise stabilize prices for a commodity or service.

(3) A contract, combination or conspiracy between two or more persons at the same level of market structure to allocate marketing territories, to reduce output of commodities and services, or to allocate customers to whom commodities and services are, has been or will be marketed.

(4) A contract, combination or conspiracy between two or more persons to condition or to have the effect of conditioning the sale of one commodity or service upon the purchase of another commodity or service.

(5) A contract, combination or conspiracy between two or more persons when the sale of a commodity or service is conditioned upon the seller’s purchase of commodities or services produced or performed by the buyer.

(6) A contract, combination or conspiracy between two or more persons at the same level of market structure to persuade or to coerce suppliers or customers to refuse to deal with another person.

(7) Actual monopolization, in which a person acquires or retains actual monopoly power through competitively unreasonable practices.

(8) Attempted monopolization, in which a person not yet in possession of actual monopoly power, purposefully engages in competitively unreasonable practices that create a dangerous probability of monopoly power being achieved.

(9) Joint monopolization, in which two or more persons conspire to jointly retain or acquire monopoly power, when actual monopoly power is achieved through competitively unreasonable practices.

(10) Incipient conspiracies to monopolize, in which two or more persons not yet in possession of monopoly power, conspire to seize monopoly control of a market but where monopoly power has not yet actually been achieved.

(11) Any other unfair or deceptive conduct.

§ 311.4. Misrepresentation.

Under section 2(4) of the act (73 P.S. § 201-2(4)):

(1) “Representing” includes any communication which conveys an impression of a purported fact, excluding puffery, whether expressed, implied, omitted or otherwise concealed, which actually deceives or has a capacity or

tendency to deceive a substantial segment of its audience, and which is likely to make a difference in a transaction decision.

(2) "Advertising" includes any marketing communication which conveys an impression of a purported fact, excluding puffery, whether expressed, implied, omitted or otherwise concealed, which actually deceives or has a capacity or tendency to deceive a substantial segment of its audience, and which is likely to make a difference in a transaction decision.

§ 311.5. Catchall.

Under section 2(4) of the act (73 P.S. § 201-2(4)), "fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding" includes unfair or deceptive conduct.

§ 311.6. Nonexhaustivity.

Under section 2(4) of the act (73 P.S. § 201-2(4)), "unfair methods of competition and unfair or deceptive acts or practices" and any enumeration therein may not be construed to be exhaustive.

§ 311.7. Trade and commerce.

Under section 3 of the act (73 P.S. § 201-3):

(1) The role of a person as a buyer, seller or third party is not dispositive as to whether a transaction itself constitutes trade and commerce.

(2) "Trade" and "commerce" include, without exception, all classes of transactions involving any commodity or service.

§ 311.8. Enforcement.

Whenever the Attorney General requires documentary material to determine whether there is reason to believe that a person is using or about to use any method, act or practice declared unlawful under the act and determines it would be in the public interest, the Attorney General may authorize a designee to require the attendance and testimony of witnesses and the production of documentary material. For this purpose under section 919 of The Administrative Code of 1929 (71 P.S. § 307-3), a designee may:

(1) Issue subpoenas, examine witnesses and receive evidence necessary for all actions within the authority of the Attorney General under the act.

(2) Use the documentary material or copies thereof as the designee determines necessary in the enforcement of the act,

(i) Sharing the documentary material with any State or Federal agency, or with any person or entity that may be assisting in the investigation or prosecution of the subject matter of the subpoena.

(ii) Presenting the documentary material before any court.

(3) Invoke the aid of the Commonwealth Court or a court of record of this Commonwealth, in case of disobedience of a subpoena or the contumacy of a witness appearing before the Attorney General or a designee, to require the person subpoenaed to obey the subpoena or to give evidence or to produce documentary material relative to the matter in question.

§ 311.9. Payment of costs and restitution.

(a) If the court finds that the defendant or defendants are in violation of section 3 of the act (73 P.S. § 201-3), the payment of a rebate by the defendant or defendants

to a person in interest does not constitute a defense to the imposition of a permanent injunction or to the restoration of moneys or property, real or personal, to the person of interest under section 4.1 of the act (73 P.S. § 201-4.1).

(b) Under section 4.1 of the act:

(1) "Person in interest" includes a person, the Commonwealth, a Commonwealth agency, municipal authority or political subdivision.

(2) "Moneys or property, real or personal" includes something of value including restitution, disgorgement, attorneys' fees, expert fees, investigation and litigation costs, and court costs.

§ 311.10. Direct or indirect recovery.

(a) If the court orders payment of restitution and costs under section 4.1 of the act (73 P.S. § 201-4.1) or damages under section 9.2 of the act (73 P.S. § 201-9.2), the defendant or defendants shall restore to any person in interest any moneys or property, real or personal, which may have been acquired by means of any violation of the act, regardless of whether the person in interest dealt directly or indirectly with the defendant or defendants.

(b) Under section 9.2 of the act:

(1) "Ascertainable loss" means any loss which is quantifiable but not speculative.

(2) "As a result of" means cause-in-fact or but-for theory of causation, excluding any requirement under any reliance theory under common law fraud.

§ 311.11. Civil penalty.

(a) If the court finds that a person is willfully using or has willfully used a method, act or practice declared unlawful by section 3 of the act (73 P.S. § 201-3):

(1) The person will be assessed no less than \$1,000 for each violation.

(2) When the victim of the willful use of the method, act or practice is 60 years of age or older, the person will be assessed no less than \$3,000 for each violation.

(b) The Attorney General or the appropriate District Attorney, acting in the name of the Commonwealth of Pennsylvania, is vested with discretion under section 8(a) of the act (73 P.S. § 201-8(a)) to exercise the right to recover a civil penalty.

(c) A payment of a rebate to a victim of the willful use of a method, act or practice declared unlawful by section 3 of the act does not constitute a defense to an award of a civil penalty.

(d) An award of civil penalty shall be in addition to other relief which may be granted under sections 4 and 4.1 of the act (73 P.S. §§ 201-4 and 204-4.1).

§ 311.12. Private action.

A private plaintiff proceeding under section 9.2 of the act (73 P.S. § 201-9.2) shall prove actual harm, excluding any incipient, attempted or threatened harm.

§ 311.13. Interpretation.

(a) The act shall be liberally construed.

(b) The independent clause in the first sentence of section 3 of the act (73 P.S. § 201-3) shall be construed to be the general prohibition provision which covers all claims of unfair methods of competition and unfair or deceptive acts or practices, except as provided in the second sentence of section 3 of the act, and shall be in addition to and not circumscribed by the per se provisions in subsection (c).

(c) The definitions and regulations cited in the participle phrase in the middle of the independent clause of the first sentence of section 3 of the act shall be construed to be per se violations of the general prohibition provision in subsection (b).

(d) The Office of Attorney General may settle and release claims brought under § 311.3 (relating to general provisions—unfair market trade practices) under section 204(c) of the Commonwealth Attorneys Act (71 P.S. § 732-204(c)) on behalf of consumers.

(e) The powers and duties in section 918 of The Administrative Code of 1929 (71 P.S. § 307-2) are the powers and duties of the Attorney General under section 204(d) of the Commonwealth Attorneys Act.

(f) The Attorney General may delegate in whole or in part the powers and duties in section 918 of The Administrative Code of 1929 to any deputy including the director of the Bureau of Consumer Protection under section 201(c) of the Commonwealth Attorneys Act (71 P.S. § 732-201(c)).

(g) The Attorney General is authorized to enforce and to bring civil actions or other proceedings, under statute or common law, including the act, State antitrust law, Federal antitrust laws, the Steel Products Procurement Act (73 P.S. §§ 1881—1887) and the Institutions of Purely Public Charity Act (10 P.S. §§ 371—385), which are among other acts as may be incidental to the exercise of the powers and functions of the Attorney General under section 918(3) of The Administrative Code of 1929.

(h) The Attorney General is authorized to investigate practices occurring in trade or commerce under section 918(1) of The Administrative Code of 1929 and to issue subpoenas under section 919(a) of The Administrative Code of 1929 (71 P.S. § 307-3(a)).

(i) The Attorney General may share documentary material with any State or Federal agency, or with any person or entity that may be assisting in the investigation or prosecution of the subject matter of the subpoena and may present documentary material before any court as the Attorney General or a designee of the Attorney General determines necessary for the enforcement of laws under which the Attorney General has standing under sections 918(3) and 919(b) of The Administrative Code of 1929.

§ 311.14. Retroactivity.

This chapter takes effect on _____ (*Editor's Note: The blank refers to the effective date of adoption of this proposed rulemaking.*) and is retroactive to January 1, 2000.

§ 311.15. Waiver of rights.

A waiver of this chapter by a person prior to or at the time of a commission of a violation of § 311.3 (relating to general provisions—unfair market trade practices) or any other section of this chapter is contrary to public policy and is void. An attempt by any person to have another waive his rights under this chapter will be deemed to be a violation of the act.

[Pa.B. Doc. No. 18-58. Filed for public inspection January 12, 2018, 9:00 a.m.]

PENNSYLVANIA PUBLIC UTILITY COMMISSION

[52 PA. CODE CH. 53]

[L-2012-2317273]

Use of Fully Projected Future Test Year; Advanced Notice of Proposed Rulemaking

Public Meeting held
December 21, 2017

Commissioners Present: Gladys M. Brown, Chairperson; Andrew G. Place, Vice Chairperson; Norman J. Kennard; John F. Coleman, Jr.; David W. Sweet

*Use of Fully Projected Future Test Year—52 Pa. Code
Chapter 53; L-2012-2317273*

Advance Notice of Proposed Rulemaking Order

By the Commission:

This advance notice of proposed rulemaking (ANOPR) identifies proposed procedures and filing requirements for use of a fully projected future test year (FPFTY) by eligible utilities in base rate cases. Any new FPFTY procedures and filing requirements, if adopted, would comprise a new Exhibit E Fully Projected Future Test Year—All Jurisdictional Public Utilities and Other Regulated Entities Electing To Use a Fully Projected Future Test Year (FPFTY) Except Communications Utilities to Section 53.53 of Title 52 of the Pennsylvania Code. The Commission has jurisdiction to employ the concept of a FPFTY as authorized by Act 11 of 2012, which amended Section 315 of the Public Utility Code.

Additionally, this advance notice requests stakeholder input on proposed or alternative updates, as well as stakeholder suggestions for updates or alternatives, to the existing Exhibits A (generally natural gas), C (electric), and D (water and waste water) or other sections of the filing requirement regulations related to Sections 53.51—53.56 Information Furnished with the Filing of Rate Changes.

The Commission will convene a stakeholder meeting to review the comments regarding the ANOPR. Thereafter, the Commission intends to initiate a proposed rulemaking regarding FPFTY procedures and filing requirements and may convene additional stakeholder meetings to gather further input from stakeholders.

Background

On February 14, 2012, Governor Corbett signed into law Act 11 of 2012 (Act 11), which amended Chapters 3, 13, and 33 of the Pennsylvania Public Utility Code (Code). 66 Pa.C.S. §§ 308, 1307, 1311, 1327, and 1350—1360. Act 11, inter alia, authorizes water and wastewater utilities, electric distribution companies (EDCs), and natural gas distribution companies (NGDCs) or a city natural gas distribution operation to use a FPFTY in their Section 1308(d) base rate proceedings. See 66 Pa.C.S. § 1308(d) (relating to voluntary changes in rates). A new Exhibit E is contemplated for applicability to utilities choosing to use a FPFTY. The new Exhibit E would standardize the procedures and filing requirements for rate case data across the utility categories. Changes are being proposed to the introductory and explanatory text in Section 53.53(a)—(c), and a new section 53.53(d) is proposed.

The FPFTY is a ratemaking mechanism that allows a utility to project capital investment and correspondingly

to include that projected investment in the utility's claimed revenue requirement throughout the twelve-month period beginning with the first month that the new rates would be placed in effect. 66 Pa.C.S. §§ 315, 1350—1360; *Pa. Public Utility Commission v. Columbia Gas of PA Inc.*, Docket No. R-2012-2321748, 2013 WL 2420877 (Pa. PUC). A public utility can also use the FPPTY mechanism to project other revenue requirement and ratemaking components such as operating revenues, operating expenses, depreciation, interest expense, taxes, and return.

Act 11 additionally allows eligible water, wastewater, gas, and electric utilities to petition the Commission for approval of a distribution system improvement charge (DSIC) to recover the reasonable and prudently incurred costs related to the repair, improvement, and replacement of utility infrastructure. In conjunction with a DSIC, the utilities must file a long-term infrastructure improvement plan (LTIIP) which is a necessary component of a DSIC petition. 66 Pa.C.S. § 1353(b)(3). The purpose of a LTIIP is to ensure that utilities are planning and executing capital expenditures that will maintain and improve the efficiency, safety, adequacy, and reliability of existing distribution infrastructure at a faster pace than they have done historically. Water utilities with a previously-approved DSIC are not required to file a LTIIP unless otherwise directed by the Commission. See 66 Pa.C.S. § 1360. Further, Section 1356 of Act 11, 66 Pa.C.S. § 1356, requires a utility with an approved DSIC to file an Annual Asset Optimization Plan (AAO Plan). An AAO Plan is intended to provide the Commission and the public with an overall status report regarding a utility's progress in making infrastructure improvements pursuant to its Commission-approved LTIIP. See Review of LTIIP, Docket No. 2012-2317274 (May 23, 3014), establishing regulations at 52 Pa. Code §§ 121.1—121.8 (relating to LTIIPs).

We have addressed policy and tariff issues related to DSICs at Implementation of Act 11: DSIC, Docket No. M-2012-2293611. The purpose of this ANOPR is to solicit comments and input on the procedures and filing requirements for utilities that use a FPPTY.

Discussion

A. New Exhibit E Specifically Referencing FPPTY Requirements

Existing regulations for Section 1308 rate cases are set forth, in part, at Section 53.53 of our regulations, 52 Pa. Code § 53.53.¹ Exhibit A to that section addresses, inter alia, gas utilities. Exhibit C addresses electric utilities. Exhibit D addresses water and wastewater utilities. These three exhibits provide the initial requirements and framework for the provision of utility data in support of rate cases using historic and future test years. No changes are contemplated to Exhibits A, C, or D.²

The term “historic test year” (HTY) as currently used in Exhibits A, C, and D refers to:

[T]he test year chosen by the utility to support its filing, that is, presumably future test year data would be supplied in most cases. “Historic test year,” as referred to in Exhibit D, is defined as book figures for

¹ The provisions of Section 53.53 were adopted September 2, 1977, 7 Pa.B. 2527; amended through March 29, 1985, effective for rate increase requests filed on and after July 1, 1985. Those utilities meeting the filing requirements in the new regulations were permitted, upon request, to file under the new regulations at an earlier date, 15 Pa.B. 1178; amended October 23, 1987, effective November 23, 1987, 17 Pa.B. 4221; corrected May 13, 1994, effective December 3, 1983, 24 Pa.B. 2533; amended May 20, 2005, effective May 21, 2005, 35 Pa.B. 3024.

² Exhibit B is not at issue either as it refers to communications utilities, which are not affected by Act 11.

the base test year. The term “future test year.”(FTY)] as used in Exhibit D, refers to the adjusted historic test year for known and measurable changes 12 months beyond the book figures for the base year, or the utility's final claimed supporting data.

52 Pa. Code § 53.53(b) (last amended effective May 21, 2005, see 35 Pa.B. 3024). To the extent not otherwise indicated, the requirements of Exhibits A, B, C, and D are to be preserved relative to cases in which a utility is not using a FPPTY. A utility using a FPPTY would be required to provide the data and support required if using a HTY or a FTY in conjunction with providing the FPPTY data and support as indicated in the proposed Exhibit E. HTY and FTY data and support would not be submitted as separate components but rather submitted in proximity and association with the data and support relative to the FPPTY data.

We note that there are several points of divergence between the data and support required in the existing Exhibits A, C, and D for the various utility categories. Some of these differences would be preserved in a new Exhibit E. Some, however, seem to serve no particular purpose and will be proposed for deletion. A new Exhibit E would therefore, also, standardize many of the procedures and filing requirements for rate case data among the eligible utility categories while spelling out instances where differences will continue.

Changes would also be necessary to the introductory and explanatory text in Section 53.53(a)—(c), and a new section 53.53(d) would be proposed.

Thus, we anticipate proposing, in a future rulemaking, to establish a new exhibit, Exhibit E, for any utility which is eligible to use and which elects to use a FPPTY. The new Exhibit E would standardize the procedures and filing requirements for rate case data among the utility categories. By statute, “fully projected future test year” is defined as the 12-month period beginning with the first month that the new rates will be placed in effect after application of the full suspension period permitted under section 1308(d) (relating to voluntary changes in rates). Thus, the term “test year,” as used in Exhibit E, would refer to the FPPTY.

Based upon these considerations, the following changes to Section 53.53 and incorporation of a new Exhibit E are contemplated:

- *Section 53.53(a) & (b)*—Information to be furnished with proposed general rate increase filing in excess of \$1 million.

We would add a notation referring to the new “Exhibit E—all utilities electing Fully Projected Future Test Year (FPPTY),” to distinguish the differences in definitions of terms used in Exhibits A—D and in Exhibit E, and to define “FPPTY.”

- *Section 53.53, Exhibit E*—Fully Projected Future Test Year—All Jurisdictional Public Utilities and Other Regulated Entities Electing To Use A Fully Projected Future Test Year (FPPTY)—Except Communications Utilities.

Subsection I. We would add a definitions section for use in FPPTY filings.

Subsection II. We would add a general filings requirements section that delineates the following:

- A. Summary of the Filing.
- B. Description of Utility Operations.
- C. Rate Base.

- D. Rate of Return (ROR).
- E. Balance Sheet.
- F. Income Statement and Statement of Cash Flow.
- G. Operating Revenue.
- H. Operating Expenses.
- I. Employee Costs, including Related Costs such as Benefits and Retiree Costs.
- J. Depreciation.
- K. Taxes.
- L. Long Term Infrastructure Improvement Plan (LTIIP) and Annual Asset Optimization Plan (AAO Plan)
- M. Industry-specific data.

We are particularly interested in comments regarding existing data production requirements that exist in Exhibits A, C, and D but which are not contemplated herein for retention in a new Exhibit E. We also request stakeholders to comment on data productions requirements that could be added to Exhibit E to enhance decision making in cases involving FPFTY considerations. Further, we request comments on how much historical and current data should be covered by the various requests.

B. *Additional Section 53.53 Matters*

The contemplated new Exhibit E addresses data to be provided with the filing. To the extent that there are non-discovery questions related to use of a FPFTY that should be addressed in regulations, we shall address those matters in a new Subsection 53.53(d). Stakeholders are invited to comment on those issues and contemplated resolutions.

C. *Housekeeping Updates to Existing Regulations*

1. *52 Pa. Code § 5.423*—Section 5.423 is referenced in Exhibit D (water and wastewater), Section VII.25. Section 5.324 has, however, been replaced by 52 Pa. Code § 5.365 (relating to orders to limit availability of proprietary information), effective September 21, 2013, 43 Pa.B. 5593. We would update the cross reference.

2. *52 Pa. Code § 53.51(d)*—Section 53.51(d) provides that utilities filing for proposed rate changes shall serve a copy of the proposed rate changes and supporting data on the Office of Consumer Advocate (OCA). We would revise this provision consistent with the Commission's e-service procedures and to direct that the Office of Small Business Advocate (OSBA) and the Commission's Bureau of Investigation and Enforcement (I&E) also be served.

3. *52 Pa. Code § 53.52(a)*—Section 53.52(a)(7) uses the term "subsection" to refer to itself, and Section 53.52(a)(8) uses "paragraph" to refer to itself. We would use "paragraph" for both internal references.

4. *52 Pa. Code §§ 53.51—53.56*—We invite comments on any other provisions Sections 53.51—53.56 that would require similar updates.

D. *Comments Invited*

We invite interested parties to file comments on the anticipated changes to be proposed in a future rulemaking. Stakeholders are invited to identify other substantive, procedural, and housekeeping matters related to FPFTY rate case filings related to electric, water, wastewater, and natural gas.

Stakeholders are also invited to comment on the applicability of FPFTY regulations to municipal utilities subject to Commission jurisdiction.

E. *Stakeholder Meetings For The ANOPR*

We shall convene a stakeholder meeting within thirty (30) days of receipt of the comments regarding the ANOPR. Thereafter, we shall determine if further stakeholder meetings would be beneficial, and we will set an appropriate schedule accordingly. The Law Bureau, in consultation with the other Commission bureaus and offices and based on the stakeholder input from the ANOPR process, will prepare a recommendation regarding the FPFTY NOPR.

F. *NOPR*

Based on the staff recommendation, we shall commence a proposed rulemaking with a FPFTY proposal. We shall publish the NOPR and proposed procedures and filing requirements and establish comment and reply comment periods. We will schedule stakeholder meetings as appropriate.

Conclusion

Accordingly, under sections 501, 1350—1360 and 1501 of the Public Utility Code, 66 Pa.C.S. §§ 501, 1350—1360, and 1501 and the Commonwealth Documents Law, Act of July 31, 1968, P.L. 769, as amended, 45 P.S. §§ 1201, et seq., and the regulations promulgated thereunder, at 1 Pa. Code §§ 7.1—7.4, we contemplate adopting new regulations at 52 Pa. Code § 53.53 as set forth in Annex A. As noted herein, comments on the ANOPR are requested within 45 days of publication; *Therefore,*

It Is Ordered That:

1. Interested parties are requested to comment on this advance notice of proposed rulemaking regarding the procedures and filing requirements for utilities using a fully projected future test year, as set forth in Annex A.

2. The Law Bureau shall deposit this Order and Annex A with the Legislative Reference Bureau to be published in the *Pennsylvania Bulletin*.

3. An original copy of any comments referencing the docket number of the proposed regulations set out in Annex A to this Order, be submitted within 45 days of publication in the *Pennsylvania Bulletin*, to Secretary Rosemary Chiavetta, Pennsylvania Public Utility Commission, 400 North Street, Harrisburg, PA 17120. Comments may be e-filed instead consistent with the Commission's e-filing instructions at: <http://www.puc.pa.gov/efiling/default.aspx>.

4. Electronic copies in Microsoft Word®-compatible format of all filings shall be provided via email to following Commission email account: RA-PC-FPFTY2317273E@pa.gov.

5. The contact person regarding legal issues for this rulemaking is Assistant Counsel Louise Fink Smith, Law Bureau, finksmith@pa.gov. The contact person for technical issues is Erin Laudenslager, Bureau of Technical Utility Services, elaudensla@pa.gov. Alternate formats of this document are available for persons with disabilities and may be obtained by contacting Alyson Zerbe, Regulatory Coordinator, alzerbe@pa.gov.

6. The Law Bureau in conjunction with the Bureau of Technical Services will convene a stakeholder meeting within thirty (30) days of receipt of comments regarding this advance notice of proposed rulemaking regarding the procedures and filing requirements for utilities using a fully projected future test year.

7. The Law Bureau in conjunction with the Bureau of Technical Services and other Commission bureaus will

prepare a recommendation regarding a fully projected future test year proposed rulemaking.

8. A copy of this Order and Annex A shall be served upon the Energy Association of Pennsylvania (EAP), the National Association of Water Companies (NWWC) all jurisdictional electric distribution companies, all jurisdictional natural gas distribution companies and city natural gas distribution companies, all jurisdictional water and wastewater utilities, all municipal utilities subject to Commission jurisdiction, other jurisdictional utilities except communication utilities, the Commission’s Bureau of Investigation and Enforcement, the Office of Consumer Advocate, and the Office of Small Business Advocate.

ROSEMARY CHIAVETTA,
Secretary

Annex A

TITLE 52. PUBLIC UTILITIES

PART I. PUBLIC UTILITY COMMISSION

Subpart C. FIXED SERVICE UTILITIES

CHAPTER 53. TARIFFS FOR NONCOMMON CARRIERS

INFORMATION FURNISHED WITH THE FILING OF RATE CHANGES

§ 53.51. General

* * * * *

(d) Each utility filing a proposed rate change with the Commission shall serve a copy of the proposed rate change and supporting data required by this chapter upon the Office of the Consumer Advocate, the Office of the Small Business Advocate, the Commission’s Bureau of Investigation and Enforcement and the Commission’s Bureau of Technical Utility Services. [Verification of service of this information upon the Office of Consumer Advocate shall be filed with the Commission.] Additionally, the utility shall file verification of service of this information with the Commission. The utility may serve hard copies or comply with the Commission’s e-service requirements.

* * * * *

§ 53.53. Information to be furnished with proposed general rate increase filings in excess of \$1 million.

(a) When a public utility under the jurisdiction of the Commission, other than a canal, turnpike, tunnel, bridge or wharf company, files a tariff or tariff supplement seeking a general rate increase within the meaning of 66 Pa.C.S. § 1308(d) (relating to voluntary changes in rates), and the general rate increase exceeds \$1 million in gross annual revenues, in addition to the data required by other provisions of this chapter, the tariff or tariff supplement shall be accompanied by responses to the data requests contained in the following exhibits which apply to the utility types or specific test year, as indicated. Utilities not using the Fully Projected Future Test Year (FPFTY) method shall refer to Exhibits A, B, C or D, consistent with their utility type. Utilities using the FPFTY method shall refer to Exhibit E which is predicated on Exhibits A, C, and D but reflects adjustments required for consideration of a FPFTY proceeding. Information provided in conjunction with rate cases is subject to the act of February 14, 2008 (P.L. 6, No. 3) (65 P.S. §§ 101–3104), known as the Right to Know Law, 52

Pa. Code §§ 102.1–102.4 (relating to confidential security information), and 52 Pa. Code § 5.365 (relating to Orders to limit availability of proprietary information). The exhibits in this section are as follows:

- (1) Exhibit A—Utilities except communications, electric, water, and wastewater utilities.
- (2) Exhibit B—Communications utilities.
- (3) Exhibit C—Electric utilities.
- (4) Exhibit D—Water and wastewater utilities.

(5) Exhibit E—All jurisdictional public utilities and other regulated entities electing to use a Fully Projected Future Test Year (FPFTY) except Communications utilities.

(b) In providing responses to these data requests, if the requested data have been previously filed with the Commission, they may be incorporated by reference. Also, the term “historic test year” as used in these exhibits refers to the test year chosen by the utility to support its filing, that is, presumably future test year data would be supplied in most cases. **The term “test year” as used in Exhibits A–D refers to the test year chosen by the utility to support its filing.** “Historic test year,” as referred to in Exhibit D, is defined as book figures for the base test year. The term “future test year,” as used in Exhibit D, refers to the adjusted historic test year for known and measurable changes 12 months beyond the book figures for the base year, or the utility’s final claimed supporting data. **These terms may have different meanings when used in conjunction with a FPFTY. See Exhibit E for specific applicability of these and other terms to the FPFTY method.**

[(c) Initial utility direct testimony of a witness who shall testify in support of the utility’s position shall be provided as part of the filing materials. The testimony of the filing utility shall include a complete explanation and justification of claims which depart from the unadjusted test year results of operations, including the methodology and rationale. The testimony shall be accompanied by supporting worksheets, if necessary, and shall refer to supporting exhibits to which the testimony relates. The explanation and documentation of the proposed adjustments shall enable a reasonably informed party to determine how the amount was calculated and to understand why the amount is being claimed.]

(c) Testimony.

(1) Filed materials shall include the direct testimony of all utility witnesses who testified in support of the utility’s position. The utility witnesses’ testimony shall be accompanied by supporting worksheets, if necessary, and shall refer to supporting exhibits to which the testimony relates.

(2) If adjustments from the test year are proposed, the utility witnesses’ testimony shall also include a complete explanation and justification of any claims which depart from the unadjusted test year results of operations, including the methodology and rationale. The utility witnesses’ testimony, explanation and documentation of the proposed adjustments shall enable a reasonably informed party to determine how the amount was calculated and to understand why the amount is being claimed.

(d) The utility shall provide a summary table of the most recent approved long-term infrastructure improvement plan (LTIP) showing a list of eligible projects, year of anticipated construction, description of project and estimated cost of each project. If a proposed LTIP is pending, the utility also shall provide a summary table of the proposed LTIP. The utility shall provide docket numbers for approved or proposed LTIPs.

(e) The utility shall provide working electronic copies of schedules in Microsoft Excel or similar electronic spreadsheet format (with all formulas and links intact).

* * * * *

(Editor’s Note: Exhibit E is anticipated proposed material and printed in regular type to enhance readability.)

Exhibit E

FULLY PROJECTED FUTURE TEST YEAR—ALL JURISDICTIONAL PUBLIC UTILITIES AND OTHER REGULATED ENTITIES ELECTING TO USE A FULLY PROJECTED FUTURE TEST YEAR (FPPTY) EXCEPT COMMUNICATIONS UTILITIES

Exhibit E sets forth definitions in Section I and common filing requirements in Subsections II.A. through II.L. for all utilities electing to use a FPPTY. Subsection II.M. sets forth further specific requirements unique to a particular industry if the utility elects to use a FPPTY.

I. Definitions.

Construction Work in Progress (CWIP)—A holding account for property costs not yet ready to be placed in service.

Distribution (of) Service/Infrastructure—Systems and facilities required to distribute utility services to the utility’s customers, including the systems and facilities required to collect wastewater from a utility’s customers.

Distribution System Improvement Charge (DSIC)—A ratemaking mechanism that may be approved by the Commission subsequent to or in conjunction with Commission approval of a utility’s LTIP that allows for the recovery of prudently incurred costs related to the repair, improvement, and replacement of eligible utility infrastructure through a surcharge that is subject to reconciliation, audit, and other consumer protections.

Fully projected future test year (FPPTY)—A 12-consecutive-month period beginning with the first full month that the new rates will be in effect after the application of the full suspension period permitted under section 1308(d).

Future test year (FTY)—A 12-consecutive-month period beginning the day after the end of the HTY reflecting anticipated or projected results of operations.

Historic test year (HTY)—12-month period that reflects the actual (e.g., historic) results of operations.

Long-term infrastructure improvement plan (LTIP)—A utility’s filed and approved plan to ensure that the utility is planning for and executing capital expenditures that will maintain and improve the efficiency, safety, adequacy, and reliability of its distribution (or collection) infrastructure at a faster pace than it has done historically, approval of which is a precondition or concurrent condition to Commission approval of a utility’s DSIC.

Parent—Includes the municipality if the utility is a municipal utility or entity subject to Commission regulation.

Test year (TY)—12-consecutive-month period chosen by the utility to support its filing.

Uniform System of Accounts (USoA)—An accounting system prescribed by the Pennsylvania Public Utility Commission (Commission) and the Federal Energy Regulatory Commission (FERC) applicable to public utilities regulated by the Commission. The accounting system prescribes the manner and form by which such accounts shall be maintained.

II. General filing requirements of all jurisdictional utilities and other entities under the Commission’s jurisdiction using the FPPTY method—except communications utilities

To the extent any of the information required is subject to a claim of confidentiality or proprietary nature, the utility shall so designate, with specificity, which information is claimed to be confidential or proprietary, and that claim shall be subject to review by the presiding officer. See 52 Pa. Code § 5.365.

A. Summary of filing

1. Provide a summary discussion of the rate change request, including the total requested increase in dollars, and specific reasons for each adjustment. Also provide a breakdown which identifies the revenue requirement value of the major items generating the requested rate change.

2. Identify the specific witnesses for all statements and schedules of revenues, expenses, taxes, cash flow, debt, debt coverage, property, valuation, etc., and provide direct testimony supporting the rate increase.

3. Provide a set of the following statements at Present Rates Income Statement, Cash Flow Statement, Debt Service Coverage schedule, and Balance Sheet showing columns for the following: Columns for each of the two years prior to the HTY, including book amounts for the base test year, a column for the HTY actuals, pro forma adjustments (between HTY and FTY, including the adjusted HTY for known and measurable changes twelve months beyond the book figures for the base test year), a column for FTY claims, pro forma adjustments between FTY and FPPTY, including twelve consecutive month period beginning with the first full month that new rates will be effect after the application of the full suspension period permitted under Section 1308(d) amounts, and a column for the FPPTY claim amounts. In each schedule, provide references in the pro forma adjustments column for each adjustment which ties to corresponding supporting schedule detailing and explaining each operating budget adjustment.

4. Provide a set of the following statements at Proposed Rates: Income Statement, Cash Flow Statement, Debt Service Coverage schedule, and Balance Sheet showing columns for the following: Columns for each of the two years prior to the HTY, the HTY actuals, pro forma adjustments between FTY and FPPTY claims, and FPPTY claim amounts. In each schedule provide references in the pro forma adjustments column for each adjustment which ties to corresponding supporting schedule detailing and explaining each operating budget adjustment.

5. Provide a schedule showing the number of customers by:

- a. Tariff subdivision, whose bills will be increased.
- b. Tariff subdivision, whose bills will be decreased.

6. Provide FERC and/or Commission orders or rulings applicable to the filing.

7. Provide a list of reports, data, or statements requested by and submitted to the Commission from one year prior to the HTY through the current date.

8. Submit a statement of past and anticipated changes, since the previous rate case, in major accounting procedures.

9. Provide an explanation of any differences between the basis or procedure used in allocations of revenues, expenses, depreciation, and taxes in the current rate case and that were used in the prior rate case. Also provide allocation of utility costs and allocation methods among affiliate companies.

10. Whenever major addition to plant or facilities are to be placed in operating service or removed from operating service, the utility shall so indicate in the summary of the filing. The supporting documentation shall indicate the effect of the plant addition or removal from service upon rate bases, revenue, expense, tax, income, and revenue requirement.

11. If the utility's present rates were established based upon data for a FPFTY, provide the following supplemental information:

a. The data for the HTY and the first year that new rates were in effect from the utility's last base rate case if the time periods for the data requested relative to the current base rate case do not include the HTY and first year under new rates from the utility's last base rate case.

b. A schedule listing the projected data used for operating revenue, operating expenses, depreciation, taxes, net income, and rate base in the FPFTY used to establish present rates and the actual data for those same rate-making components for the same test year.

c. Explain any differences in projections, techniques, and adjustments made for that prior base rate case as compared to the projections, techniques, and assumptions made relative to the current rate case.

d. Details of any reconciliations and adjustments made relative to the last base rate case. Explain whether (and now) they would be expected to be rolled into base rates in the current rate case or whether they are expected to be recovered in a surcharge or rider.

12. If more recent year-end information becomes available during the course of the rate case, supplement the filing with the most recent information.

B. *Description of utility operations*

1. Provide a corporate history (include the dates of original incorporation, subsequent mergers and/or acquisitions). Indicate all counties, cities, and other governmental subdivisions to which service is provided (including service areas outside this Commonwealth) and the total number of customers by customer class or billed units in the areas served.

2. Provide an overall system map, including and labeling all measuring and regulating stations, storage facilities, production facilities, transmission, and distribution facilities, by size, and all interconnections with other utilities and pipelines.

3. Attach a chart explaining utility's corporate relationship to its affiliates showing system structure.

4. Supply copies of the two most recent internal and independent audit reports, noting any exceptions and recommendations and disposition thereof.

5. Provide a working electronic copy in Microsoft Excel or similar electronic spreadsheet format (with all formulas intact) linking the amounts in the income statements, proof of revenue, expenses, cash flow statement, debt, and debt coverage schedules for the HTY, FTY and FPFTY.

6. Provide a working electronic copy in Microsoft Excel or similar electronic spreadsheet format (with all formulas intact) linking the cost of service study, the customer cost analysis, and supporting schedules for the FTY and FPFTY.

C. *Rate Base*

1. Provide a schedule showing the measures of value and the rates of return at the original cost. All claims made on this schedule should be cross-referenced to appropriate exhibits.

2. *Construction Work In Progress (CWIP)*—Provide an exhibit with a description of each project; a summary of all work orders; amount expended at the end of the HTY and the FTY and at the completion of the project; whether project will be funded by the Distribution System Improvement Charge (DSIC); and anticipated in-service dates. Include a list of items needed to complete each project subsequent to the date of filing. Indicate whether each project is revenue producing or non-revenue producing.

3. For a claim made for plant held for future use, supply the following:

a. A brief description of the plant or land site and its original cost.

b. Expected date of use for each item claimed.

c. Explain why it is necessary to acquire each item in advance of its date of use.

d. Date when each item was acquired.

e. Date when each item was placed in the plant held for future use account.

4. If a claim is made for materials and supplies or fuel inventory, provide a supporting schedule for each claim showing the most current actual 13 monthly balances and showing in the case of fuel inventory claims, the type of fuel, and location, as in station, and the quantity and price claimed.

5. If a claim is made for cash working capital, provide a supporting schedule setting forth the method and all data utilized to determine the cash working capital, requirement. If not provided in the support data, provide a lead-lag study of working capital, completed no more than 6 months prior to the rate increase filing.

6. If fuel stocks comprise part of the cash working capital claim, provide an exhibit showing the actual book balances, noting quantity and price for the fuel inventories by type of fuel, for the 13 months prior to the beginning of the HTY and for the HTY, the FTY, and the FPFTY, by location, station, etc. Explain the method of determining the claim if other than that described above.

7. Explain in detail by statement or exhibit the appropriateness of claiming any additional items, not previously mentioned, in the measures of value.

8. Provide schedules and data in support of the following working capital items:

a. Prepayments—list and identify all items.

- b. Federal Excise Tax accrued or prepaid.
- c. Federal Income Tax accrued or prepaid.
- d. Pennsylvania State Income Tax accrued or prepaid.
- e. Pennsylvania Gross Receipts Tax accrued or prepaid.
- f. Pennsylvania Capital Stock Tax accrued or prepaid.
- g. Pennsylvania Public Utility Realty Tax accrued or prepaid.
- h. State sales tax accrued or prepaid.
- i. Payroll taxes accrued or prepaid.
- j. Any adjustments related to the above items for ratemaking purposes.

9. Provide detailed calculations showing the derivation of the tax liability offset against gross cash working capital requirements.

10. Supply an exhibit supporting the claim for cash working capital requirement based on the lead-lag method.

a. Pro forma expenses and revenues are to be used in lieu of book data for computing lead-lag days.

b. The utility must either include sales for resale and related expenses in revenues and in expenses or exclude from revenues and expenses. Explain procedures followed.

11. Indicate if amortized expenses have been removed from the lead-lag study. If so, provide documentation showing such removal. If not, provide a list of such amortization expenses included.

12. Identify the fund's availability arrangements or terms which the utility has with its banks with respect to deposits of customer checks. For example, does the utility have same day or next day access to funds deposited?

13. In reference to materials and supplies:

a. What method of inventory valuation was used to develop the claim for materials and supplies?

b. Does the utility use a material and supply model to calculate needed material and supply levels? If so, provide the model. Supply an illustrative example of how the monthly balances are derived.

c. Provide the actual monthly value for the inventory of materials and supplies for the HTY. Supply as of the end of the HTY, a 13-month average, by month, for the material and supply account.

d. Provide the monthly level of materials and supplies for one prior year, the HTY, the FTY, and the FPFTY.

14. For each projected plant addition to cost the greater of \$100,000 or 0.5% of current rate base, included in the FPFTY, provide:

- a. Description of the project.
- b. Starting date of project.
- c. Amount expended to date.
- d. Percent of project currently complete.
- e. Original budgeted cost broken down by allowance for funds used during construction (AFUDC) and non-AFUDC components.
- f. Current budgeted cost broken by AFUDC and non-AFUDC components.
- g. Reason for any change in budgeted cost.
- h. Original estimated timeline and date(s) of completion and in service.

i. Current estimated timeline and date(s) of completion and in service.

j. Reason for any change in timeline and date(s) of completion and in service.

k. Anticipated retirement related to the plant addition.

l. The depreciation rate applicable.

m. Identify which projects are mandated by the Pennsylvania Department of Environmental Protection (PA DEP) or the Department Environmental Protection Agency (EPA) or other governmental entity.

15. Explain how the FTY and the FPFTY plant balances were projected and provide supporting workpapers and documentation.

16. Are all of the assets included in the plant-in-service claim used exclusively by the utility to provide jurisdictional service? If not, provide the estimated percentage that each shared asset is used by other entities or for non-jurisdictional service.

17. Identify all plant that will not be providing jurisdictional service and prepare a schedule listing those plant items identified by account. In addition, provide a narrative explaining the reason why such plant is not being used and the anticipated future disposition of the plant. If plant is used to provide more than one mode of jurisdictional service, so indicate.

18. Provide all workpapers and supporting documentation showing the derivation of the projected balances of contributions in aid of construction, customer and developer advances for construction and utility service line, and customer deposits for the FTY and the FPFTY.

19. Provide a schedule showing the HTY rate base and rates of return at original cost less accrued depreciation under present rates and under proposed rates. Claims made on this schedule should be cross-referenced to appropriate supporting schedules. Show pro forma for the FTY and the FPFTY.

D. *Rate of Return (ROR)*

1. Provide capitalization and capitalization ratios for the last 5-year period and projected through the FTY and the FPFTY (with short-term debt and without short-term debt) for the utility, parent, and consolidated system.

a. Provide most recent year-end interest coverage before and after taxes for the last 3 years and at the most current, including indenture and Securities and Exchange Commission (SEC) basis, for the company, parent, and consolidated system.

b. Provide most recent year-end preferred stock dividend coverages for the last 3 years and at most current date, including charter and SEC basis.

2. Provide most recent current quarterly financial report (utility and parent). As more recent quarterly information becomes available during the course of the rate case, supplement the filing with the most recent information.

3. Provide most recent Stockholder's Report (utility and parent).

4. Provide most current prospectus for the utility and the parent.

5. Supply projected capital requirements and sources of utility, parent, and consolidated system capital for the HTY, FTY, FPFTY, and each of the two years following the FPFTY.

6. Provide a schedule of debt and preferred stock of utility, parent, and consolidated system as of HTY year-end and most current date. Projected new issues, retirements, and other major changes from the comparable historical data should be clearly noted. The following details are required:

- a. Date of issue.
- b. Date of maturity.
- c. Amount issued.
- d. Amount outstanding.
- e. Amount retired.
- f. Amount required.
- g. Gain or loss on reacquisition.
- h. Coupon rate.
- i. Discount or premium at issuance.
- j. Issuance expenses.
- k. Net proceeds.
- l. Sinking fund requirements.
- m. Effective interest rate.
- n. Dividend rate.
- o. Effective cost rate.
- p. Total average weighted effective cost rate.

7. Provide details on utility or parent common stock offerings for the past 5 years to present as follows, including details of any planned issuance in the FTY and the FPFTY:

- a. Date of prospectus.
- b. Date of offering.
- c. Record date.
- d. Offering period including dates and number of days.
- e. Amount and number of shares of offering.
- f. Offering ratio, if rights offering.
- g. Percent subscribed.
- h. Offering price.
- i. Gross proceeds per share.
- j. Expenses per share.
- k. Net proceeds per share in (i.) and (j.) above.
- l. Market price per share.
 1. At record date.
 2. At offering date.
 3. One month after close of offering.
- m. Average market price during offering.
 1. Price per share.
 2. Rights per share-average value of rights.
- n. Most current reported earnings per share at time of offering.
 - o. Most current reported dividends at time of offering.
8. Provide complete support for claimed common equity.

9. Provide schedules of comparative financial data and ratios for the HTY and two prior years, the FTY, and the FPFTY for the utility. Changes in Moody's/S&P ratings, noted on these schedules, shall be accompanied by the Moody's/S&P write-up of such changes, if available. The

financial data and ratios shall be supplied for the utility's parent, where applicable, if not available for the utility. Show work and formulas.:

- a. Earnings-price ratio (average).
- b. Times interest earned ratio—pre- and post-tax basis.
- c. Preferred stock dividend coverage ratio—post-tax basis.
- d. Times fixed charges earned ratio—pre-tax basis.
- e. Dividend payout ratio.
- f. AFUDC as a percent of earnings available for common equity.
- g. Construction work in progress as a percent of net utility plant.
- h. Effective income tax rate.
- i. Internal cash generations as a percent of total capital requirements.
- j. Times fixed charges earned ratio-post-tax basis.
- k. Earnings per share.
- l. Dividend per share.
- m. Average dividend yield (52-week high/low common stock price).
- n. Average book value per share.
- o. Average market price per share.
- p. Market price-book value ratio.
- q. Earnings-book value ratio (per-share basis, average book value).

10. Provide AFUDC charged by utility at the end of the HTY, projected for the end of the FTY, and projected for the end of the FPFTY.

11. Provide a schedule that shows how the AFUDC was determined, explain the method by which the amounts were calculated in each test year (HTY, FTY, and FPFTY), and indicate where each is reflected in the filing.

12. Provide the following information concerning bank notes payable for the actual per book HTY year:

- a. Line of credit at each bank.
- b. Average daily balances of notes payable to each bank, by name of bank.
- c. Interest rate charged on each bank note (prime rate, formula).
- d. Purpose of each bank note (for example, construction, fuel storage, working capital, debt retirement, etc.).
- e. Prospective future need for this type of financing.

13. If a claim is made for a cost of debt that exceeds that shown in the preceding nominal cost schedule because of convertible features, sale with warrants, or any other reason, provide a full statement of the basis for each such claim.

14. If a claim is made for compensating bank balances, provide the following information:

- a. Name and address of each bank.
- b. Types of accounts with each bank—checking, savings, escrow, other services, and the like.
- c. Average daily balance in each account.
- d. Amount and percentage requirements for compensating bank balances at each bank.

e. Average daily compensating bank balance at each bank.

f. Documents from each bank explaining compensating bank balance requirements.

g. Interest earned on each type of account.

h. A calculation showing the average daily float for each bank.

15. Set forth amount of compensating bank balances required under each of the following rate case bases:

a. Annualized test year operations at pro forma present rates.

b. Operations under pro forma proposed rates.

16. Set forth provisions of utility's and parent's charter and indentures, if applicable, which describe coverage requirements, limits on proportions of types of capital outstanding, and restrictions on dividend payouts.

17. Attach copies of the summaries of the utility's projected revenues, expenses, and capital budgets for the FTY and the FPFTY.

18. Describe long-term debt reacquisition by issue by the utility and parent as follows:

a. Reacquisition by issue by year.

b. Total gain or loss on reacquisitions by issue by year.

c. Accounting for gain or loss for income tax and book purposes.

d. Proposed treatment of gain or loss on such reacquisition for ratemaking purposes.

19. Provide a schedule showing the major components of claimed capitalization, and the derivation of the weighted costs of capital for the rate case claim. This schedule shall include a descriptive statement concerning the major elements of changes in claimed capitalization, cost rates, and overall return from comparable historical data.

20. Provide a schedule in the same format as the schedule provided in 18 above, except for the omission of the descriptive statement, for the most immediate comparable annual historical period prior to the HTY and the two calendar years most immediately preceding the rate of return claim period. Regardless of whether the capitalization claimed on the schedule provided in 18 above, includes short-term debt, this schedule should reflect capital ratios with and without short-term debt.

21. Provide the capitalization data requested in 18 and 19 above, for the parent company and for the system—consolidated.

22. Supply copies of the following documents for the utility and, if applicable, its parent:

a. Most recent annual report to shareholders including any statistical supplements.

b. Most recent SEC form 10K.

c. All SEC form 10Q reports issued within the preceding 12 months of the date of submittal of the rate increase request.

23. Supply copies of the utility's balance sheets for each month for the HTY and the prior 2 years.

24. Provide the bond rating history for the utility and, if applicable, its parent from the major credit rating agencies for the most recent five years.

25. Provide copies of all bond ratings reports relating to the utility and, if applicable, its parent for the past 2 years.

26. Supply copies of all presentations and reports by the utility's and, if applicable, its parent's management and securities analysts made on behalf of the utility, or its parent if applicable, during the past 2 years, including presentations of financial projections.

27. Provide a listing of all securities issuances for the utility and, if applicable, its parent projected for the next 2 years. The response shall identify for each projected issuance the date, dollar amount, type of security, and effective cost rate.

28. Identify any plan by the utility to refinance high cost long-term debt or preferred stock.

29. If applicable, supply a listing of all common equity infusions from the parent to the utility during the HTY. Indicate any common equity infusions anticipated in the FTY and the FPFTY calculations. In each case, identify date and dollar amount.

30. If applicable, identify the utility's common dividend payments to its parent for each of the last 5 years.

31. Provide the most current year-by-year financial projections for the utility for the next 5 years. Also, indicate the date these projections were prepared, whether approved by management, and whether the projections have been submitted to bond rating agencies.

32. Provide the utility's 5-year construction budget. If the utility has a LTIIP or a DSIC rider, describe any variations between the LTIIP, the DSIC, and the construction budgets. Prepare a schedule indicating the sources of funding for projects included in the LTIIP.

33. Identify the utility's and, if applicable, its parent's capital structure targets (percentages of capital types) for the FTY and the FPFTY. Provide the complete basis for the capital structure targets. Provide a schedule showing targets and actuals for the HTY and prior two years.

34. For each month, of the most recent 24 months, supply the utility's:

a. Short-term debt balance.

b. Short-term debt interest rate.

c. Balance of construction work in progress.

d. Balance of construction work in progress which is eligible for AFUDC accrual.

35. Identify all debt, other than instruments traded in public markets, owed to all shareholders, corporate officers, or members of the board of directors, its affiliates, parent company, or subsidiaries.

36. Provide complete support for claimed common equity rate of return.

37. Provide a summary statement of all stock dividends, splits, or par value changes during the 2-year calendar period preceding the rate case filing.

38. Provide a schedule of utility or parent stock purchases or retirements during the 2-year calendar period preceding the rate case filing. Also provide the details of any planned purchases or retirements in the FTY and the FPFTY.

39. If a claim of the filing utility is based on utilization of the capital structure or capital costs of the parent company and consolidated system, state and support the reasons for such a claim.

40. List the amount of total cash (all cash accounts) on hand from balance sheets for the HTY, the FTY, and the FPFTY.

41. List details and sources of "Other Property and Investment", Temporary Cash Investments" and "Working Funds" on the HTY-, the FTY-, and the FPFTY-year-end balance sheets.

E. Balance Sheet

1. Provide most current available Balance Sheet for the utility, its parent, and the system (consolidated).

2. Provide a comparative balance sheet for the HTY and the preceding year which corresponds with the HTY dates. Provide pro forma balance sheets for the FTY and the FPFTY using present rates and proposed rates.

3. Provide a detail of other physical property, investments in affiliated companies and other investments. Provide a schedule showing any anticipated changes for the FTY and the FPFTY.

4. Supply the amounts and purpose of special cash accounts of all types, such as:

- a. Interest and dividend special deposits.
- b. Working funds other than general operating cash accounts.
- c. Other special cash accounts and amounts (e.g., temporary cash investments).

5. Describe the nature and/or origin and amounts of notes receivable, accounts receivable from affiliates, and any other receivables, other than customer accounts, which appear on the balance sheet. Identify receivables that are greater than 15% of total receivables and limit explanation to variances greater than \$10,000.

6. Provide the amount of accumulated reserve for uncollectible accounts, method and rate of accrual, amounts accrued, and amounts written-off in each of the last three years, including the HTY.

7. Provide a list of prepayments and give an explanation of special prepayments.

8. Explain in detail any other significant (in amount, i.e., greater than 5% of total current assets) current assets listed on the balance sheet.

9. Explain in detail, including the amount and purpose, the deferred asset accounts that currently operate to affect or will at a later date affect the operating account supplying:

- a. Origin of these accounts
- b. Probable changes to this account in the near future.
- c. Amortization of these accounts currently charged to operations or to be charged in the anticipated two years following the HTY.
- d. Method of determining yearly amortization for the following accounts:
 - i. Temporary Facilities
 - ii. Miscellaneous Deferred Debits
 - iii. Research and Development
 - iv. Property Losses
 - v. Any other deferred accounts that affect operating results
10. Explain the nature of accounts payable to affiliates. Provide a breakdown by category.

11. Provide the following detail for each deferred credit on the HTY, FTY, and FPFTY balance sheet:

- a. Origin of these accounts.
- b. Account number.
- c. Amount contained on the balance sheet.
- d. Disposition policy, (e.g., amortization).
- e. Probable changes to this account in the near future.

12. Provide details of other deferred credits as to their origin and disposition policy (e.g., amortization).

13. Supply the basis for injury and damages reserve and amortization shown on the HTY, FTY, and FPFTY balance sheets.

14. Provide details for any significant reserves, other than depreciation bad debt, injury and damages, appearing on HTY, FTY, or FPFTY balance sheets.

15. Provide an analysis of unappropriated retained earnings for the HTY and three preceding calendar years.

16. Describe the purpose of any advances made by the utility to its parent and describe all terms and conditions associated with such advances for the HTY and preceding two years including an estimate of future advances or repayments that are expected to occur in the FTY and the FPFTY.

F. Income Statement and Statement of Cash Flows

1. Provide most current available income statement for the utility, the parent, and the company as a whole (consolidated).

2. Prepare Summary Income Statements for the HTY, FTY, and FPFTY showing the following:

- a. Column 1—Book recorded statement for each test year.
- b. Column 2—Adjustments to annualize and normalize revenue and expenses under present rates.
- c. Column 3—Income statement under present rates after adjustments in Column 2.
- d. Column 4—Requested increase and corresponding changes with increase.
- e. Column 5—Income statement under proposed rates.
- f. Expenses may be summarized by the following expense classifications for purposes of this statement:

Operating Expenses (by category)

Depreciation

Amortization

Taxes

Other than Income Taxes

Federal Taxes

State Taxes

Deferred Federal

Deferred State

Income Tax Credits

Taxes Applicable to Other Income and Deductions

Other Credits and Charges, etc.

Interest Charges and all amortization of Premiums and/or Discounts and Expenses on Debt issues

Total Interest

g. Footnote each adjustment in any of the above statements with an explanation in sufficient clarifying detail.

3. Provide comparative operating statements for the FPFTY and the immediately preceding two years showing increases and decreases between the three periods. Revenues and expenses shall be summarized by the major account classifications for the applicable industries' Uniform System of Accounts (USoA). These statements should supply detailed explanation of causes of the major variances between the FPFTY and two preceding years detailed by account number. Major variances are greater than 15% of total variances and limit explanation to variances greater than \$10,000.

4. If the schedule provided in item 3 is based upon budgeted data for a FTY, provide a schedule similar to that required in item 3 which is based upon actual data for the HTY.

5. Expenses shall be summarized by the USoA expense classifications for purposes of the income statement.

6. If a utility has separate operating divisions, an income statement must be shown for each division, plus an income statement for the utility as a whole.

7. Provide operating income claims under:

- a. Present rates.
- b. Pro forma present rates.
- c. Pro forma proposed rates.

8. Provide rate of return on original cost under:

- a. Present rates.
- b. Pro forma present rates.
- c. Pro forma proposed rates.

9. Provide a statement of cash flows under present rates that sets forth all cash inflows from customer rates, depreciation, deferred taxes, external financing, investment income, and all other sources of cash, and all cash outflows to pay for utility operations, administrative and general expenses, taxes, capital investments, dividends, and other uses of funds.

10. Provide a statement of cash flows under proposed fully projected future test year rates that sets forth all cash inflows from customer rates, depreciation, deferred taxes, external financing, investment income, and all other sources of cash, and all cash outflows to pay for utility operations, administrative and general expenses, taxes, capital investments, dividends, and other uses of funds.

G. Operating Revenues

1. Prepare a summary of operating revenues for the FPFTY, the FTY, and the HTY, providing the following information for each classification of customers:

- a. Number of customers per class as of year-end;
- b. Total utility sales volume in customary units;
- c. Total utility revenues; and
- d. Customers' penalties and miscellaneous revenues.

2. Provide a summary of operating revenues for the HTY and adjustments anticipated for the FTY and the FPFTY, providing the following information for each classification of customers and for customers' penalties and miscellaneous revenues:

- a. Revenues;
- b. Annualizing and normalizing adjustments to arrive at adjusted operating revenues for ratemaking;
- c. Proposed increase in operating revenues;
- d. Percent increase in operating revenues; and
- e. Operating revenues under proposed rates.

3. State the manner in which revenues are being presented for ratemaking purposes and provide details using one of the following methods:

- a. Accrued Revenues.
- b. Billed Revenues.
- c. Cash Revenues.

4. If revenue accruing entries are made on the books at the end of each fiscal period, give entries made accordingly at the end of the HTY and at the beginning of the FTY. State whether they are reversed for ratemaking purposes and the impact on the FPFTY.

5. State whether any adjustments have been made to expenses in order to present such expenses on a basis comparable to the manner in which revenues are presented in this proceeding (i.e., accrued, billed, or cash).

6. Provide a schedule of present and proposed tariff rates showing dollar change and percent of change by rate class. Prepare comparative schedule of monthly (or quarterly where applicable) billings at existing and at proposed rates to demonstrate the impact of proposed rates over a range of usages. Include an explanation of any rate re-structure and the reason therefore. Provide a copy of the proposed tariff or tariff supplement on a red line basis to identify any changes.

7. Provide detailed computations of the determination of accrued revenues as of the HTY year-end and year-end immediately preceding the HTY, together with a detailed explanation of the procedures and methods used in developing accrued revenues and the impact on the FTY and the FPFTY.

8. Provide a detailed breakdown of miscellaneous revenues for the HTY and the two years immediately preceding the HTY. For the HTY, provide a monthly breakdown and an explanation of monthly variances greater than 15%. Detail any anticipated variances in the FTY and the FPFTY.

9. Provide for the HTY and the current year-to-date, the monthly usage for each classification of customers. Provide projections into the FTY and the FPFTY.

10. Provide by customer classification for the HTY and for the 2 prior years the number of customers and usage, the projected number of customers, and the projected usage for the 2 subsequent years.

11. Provide for the HTY and the 2 prior years usage and billings for the ten largest customers at current rates. Provide the HTY, the FTY, and the FPFTY usage priced at proposed rates.

12. If applicable, provide for the HTY and the 2 prior years' usage and billings for the ten largest sales for resale customers if such sales are not included in sales to the ten largest customers requested in G.11, above. Provide projections for the FTY and the FPFTY.

13. Provide growth patterns of usage and customer numbers per rate class, using historical and projected data.

14. Provide, for the FPFTY, a schedule by tariff rates and by service classifications showing proposed increase and percent of increase.

15. If a utility is affiliated with another utility, explain the effects, if any, upon allocations factors used in the rate filing of current or recent rate increases allowed to the other utility segment (or segments) of the company.

16. Provide supporting data detailing curtailment adjustments, procedures, and policies.

17. Provide details of the utility's attempts to recover uncollectible and delinquent accounts.

18. Describe the procedures involved in determining whether forfeited discounts or penalties are applied customer billing.

19. Provide annualization of revenues as a result of rate changes occurring during the test year, at the level of operations as of end of the test year.

20. Provide a detailed billing analysis supporting present and proposed rates by customer classification and/or tariff rate schedule.

21. Provide a schedule showing sales from all customer classes by unit per month for the HTY and three preceding 12-month periods. Provide also the projections for the FTY and the FPFTY.

22. Provide the following statements and schedules. The schedules and statements for the HTY should be reconciled with the summary operating statement. The schedule should also show number of customers and unit of sales, and should provide number of customers by service classification at beginning and end of HTY. Provide also projections for the FTY and the FPFTY.

a. An operating revenues summary for the HTY and the year preceding showing the following:

i. For each major classification of customers

A. Units sold.

B. Dollar Revenues.

C. Forfeited Discounts (Total if not available classification).

D. Other and Miscellaneous revenues that are to be taken into the utility operating account along with their related costs and expenses.

ii. A detailed explanation of all annualizing and normalizing adjustments showing method utilized and amounts and rates used in calculation to arrive at adjustment.

iii. Segregate, from recorded revenues from the HTY and prior year, the amount of revenues that are contained therein, by appropriate revenue categories, from:

A. Fuel or energy Adjustment Surcharge

B. State Tax Surcharge

C. Any other surcharge being used to collect revenues.

D. Provide explanation whether any of the surcharges are not applicable to the utility's operations.

23. Provide details of sales for resale, based on periods five years before and projections for five years after the FPFTY. List customers, units sold or projected to be sold, revenues received or projected to be received, source of units sold, contracted or spot sales, whether sales are to affiliated companies, and any other pertinent information.

H. Operating Expenses

1. Provide a summary of operating expenses by operating expense account for the HTY and the two preceding 12-month periods.

2. Provide a summary of claimed operating expenses for the HTY, including annualizing and normalizing adjustments to arrive at adjusted future operating expenses for ratemaking, including supporting data for the FTY and the FPFTY, where applicable.

3. List extraordinary property losses as a separate item, not included in operating expenses or depreciation and amortization (not included in cost of service when the gain or loss on this property has occurred or is likely to occur in the FTY or FPFTY. The proposed ratemaking treatment of extraordinary gains and losses must also be disclosed). Sufficient supporting data must be provided, such as explanation and breakdown of costs.

4. Concerning rate case expense:

a. Supply detailed calculations of normalized rate case expense, including supporting data for outside services rendered.

b. Provide justification for the Company's proposed normalization period for the current rate case.

c. Provide the details by category with related dollar amounts for each category of the rate case expense claim (include the actual billings or invoices, and contracts where applicable, in support of each category of rate case expense).

d. Provide the docket numbers and filing dates indicating fully litigated or settled, for the last three base rate cases filed with the Commission.

e. Provide the details by category with related dollar amounts for each comprising the actual expenses of the prior rate case.

5. Supply exhibits showing an analysis, by functional accounts, of the charges by affiliates (service corporations, etc.) for services rendered and included in claimed operating expenses of the filing company for the HTY, the 12-month period ended prior to the HTY, and claimed expenses for the FTY and the FPFTY:

a. Supply a copy of contracts, if applicable.

b. Explain the nature of the services provided.

c. Explain the basis on which charges are made.

d. If charges are allocated, identify allocation factors used for all parent/affiliate companies along with the filing company and also identify all parent/affiliate companies not receiving allocation with an explanation why not.

e. Supply the components and amounts comprising the expense in this account.

f. Provide details of initial source of charge and reason thereof.

6. Describe costs relative to leasing equipment, computer rentals, and office space, including terms and conditions of the lease (including but not limited to, beginning and end date(s) of lease(s), monthly or annual dollar amount of payment(s), etc. Explain the method of calculating monthly or annual payments. If allocated from the parent company, provide an explanation and supporting documentation for the method of allocation.

7. Submit detailed calculations (or best estimates) of the cost resulting from storm, climate or similar damage

in the HTY and claimed amounts for the FTY and the FPFTY. Fully explain the basis for any estimates.

8. Submit schedules for the HTY and for the 12-month prior periods showing by major components, if included in claimed test year expenses, the expenses incurred in each of the following expense categories. Explain major variances between the HTY expenses and those expenses for the prior two 12-month period. Additionally, provide similar schedules showing claimed above-the-line amounts for the FTY and the FPFTY.

- a. Miscellaneous general expenses.
- b. Outside service expense.
- c. Regulatory commission expenses.

d. Advertising expenses broken down by category for claimed amounts, including but not limited to advertising engaged in by trade associations whenever the utility has claimed a contribution to the trade association as a ratemaking claim.

e. Research and development expenses, provide a listing of major projects.

f. Charitable and civic contributions, by recipient and amount, showing types of social and service organization memberships paid for, the cost thereof, the accounting and tax treatment, and whether included in above-the-line claimed expenses.

g. Lobbying expenses, including but not limited to amounts that are a portion of membership dues.

I. *Employee Costs, Including Related Costs Such as Benefits And Retiree Costs*

1. Concerning employee numbers, using calendar-year-end counts.

a. Provide employee counts, total and by operational divisions and by managerial, nonunion, and union categories for the HTY, the FTY, and the FPFTY.

b. Indicate number of employee positions that have been eliminated since the commencement of the HTY or are expected to be eliminated during the FTY or FPFTY.

c. Indicate whether employment changes have happened due to, or are expected to happen as a result of, attrition, reductions in force, sale or acquisition of operations or facilities, mergers, etc., in the HTY, the FTY, and the FPFTY.

d. Provide a copy of all wage, salary, incentive compensation and bonus, benefit, leave, insurance, pension/thrift, and similar plan documents.

2. Submit detailed computation of adjustments to operating expenses for salary, wage, and fringe benefit increases (union and non-union merit, progression, promotion, and general, etc.) granted during the HTY, the FTY, and the FPFTY. Supply data for the HTY, the FTY, and the FPFTY claims showing:

a. Payroll expense (regular and overtime separately) by categories of operating expenses, i.e., maintenance, operating transmission, distribution, other (specify by type). Indicate management, non-union, and union.

b. Date, percentage increase and annual amount of each general payroll increase by category, i.e., maintenance, operating transmission, distribution, other. Indicate management, non-union, and union and provide supporting documentation for each increase.

c. Dates and annual amounts of merit, incentive plan, and/or bonus increases and management salary adjustments by category, i.e., maintenance, operating transmission, distribution, other.

d. Total annual payroll increases by date and percentage in the HTY and as anticipated for the FTY and the FPFTY.

e. Proof that the actual payroll plus the increases equal the payroll expense claimed in the supporting data (by categories of expenses) for the HTY. Provide assurance that similar verification will be conducted for the FTY and FPFTY and indicate procedures for addressing any material differences between estimated expenses and actual expenses for the FTY and FPFTY.

f. Detailed list of employee benefits and cost thereof for union and non-union personnel. Include specific benefits and costs for executives and officers.

g. Support the annualized pension cost figures.

h. If the pension cost figures include any unfunded pension costs, state the unfunded portion.

3. Provide the following payroll and employee benefit data—regular and overtime—separately for the HTY and for the 12-month period immediately prior to the HTY. Provide projections for the FTY and the FPFTY.

a. Average and year-end numbers of employees and the unadjusted annual payroll expense and employee benefit expense associated with contract and temporary employees.

b. Summary of employee benefit changes granted in HTY or to be granted in or anticipated for the FTY or FPFTY.

c. Claimed payroll expense in employee benefit expense.

d. Percentage of payroll expense and employee benefit expense applicable to operation and maintenance expenses and the basis thereof. Provide similar percentages for the HTY and the two immediately preceding years, and the claimed percentages for the FTY and the FPFTY.

e. Level of related bonus payments included in the cost of service. Provide information for the two years preceding the HTY and any changes since the last rate case. Provide projections for the FTY and the FPFTY.

f. Most recent insurance premiums for each type of insurance coverage, both employee benefit and those purchased for the utility, reflected in the utility's HTY. Provide estimated premiums for the FTY and the FPFTY and explain the basis for the estimates. Indicate whether utility is self-insured or third-party insured. Indicate any reserves for claims. Indicate extent to which employees contribute to such coverage.

g. Level of payments made to industry or professional organizations included in the cost of service along with a description of each payee organization and purpose for the HTY and provide projections for the FTY and the FPFTY, normalized for applicable year. That is, prepayments and late payments are to be adjusted to time period applicable.

h. Explanation of how the utility accounts for vacation, sick, military, and other off-the-job pay for book and ratemaking purposes. Quantity the amounts for each account for the HTY and provide projections for the FTY and the FPFTY.

4. Submit a schedule showing any deferred income and consultant fees, paid to both corporate officers and em-

ployees in the HTY and the two 12-month period ended prior to the HTY. Provide projections for the FTY and the FPFTY.

5. Pension Expenses and Other Post-Employment Benefits Expense (OPEB)

a. Provide the three most recent actuarial studies for both pension expense and post-employment benefits other than pensions (OPEBs). Indicate whether it is expected to fluctuate up or down and provide details of the plan to accommodate for anticipated increases in costs.

b. Identify the total pension expense understatement of the Statement of Accounting Standards (SFAS) No. 87 for the HTY and the portion charged to operation and maintenance (O&M) as well as other discreet cost centers. Include an analysis showing the contribution to the pension plan and the amount deferred or expensed for each of the HTY and preceding two years. Also provide any estimates for the FTY and the FPFTY providing supporting calculations and explanation of the basis for such estimates.

c. Provide an analysis of OPEBs showing the accrual amount under SFAS No. 106 and the pay-as-you-go expense (cash basis).

d. Reconcile the HTY and FTY test year SFAS No. 106 expense levels with the amount identified in the actuarial report.

e. Identify the actual or projected amounts contributed to SFAS No. 106 funds for the HTY, the FTY, and the FPFTY. Identify the actual or projected dates and amounts of the contributions.

f. Explain the funding options or plans which are being used for SFAS No. 106 costs. Identify the portion of costs which are eligible for tax preferred funding.

g. State whether the utility is studying or anticipating any changes to its postretirement benefits offered to employees as a result of SFAS No. 106 or for other reasons. If yes, provide the study and explain the anticipated changes.

h. State whether the HTY expenses reflect any accruals for postemployment benefits under SFAS No. 112. If yes, provide complete details including supporting documentation, assumptions, and funding mechanisms.

i. Support the annualized pension cost figures by addressing whether these figures include any unfunded pension costs and explain provisions to address any unfunded costs.

j. Provide a copy of the utility's pension funding policy.

6. Provide proof that the actual payroll plus the increases equal the payroll expenses claimed in the supporting data by categories of expenses for the HTY. Provide assurance that similar verification will be conducted for the FTY and the FPFTY and indicate procedures for addressing any material differences between estimated expenses and actual expenses for the FTY and the FPFTY. Provide the same analysis for other employee, former employee, and retiree costs and for claimed expenses.

7. Submit detailed computation of adjustments to operating expenses for salary, wage, and fringe benefit increases (union and nonunion merit, progression, promotion, and general) granted during the HTY. Supply data for the HTY and projections for the FTY and the FPFTY, showing:

a. Actual payroll expense (regular and overtime separately) by categories of operating expenses, i.e., maintenance, operating transmission, distribution, other.

b. Date, percentage increase and annual amount of each general payroll increase.

c. Dates and annual amounts of merit increases or management salary adjustments.

d. Total annual payroll increases in the HTY and the 12-month period ended prior to the HTY.

e. Detailed list of employee benefits and cost thereof for union and nonunion personnel. Specific benefits for executives and officers should be identified separately and costs thereof.

f. Support for the annualized pension cost figures by providing the following:

i. State whether these figures include any unfunded pension costs. Explain.

ii. Provide the most current and two prior actuarial studies used for determining pension accrual rates.

g. Schedule showing any deferred income and consultant fees, paid to corporate officers and employees in the HTY and the 12-month period ended prior to the HTY.

8. Provide the following payroll and employee benefit data—regular and overtime—separately for the HTY and for the two 12-month period immediately prior to the HTY. Provide also the projections for the FTY and the FPFTY.

a. The average and year-end number of employees and the unadjusted annual payroll expense and employee benefit expense associated with union personnel.

b. The average and year-end number of employees and the unadjusted annual payroll expense and employee benefit expense associated with non-union personnel.

c. The average and year-end numbers of employees and the unadjusted annual payroll expense and employee benefit expense associated with management employees, if different than Subsection II.I.8.b.

d. The summary of the wage rate, salary, and employee benefit changes granted or to be granted during the year.

e. The claimed test year payroll expense in employee benefit expense.

f. The percentage of payroll expense and employee benefit expense applicable to operation and maintenance expenses and the basis thereof.

9. If the utility has included any costs associated with canceled construction projects or obsolete inventory in requested rates, separately identify the items, provide the related amounts and explain the reason for the cancellation or obsolescence.

10. Provide a list of reports, data, or statements requested by and submitted to the Commission during and subsequent to the HTY.

11. Provide a detail analysis of Special Services pursuant to USoA.

12. List and explain all non-recurring abnormal or extraordinary expenses incurred in the HTY which will not be present in the FTY or the FPFTY.

13. List and explain all expenses included in the HTY, FTY, and FPFTY which do not occur yearly but are of a nature that they do occur over an extended period of years (e.g., non-yearly maintenance programs, etc.).

14. Using the adjusted year's expenses as adjusted under present rates as a base, give detail necessary for clarification of all expenses adjustments. Give clarifying detail for any such adjustments that occur due to changes in accounting procedure, such as charging a particular expense to a different account than was used previously. Explain any extraordinary declines in expense due to such change of account use.

15. Identify any anticipated change in expense resulting from addition or removal of utility plant. Provide the annualized expense impact of the change or changes for the HTY, the FTY, and the FPFTY and calculate the adjustment to the prior expense to reflect projected on-going expense.

16. Submit a statement of past and anticipated changes, since the previous rate case, in major accounting procedures.

17. Adjustments which are estimated shall be fully supported by basic information reasonable necessary.

18. Provide explanation, calculations and documentation of adjustments for projecting Operation Expenses for the FTY and the FPFTY.

19. If a utility's business extends into different states or jurisdictions, then statements must be shown listing Pennsylvania jurisdictional data, other state data and federal data separately and jointly (balance sheets and operating accounts).

J. Depreciation

1. Provide a description of the depreciation methods used to calculate annual depreciation amounts and depreciation reserves, together with a discussion of the factors which were considered in arriving at estimates of service life and dispersion by account. Supply a comprehensive statement of any changes made in method of depreciation, including the impact of DSIC projects on service lives. Provide dates of all field inspections and facilities visited.

2. Include an exhibit and charts depicting the original and estimated survivor curves and a table presenting of the original life table plotted on the chart for each account where the retirement rate method of analysis is utilized. If any utility plant was excluded from the measures of value because it was deemed not to be "used and useful" in the public service, supply a detailed description of each item of property and the associated cost.

3. Provide the surviving original cost at HTY year-end by vintage by account and include applicable depreciation reserves and accruals. These calculations should be provided for plant in service as well as other categories of plant, including contributions in aid of construction and customers' advances for construction, and anticipated retirements associated with any construction work in progress claims (if applicable).

4. Provide a comparison of the calculated depreciation reserve used for ratemaking purposes compared to the book reserve by account at the end of the HTY, the FTY, and the FPFTY, if they differ.

5. Supply a schedule by account and depreciable group showing the survivor curve and annual accrual rate estimated to be appropriate.

a. For the purposes of this filing.

b. For the purposes of the most recent rate increase filing prior to the current proceedings.

c. Supply an explanation for all changes in annual accrual rates by account or by depreciable group.

d. Supply a comprehensive statement of any changes made in method of depreciation and in the selection of average service lives and dispersion as a result of implementing the DSIC.

6. Provide an exhibit showing gross salvage, cost of removal, and net salvage for the three (3) most recent calendar or fiscal years by account.

7. Provide a table, showing the cumulative depreciated original cost by year of installation for utility plant in service at the end of the HTY. (depreciable plant only) as claimed in the measures of value, in the following form:

a. Year installed.

b. Original cost—the total surviving cost associated with each installation year from all plant accounts.

c. Calculation depreciation reserve—the calculated depreciation reserve associated with each installation year from all plant accounts.

d. Depreciated original cost—(Column B minus Column C).

e. Total—cumulation year by year of the figures from Column D.

f. Column E divided by the total of the figure in Column D.

8. If material and supplies comprise part of the cash working capital claim, attach an exhibit showing the actual book balances for materials and supplies by month for the thirteen months prior to the end of the HTY. Explain any abrupt or significant changes in monthly balances.

9. Regardless of whether claim for net negative or positive salvage is made, attach an exhibit showing gross salvage, cost of removal, and net salvage for the HTY and four previous years by account.

10. Explain in detail by statement or exhibit the appropriateness of claiming any additional items, not previously mentioned, in the measures of value.

K. Taxes

1. Provide a copy of the Corporate Federal Tax Returns and Corporate State Tax Returns, including supporting schedules for the most recent 3 years and, if applicable, any amended returns.

2. Provide a schedule of Federal and Pennsylvania taxes, other than income taxes, calculated on the basis of test year per book, pro forma at present rates, and pro forma at proposed rates, to include the following categories:

a. Social Security.

b. Unemployment.

c. Capital Stock.

d. Public Utility Realty.

e. PUC assessment.

f. Other property.

g. Sales and use tax.

h. Any other appropriate categories.

3. Provide a copy of the most current Pennsylvania Corporate Tax report and the most current Pennsylvania Corporate Tax Settlement.

4. Submit a schedule, if applicable, showing the Gross Receipts Tax base used in computing Pennsylvania Gross Receipts Tax adjustment.

5. Submit details of calculations for taxes, other than income, where a utility is assessed taxes for doing business in another state, or on its property located in another state.

6. State amount of the debt interest utilized for income tax calculations and details of debt interest computations under each of the following rate case bases:

a. Actual HTY.

b. Annualized HTY year-end.

c. Proposed FTY and FPPTY year-end, using present rates and proposed rates.

7. State amount of debt interest utilized for income tax calculations which has been allocated from the debt interest of an affiliate, and details of the allocation, under each of the following rate case bases:

a. Actual HTY.

b. Annualized HTY year-end.

c. Proposed FTY and FPPTY year-end, using present rates and proposed rates.

8. Provide the following income tax data:

a. Consolidated income tax adjustments, if applicable.

b. Interest for tax purposes (basis).

9. Submit a schedule showing for the last 3 years' income tax refunds, plus interest, net of taxes, received from the federal government due to prior year claims.

10. Provide detailed computations showing the deferred income taxes derived by using accelerated tax depreciation applicable to post-1969 utility property that increases productive capacity, and accelerated depreciation (ADR) rates on property (separate between state and federal; also, rate used). If based on the HTY, justify.

a. State whether tax depreciation is based on all rate base items claimed as of the end of the FTY, and whether it is the annual tax depreciation at the end of the FTY.

b. Reconcile any difference between the deferred tax balance, as shown as a reduction to measures of value (rate base), and the deferred tax balance as shown on the balance sheet.

c. Make appropriate adjustment and projections for the FPPTY.

11. Submit a schedule showing a breakdown of the deferred income taxes by federal and state per book, pro forma, existing rates, and under proposed rates.

12. Submit a schedule showing a breakdown of accumulated investment tax credits, (3%, 4%, 7%, 10%, and 11%), together with details of methods used to write-off the unamortized balances.

13. Submit a schedule showing the adjustments for taxable net income per book, including below-the-line items, and pro-forma under existing rates, together with an explanation of any difference between the adjustments. Indicate charitable donations and contributions in the tax calculation for ratemaking purposes.

14. Submit detailed calculations supporting taxable net income before federal and state income taxes where the income tax is subject to allocation due to operations in another state, or due to operation of other taxable utility or nonutility business, or by operating divisions or areas.

15. Submit detailed calculations showing the derivation of deferred income taxes for amortization of repair allowance if such policy is followed. Submit additional schedules if the utility has more than one accounting area.

16. State the utility's policy and practice on capitalization of repairs maintenance. If the utility has opted out of Treasury Regulations 1.162 to 1.263, submit depreciation/amortization schedule to reflect depreciation as taken over the useful life of the asset(s).

17. Provide details of the Federal Surtax Credit allocated to the Pennsylvania jurisdictional area, if applicable.

18. Furnish a breakdown of major items comprising prepaid and deferred income tax charges and other deferred income tax credits, reserves and associated reversals on liberalized depreciation.

19. Explain the reason for the use of cost of removal of any retired plant figures in the income tax calculations.

20. Submit the corresponding data applicable to Pennsylvania Corporate Income Tax deferral.

a. Show the amounts of straight line depreciation and accelerated tax depreciation, the difference between which gave rise to the normalizing tax charged back to the HTY operating statement.

b. Show normalization for both federal and state income taxes.

c. Show tax rates used to calculate tax deferral amount.

21. Provide the accelerated tax depreciation and the book depreciation used to calculate HTY deferrals in amounts segregated as follows:

a. Property installed prior to 1970.

b. Property installed subsequent to 1969 (indicate increasing capacity additions and non-increasing capacity additions).

22. State whether all tax savings due to accelerated depreciation on property installed prior to 1970 have been passed through to income. If not, explain.

23. Explain how the utility handled in the HTY the reduction in tax caused by the 2008 change in method for accounting for repairs. Explain the future impact of the change in accounting method on taxable income relative to the FTY and the FPPTY.

24. Show any income tax loss/gain carryovers from previous years that may affect the HTY income taxes or the FTY or the FPPTY Income Taxes. Show loss or gain carryovers by years of origin and amounts remaining by years at the end of the HTY.

25. State whether the utility eliminates tax savings by the payment of actual interest on construction work in progress not in rate base claim. If response is affirmative:

a. Set forth amount of construction claimed in this tax savings reduction and explain the basis for this amount.

b. Explain the manner in which the debt portion of this construction is determined for purposes of the deferral calculations.

c. State the interest rate used to calculate interest on this construction debt portion and the manner in which it is derived.

d. Provide details of calculation to determine tax savings reduction and state whether state taxes are increased to reflect the construction interest elimination.

26. Provide a detailed analysis of taxes accrued per books as of year-end for the HTY and as anticipated for the FTY and the FPFTY. Also supply the basis for the accrual and the amount of taxes accrued monthly.

27. For the HTY as recorded on the HTY's operating statement:

a. Supply the amount of federal income taxes actually paid.

b. Supply the amount of the federal income tax normalizing charge to tax expense due to excess of accelerated tax depreciation over book depreciation.

c. Supply the normalizing tax charge to federal income taxes for the 10% Job Development Credit during test year.

d. Provide the amount of the credit of federal income taxes due to the amortization or normalizing yearly debit to the reserve for the 10% Job Development Credit.

e. Provide the amount of the credit to federal income taxes for the normalizing of any 3% Investment Tax Credit Reserve that may remain on the utility books.

28. Provide the debit and credit in the HTY to the deferred taxes due to accelerated depreciation for federal income taxes and provide the debit and credit for that Job Development Credits for the HTY.

29. Reconcile all data given any answers to questions on income taxes charged on the HTY operating statement with regard income taxes paid, income taxes charged because of normalization and credits due to yearly write-offs of past years income tax deferrals and from normalization of investment tax and development credits. (Both federal and state income taxes).

30. With respect to determination of federal and state income taxes:

a. Show income tax results of the annualizing and normalizing adjustments to the HTY and FTY before any rate increase.

b. Show income taxes for the annualized and normalized HTY and FTY.

c. Show income tax effect of the rate increase requested.

d. Show income taxes for the normalized and annualized test year after application of the full rate increase.

e. Provide projections for the FPFTY.

31. In adjusting the HTY to an annualized year under present rates, explain any changes that may be due to book or tax depreciation change and to debits and credits to income tax expense due to accelerated depreciation, deferred taxes, job development credits, tax refunds, or other items.

32. State whether section 1552 of the Internal Revenue Code (26 U.S.C. § 1552) or 26 CFR 1.1552-1 (1983) apply to the utility and its parent. If these provisions are not applicable, state why they are not applicable. State whether the parent company has filed a consolidated income tax return for the group. Additionally, if the provisions are applicable:

a. State what option has been chosen by the group.

b. Provide, in summary form, the amount of tax liability that has been allocated to each of the participating members in the consolidated income tax return for the test year and the most recent 3 years for which data is available.

c. Provide a schedule, in summary form, of contributions, which were determined on the basis of separate tax return calculations, made by each of the participating members to the tax liability indicated in the consolidated group tax return. Provide total amounts of actual payments to the tax depository for the tax year, as computed on the basis of separate returns of members.

d. Provide the most recent annual income tax return for the group.

e. Provide details of the amount of the net operating losses of any member allocated to the income tax returns of each of the members of the consolidated group for the most recent years for which data is available, together with a summary of the actual tax payments for those years.

f. Provide details of the amount of net negative income taxes, after all tax credits are accounted for, of any member allocated to the income tax return on each of the members of the consolidated group for the 3 most recent years for which data is available, together with a summary of the actual tax payments for those years.

g. Explain any changes in accounting method under IRC Section 446 and 448 and the effects of such changes on the utility's federal taxable income for the HTY, FTY, and FPFTY.

L. *Long Term Infrastructure Improvement Plan (LTIIP) And Annual Asset Optimization Plan (AAO Plan)*

1. Provide a copy of the most recent Long Term Infrastructure Improvement Plan (LTIIP) approved by the Commission as well as any pending LTIIP filed by the utility.

2. Provide a copy of all of the AAO Plans approved since the most recent approved LTIIP as well as the any pending AAO Plans filed by the utility.

3. Document impact on service reliability, safety enhancements, and operational savings resulting from LTIIPs and AAO Plans such as reduced equipment-failure-related expenses, fewer field investigations for outages, fewer complaints, for example.

M. *Industry Specific Data—This subsection details additional information, based on specific utility type, that is required in a FPFTY filing.*

M.1. *GAS, STEAMHEAT, AND PIPELINE UTILITIES ONLY*

1. Provide a description of the property of the utility and an explanation of the system's operation using available projections if actual data is unavailable. This description should include, but not be limited to, the following:

a. If the utility has various gas service areas, indicate if they are integrated such that the gas supply is available to all customers.

b. Provide all pertinent information regarding utility policy related to the addition of new consumers in the utility's service area.

c. Explain how the utility obtains its gas supply, as follows:

i. Explain how the utility stores or manufactures gas; if applicable.

ii. State whether the utility has peak shaving facilities.

iii. Provide details of coal-gasification programs, if any.

iv. Describe the potential for emergency purchases of gas.

v. Provide the amount of gas in Mcf supplied by various suppliers in the test year (include a copy of all contracts).

vi. Provide the amount of gas in Mcf supplied from utility-owned wells during the test year.

d. Provide plans for future gas supply, as follows:

i. Supply details of anticipated gas supply from the utility's near-term development of gas wells, if any.

ii. Provide gas supply agreements and well development ventures and identify the parties thereto.

e. Indicate any anticipated curtailments and explain the reasons for the curtailments.

f. Provide current information on any FERC action or programs that may affect, or tend to affect, the natural gas supply to the gas utility.

2. Submit a schedule showing a reconciliation of the historic test year and two prior twelve-month periods showing a breakdown of City Gate Requirements, City Gate Source volumes, Mcf sales, and line losses. List all amounts of gas purchased, manufactured, used, transported, and sold.

3. Provide calculations substantiating the adjustment to revenues for annualization of changes in number of customers and annualization of changes in volume sold for all customers for the test year.

a. Break down changes in number of customers by rate schedules.

b. If an annualization adjustment for changes in customers and changes in volume sold is not submitted, explain why not.

4. Provide the three most recent Annual Unaccounted-for Gas (UFG) Reports filed with the Commission.

5. Provide the schedules included in the three most recent Purchased Gas Cost (PGC) filings that show the reconciliation of the calculation of UFG in the Annual UFG Report and the calculation of the UFG used to determine the Company's retainage rate.

6. Submit a schedule showing the sources of gas supply associated with annualized Mcf sales.

7. If the utility has a Fuel Adjustment Clause:

a. State the base fuel cost per Mcf chargeable against basic customers' rates during the test year. If there was any change in this basic fuel charge during the HTY, give details and explanation thereof.

b. State the amount in which the fuel adjustment clause cost per Mcf exceeds the fuel cost per Mcf charged in base rates at the end of the HTY.

c. If fuel cost deferment is used at the end of the HTY, give:

i. The amount of deferred fuel cost contained in the operating statement that was deferred from the 12-month operating period immediately preceding the HTY.

ii. The amount of deferred fuel cost that was removed from the HTY and deferred to the period immediately following the HTY.

d. State the amount of Fuel Adjustment Clause revenues credited to the HTY operating account.

e. State the amount of fuel cost charged to the operating expense account in the HTY which is the basis of Fuel

Adjustment Clause billings to customers in that year. Provide summary details of this charge.

f. From the recorded HTY operating account, remove the Fuel Adjustment Clause Revenues. Also remove from the HTY recorded operating account the excess of fuel cost over base rate fuel charges, which is the basis for the Fuel Adjustment charges. Explain any difference between FAC Revenues and excess fuel costs. This is intended to limit the operating account to existing customers' base rate revenues and expense deductions relative thereto.

g. Provide projections for the FTY and the FPFTY.

8. Submit a schedule showing fuel cost in excess of base compared to fuel cost recovery for the period two months prior to HTY and the HTY.

9. Supply a detailed analysis of Purchased Gas for the HTY and the prior twelve months. Provide projections for the FTP and the FPFTY.

10. Submit calculations supporting energy cost per Mcf and operating ratio used to determine increase in costs other than production to serve additional load.

11. Submit detailed calculations for bulk gas transmission service costs under supply and/or interconnection agreements.

12. Submit a schedule for gas producing units retired or scheduled for retirement subsequent to the HTY showing station, units, Mcf capacity, hours of operation during HTY, net output produced, cents/Mcf of maintenance, and fuel expenses.

13. Provide a statement explaining the details of firm gas purchase (long-term) contracts with affiliated and nonaffiliated utilities, including determination of costs, terms of contract, and other pertinent information.

14. Provide intrastate operations percentages by expense categories for two years prior to the HTY. Provide projections for the FTY and the FPFTY.

15. Provide a schedule showing suppliers, Mcf purchased, cost (small purchases from independent suppliers may be grouped), emergency purchases, listing same information; curtailments during the year; gas put into and taken out of storage; line loss, and any other gas input or output not in the ordinary course of business.

16. Provide a schedule showing the determination of the fuel costs included in the base cost of fuel.

17. Providing a schedule showing the calculation of any deferred fuel costs shown in Account 174. Also, explain the accounting, with supporting detail, for any associated income taxes.

18. Submit a schedule showing maintenance expenses, gross plant, and the relation of maintenance expense thereto as follows:

a. Gas Production Maintenance Expenses per Mcf production, per \$1,000 Mcf production and per \$1,000 of Gross Production Plant;

b. Transmission Maintenance Expenses per Mmcf mile and per \$1,000 of Gross Transmission Plant;

c. Distribution Maintenance Expense per customer and per \$1,000 of Gross Distribution Plant;

d. Storage Maintenance Expenses per Mmcf of Storage Capacity and \$1,000 of Gross Storage Plant. This schedule shall include three years prior to HTY and projections for the FTY and the FPFTY.

19. Prepare a five-column schedule of expenses, as described below, for the periods listed (supply sub-accounts, if significant, to clarify basic accounts). Provide the annual recorded expense by accounts claimed amounts. Include all accounts used but not specifically listed below:

- a. Columns 1 and 2—The two preceding years to the HTY.
- b. Column 3—HTY.
- c. Column 4—FTY.
- d. Column 5—FPPTY.

OPERATING EXPENSES

- Steam Production
- Manufactured Gas Production
- Raw Gas Material
- Other Storage Expenses
- Transmission Expense
- Distribution Expense
- Customer Accounts Expense
- Administrative and General Expenses
- Maintenance Expenses
- Total Operating Expenses

OTHER EXPENSES

- Depreciation Expenses
- Taxes Other than Income

INTEREST EXPENSE

TOTAL EXPENSES

20. Provide the most recent three-year monthly balances for current gas storage and notes, including the interest rate, financing such storage.

21. Provide a schedule that compares the dollar amount of mains and services projected in the last base rate case to be installed in the FTY with the actual dollar amount of mains and services installed in that FTY period. If the actual amounts were less than projected, explain why they were less.

22. Provide a schedule that compares the dollar amount of mains and services projected in the last base rate case to be installed in the FPPTY with the actual dollar amount of mains and services actually in that FPPTY. If the actual amounts were less than projected, explain why they were less.

23. State the amount of gas, in Mcf, obtained through various suppliers in past years.

24. In determining pro forma expense, exclude cost of gas adjustments applicable to fuel adjustment clause and exclude fuel adjustment clause revenues, so that the operating statement is on the basis of base rates only.

25. Identify utility's policy with respect to replacing customers lost through attrition.

26. Identify procedures developed to govern relationship between the utility and potential customers—e.g., expansion, alternate energy requirements, availability of distribution facilities, smart metering, and ownership of metering-related facilities.

27. If Unrecovered Fuel Cost policy is implemented, provide the following:

a. State manner in which amount of Unrecovered Fuel Cost on balance sheet at the end of the HTY was determined and the month in the HTY in which such fuel expense was actually incurred. Provide amount of adjustment made on the rate case operating account for the HTY year-end unrecovered fuel cost. (If different than balance sheet amount, explain.)

b. Provide amount of Unrecovered Fuel Cost that appeared on the balance sheet at the opening date of the HTY and the manner in which it was determined. State whether this amount is in the HTY operating account.

c. Provide projections for the FTY and the FPPTY.

28. Provide details of times and amounts comprising the accounting entries for Deferred Fuel Cost at the beginning and end of the HTY.

29. Submit the following simultaneously with any rate increase filing:

a. Provide a Cost of Service Study showing the rate of return under the present and proposed tariffs for all customer classifications. The study should include a summary of the allocated measures of value, operating revenues, operating expenses, and net return for each of the customer classifications at present and proposed rates for the FTY and FPPTY.

b. Provide a statement of testimony describing the complete methodology of the cost of service study.

c. Provide a complete description and back-up calculations for all allocation factors.

d. Provide an exhibit for each customer classification showing the following data for the HTY and the four previous years:

- i. The maximum coincident peak day demand.
- ii. The maximum coincident 3-day peak day demand.
- iii. The average monthly consumption in Mcf during the Primary Heating Season (November—March).
- iv. The average monthly consumption in Mcf during the Non-heating season (April—October).
- v. The average daily consumption in Mcf for each 12-month period.

30. Submit a Bill Frequency Analysis for each rate. The analysis should include the rate schedule and block interval, the number of bills at each interval, the cumulative number of bills at each interval, the Mcf or therms at each interval, the accumulation of Mcf or therms passing through each interval, and the revenue at each interval for both the present rate and the proposed rates. The analysis should show only those revenues collected from the basic tariff.

31. Supply a map showing the Gas System Facilities and Gas Service Areas. The map should include transmission lines, distribution lines, other companies' lines interconnecting with the interconnecting points clearly designated, major compressor stations, gas storage areas, and gas storage lines. The normal direction of gas flow within the transmission system should be indicated by arrows. Separate service areas within the system should be clearly designated.

32. Supply a cost analysis supporting minimum charges for all rate schedules.

33. Supply a cost analysis supporting demand charges for all tariffs which contain demand charges.

34. Supply the net fuel clause adjustment by month for the HTY. Provide projections for the FTY and the FPFTY.

35. Supply a tabulation of base rate bills for each rate schedule comparing the existing rates to proposed rates. The tabulation should show the dollar difference and the percent increase or decrease.

36. Submit the projected demands for all customer classes for both purchased and produced gas for the three years following the HTY filing.

37. Supply an exhibit showing the gas deliveries to each customer class for the most recent 24-month period. The exhibit should identify the source of the gas as “purchased” (pipeline), “production” (includes purchases from local producers), “storage withdrawal,” “propane/air,” and “unaccounted for.”

38. Describe how the net billing and gross billing is determined. For example, if the net billing is based on the rate blocks plus Fuel Cost Adjustment (FCA) and State Tax Adjustment (STA), and the gross billing is determined by a percentage increase (1, 3, or 5 percent), then state whether the percentage increase is being applied to all three items of revenue i.e., rate blocks plus FCA and STA.

39. Provide a schedule that shows the number of miles of distribution main replaced in the HTY and the projected amount to be replaced in the FTY and FPFTY.

40. For the ten longest main replacement projects completed in the HTY, provide the following information:

- a. Total cost of the project.
- b. Length of distribution main replaced.
- c. Total restoration costs.
- d. A breakdown of the restoration costs (permits, trench paving, street paving, curbing, sidewalks, landscaping).

41. For the ten longest main replacement projects to be completed in the FTY, provide the following information:

- a. Total cost of the project.
- b. Length of distribution main replaced.
- c. Total restoration costs.
- d. A breakdown of the restoration costs (permits, trench paving, street paving, curbing, sidewalks, landscaping).

42. For the ten longest main replacement projects to be completed in the FPFTY, provide the following information:

- a. Total cost of the project.
- b. Length of distribution main replaced.
- c. Total restoration costs.
- d. A breakdown of the restoration costs (permits, trench paving, street paving, curbing, sidewalks, landscaping).

M.2. *ELECTRIC UTILITIES ONLY*

1. Provide a description of the property of the utility and an explanation of the system’s operation using available projections if actual data is unavailable. This description should include, but not limited to the following:

- a. A schedule of generating capability showing for the HTY and for the two consecutive 12-month periods prior to the HTY, net dependable capacity in KW by unit, plant capacity factor by unit, and total fuel consumption by type and cost of each unit, if available, or for each station,

and operation and maintenance expenses by station. Provide projection for the FTY and the FPFTY.

b. A schedule showing for the HTY, and for the 12-month period immediately prior to the HTY, the scheduled and unscheduled outages (in excess of 48 hours), for each station, the equipment or unit involved, the date the outage occurred, duration of the outage, maintenance expenses incurred for each outage, if available, and amounts reimbursable from suppliers or insurance companies. Provide projections for the FTY and the FPFTY.

c. A schedule for each unit retired during the HTY or subsequent to the end of the HTY, which shows the unit’s KW capacity, hours of operation during the HTY, net output generated, cents/KWH of maintenance and fuel expenses, and date of retirement. Provide projections for the FTY and the FPFTY.

d. A schedule showing most current projections of capacity additions and retirements (costs and KW), and reserve capacity at the time of peak for at least 10 years beyond the HTY, including the in-service dates (actual or expected) and AFDC cutoff dates, if different from in-service dates, for all new generating units coming on line during or subsequent to the HTY, if claimed. Provide projections for the FTY and the FPFTY.

2. When a utility files a tariff stating a new rate based in whole or in part on the cost of construction, as defined in 66 Pa.C.S. § 1308(f) (relating to voluntary changes in rates), of an electric generating unit, the utility shall identify:

- a. The total cost of the generating unit.
- b. The following costs:
 - i. Cost and quantity of each category of major equipment, such as switchgear, pumps or diesel generators and the like.
 - ii. Cost and quantity of each category of bulk materials, such as concrete, cable, structural steel, and the like.
 - iii. Manual labor.
 - iv. Direct and indirect costs of architect/engineering services.
 - v. Direct and indirect costs of subcontracts or other contracts involving major components or systems such as turbines, generators, nuclear steam supply systems, major structures, and the like.
 - vi. Distributed costs.

c. A cost increase of \$5 million or more, including AFUDC, over the original utility estimates provided under 66 Pa.C.S. § 515(a) (relating to construction cost of electric generating units) and its causes.

d. Compliance with subsections (a) and (b) will be identical in format and substance as that provided under 52 Pa. Code § 57.103 (relating to estimate of construction costs) for original cost estimates submitted under 66 Pa.C.S. § 515(a).

3. Provide details regarding smart meter deployment, actual and/or projected operational savings, and what is being done to leverage the smart meter capabilities.

M.3. *WATER AND WASTEWATER UTILITIES ONLY*

1. Provide a breakdown of the number and size of private fire services for according to the general service class of customers. Include sprinkler systems serving municipal buildings.

2. List all public fire customers showing the number of public hydrants by size for each customer for the end of the HTY and projected for the FTY and the FPFTY.

3. Provide a calculation of the utility's base cost of water or wastewater per billing unit.

4. Furnish the name of each supplier, gallonage and expense for water purchased as recorded in the Water Purchased for Resale for the HTY and two preceding years. Provide projections for the FTY and the FPFTY.

5. Quality of Service

a. Indicate whether the utility is in violation of any provision of the Pennsylvania Safe Drinking Water Act (SDWA) or any rule, regulation or order, or any condition of any permit variance or exemption granted by the Pennsylvania Department of Environmental Protection (PA DEP), or its predecessor.

i. Provide information indicating whether the utility is in compliance with SDWA provisions at 25 Pa. Code § 109.407 regarding general public notification requirements:

A. Provide a copy of each public notification given in accordance with this section, since the last rate proceeding. [3]

B. Provide a detailed explanation of all actions taken to remedy an acute violation, and to comply with the requirements prescribed by a variance or exemption.

C. State whether any fines or penalties were assessed by PA DEP, and indicate the amounts paid by the utility.

ii. Provide the most recent copies of all annual consumer confidence reports issued pursuant to SDWA Amendments of 1996 since the last rate proceeding.

A. Provide any annual consumer confidence reports which reflect violations of State and Federal safe drinking water requirements.

B. Explain how these violations were resolved.

b. Indicate whether the utility is in compliance with 52 Pa. Code § 65.6(d) regarding pressure surveys at regular intervals.

i. Provide details on any water pressure problems lasting longer than 5 days which have occurred since the last rate proceeding in any part of the water transmission and distribution system.

ii. Describe any action taken on a temporary basis, and the long-term solutions developed to address any water pressure problems.

c. Provide support to demonstrate that water or wastewater service is being furnished on a continuous basis by supplying a summary of the utility's records of each service interruption greater than 24 hours since the last rate proceeding.

d. Indicate whether the utility is in compliance with 52 Pa. Code § 65.4(b) regarding complete and current mapping of the entire distribution or collection system. If not in compliance, indicate what needs to be done to get into compliance.

e. Provide a summary report demonstrating the utility's efforts in water conservation, since the last rate proceeding, pursuant to 52 Pa. Code § 65.20.

³ Request for specific stakeholder comment during the advance notice comment period: Should a DSIC (or CSIC) proceeding suffice if such a proceeding has concluded more recently than a general rate case?

f. Provide a discussion of the utility's policy, or provide a copy of the policy if in written form, on tracking and responding to customer complaints. [4]

g. Provide a summary report demonstrating the utility's compliance with 52 Pa. Code § 65.3 regarding the full and prompt investigation of service or facility complaints and the recordkeeping requirements of such complaints.

h. Provide a discussion of the utility's policy regarding meter requirements, replacements and testing. State if the utility's procedures are in compliance with 52 Pa. Code § 65.8(b).

i. Provide meter test records as required in 52 Pa. Code § 65.8(c) for the 50 meters most recently removed from service.

ii. Provide a discussion on the utility's policy and history of compliance with 52 Pa. Code § 65.9 regarding adjustments of bills for meter error with in the last year.

6. Cost of Service—Wastewater Utilities

a. Provide a cost of service allocation study if an interval of 5 years has passed between a previous cost of service study and the anticipated date of the start of the FPFTY. The cost of service study shall provide the necessary data to determine if the rate structure is fair and equitable to all customer classes. The study shall allocate cost driving factors such as volume, phosphorus (P), nitrogen (N), biological oxygen demand (BOD), and suspended solids (SS) equitably among the customer classes based on acceptable industry cost driving factors. The study shall use the FPFTY proposed revenue requirement. Summaries of conclusions and back-up calculations shall be made part of the submission of the allocation study and shall include the following:

i. A description of the allocation method and development of allocation factors used and a schedule of the allocated cost of service by class (and service area if applicable) at the present and proposed revenues.

ii. A comparative schedule showing the rate of return produced at present and proposed rates by customer class (and by service area if applicable.)

iii. Indicate if the method for calculating the allocation factors is consistent with the previous rate case study and explain the impact of any changes.

iv. Provide the average day, volume, P, N, BOD, and SS by the treatment plant for the HTY and 2 prior years.

v. Provide workpapers, calculations, and supporting documentation which develop the equivalent meters and equivalent service line weightings used in the utility's cost of service study.

vi. Provide a detailed cost analysis that supports the utility's customer charges, by meter or service line size, showing all direct and indirect costs included.

b. Provide a listing of negotiated special rate contracts and a comparison of revenues for special rate contracts and under tariff rates. Special rates are defined as rates not contained in the currently effective tariff.

M.4. PHILADELPHIA GAS WORKS (PGW) and any other city natural gas company or municipal authority under Commission jurisdiction

1. Attach copies of the Company's approved budget for the HTY, FTY, and FPFTY.

⁴ Request for specific stakeholder comment during the advance notice comment period: Relative to subsections f. through h.2., should similar inquiries regarding customer service be included for the energy utilities that elect to use a FPFTY? Relative to subsection h.2., is one year long enough?

2. Provide the most recent Customer Responsibility and Universal Service Program Plan and Evaluation detailing participation, cost, and recovery.

M.5. Pittsburgh Water and Sewer Authority (PWSA) and any other municipal or authority water/wastewater company under Commission jurisdiction

1. Attach copies of the Company's approved budget for the HTY, FTY, and FPFTY.

2. Provide the most recent Customer Responsibility and Universal Service Program Plan and Evaluation detailing participation, cost, and recovery.

[Pa.B. Doc. No. 18-59. Filed for public inspection January 12, 2018, 9:00 a.m.]

STATE POLICE

[37 PA. CODE CH. 33]

Procedures and Specifications for Firearm Record Forms under the Uniform Firearms Act

The State Police proposes to amend § 33.103 (relating to confidentiality) to read as set forth in Annex A.

Effective Date

This proposed rulemaking will be effective upon final-form publication in the *Pennsylvania Bulletin*.

Statutory Authority

This proposed rulemaking is authorized under 18 Pa.C.S. § 6111.5 (relating to rules and regulations). Section 111(b) of the Mental Health Procedures Act (MHPA) (50 P.S. § 7111(b)) authorizes disclosure of mental health records information by the State Police.

Background and Need for this Proposed Rulemaking

Under 18 Pa.C.S. § 6111.1(a) (relating to Pennsylvania State Police), the State Police is charged with the responsibility to administer 18 Pa.C.S. §§ 6101—6127 (relating to Pennsylvania Uniform Firearms Act of 1995) (act). This charge has been described as “broad authority” for the purpose of “ensur[ing] public safety and welfare by keeping firearms out of the hands of dangerous individuals.” *In re Expungements*, 938 A.2d 1075, 1080—82 (Pa. Super. Ct. 2007). Section 6105(a)(1) and (c)(4) of 18 Pa.C.S. (relating to persons not to possess, use, manufacture, control, sell or transfer firearms) prohibits an individual who has been adjudicated as an incompetent or who has been involuntarily committed to a mental health institution for inpatient care and treatment under the MHPA from possessing, using, controlling, selling or manufacturing a firearm or obtaining a license to possess, use, control, sell, transfer or maintain a firearm in this Commonwealth. Furthermore, the possession of a firearm by the mentally ill is regulated by section 902(g)(4) of the Gun Control Act of 1968 (18 U.S.C.A. § 922(g)(4)), and essentially every state in the country.

Records regarding mental health commitments under the MHPA are confidential and are generally not subject to disclosure except as provided by law. Section 111(a) of the MHPA provides that all documents regarding persons in treatment shall be kept confidential and may not be released or their contents disclosed without that individual's written consent. Section 111(b) of the MHPA provides an exception to this general rule that enables the State Police to obtain mental health records information, and

disclose this information to any person, to administer 18 Pa.C.S. § 6105(c)(4), which prohibits an individual who has been adjudicated as an incompetent or who has been involuntarily committed under the MHPA from, among other things, possessing a firearm. See *Commonwealth v. Emmil*, 866 A.2d 420, 422 (Pa. Super. Ct. 2005) (“[t]he MHPA permits the State Police to obtain specific mental health records in order to ensure that Section 6105 is not violated”). This exception allows the State Police to keep firearms out of the hands of individuals who have been adjudicated incompetent or involuntarily committed under the MHPA by allowing direct access to the mental health records information that evidence the prohibiting event.

The State Police obtains mental health records information because section 109(d) of the MHPA (50 P.S. § 7109(d)) and 18 Pa.C.S. § 6111.1(f) require judges and certain mental health officers and administrators to notify the State Police regarding an individual's involuntary commitment or incompetency adjudication within 7 days of its occurrence. This notice is a one-page form consisting of biographic information (not a copy of actual record of commitment or adjudication) and is used to create the State Police Mental Health Database for purposes of administering the firearm prohibition in 18 Pa.C.S. § 6105(c)(4).

The State Police's regulations do not clearly provide for the permitted use of the confidential information consistent with the authorized use in section 111(b) of the MHPA. Section 33.103(e), which concerns the confidentiality of mental health records information, only authorizes the mental health records information to be used by the State Police for the purpose of determining whether a person applying to obtain a firearm or license to carry a firearm is prohibited from possessing, using, controlling, selling, transferring or manufacturing a firearm. Section 111(b) of the MHPA, however, provides for a broader permissible use of this information and authorizes the State Police to disclose the information to any person to ensure compliance with 18 Pa.C.S. § 6105(c)(4). The lack of symmetry between § 33.103(e) and section 111(b) of the MHPA may be interpreted to prevent the State Police from using mental health record information for other purposes that are consistent with the act and the MHPA, but which are not seeking to obtain a firearm from a dealer or the issuance of a license to carry through the county sheriff.

The following are two examples for which the State Police would be using the information in the State Police Mental Health Database consistent with the authorization in section 111(b) of the MHPA, but which are not currently within the permitted use of this information under current § 33.103(e). First, it is consistent with section 111(b) of the MHPA for the State Police to query the State Police Mental Health Database in conducting a background check to determine whether local law enforcement officers, or candidates for those positions, are prohibited from possessing a firearm under 18 Pa.C.S. § 6105(c)(4). This is particularly important for a department prior to hiring an officer and issuing the officer a department-owned firearm. Allowing a police officer to possess a firearm when the officer has been adjudicated as incompetent, or involuntarily committed to a mental institution, has the potential to place residents in this Commonwealth at risk, not to mention allowing an individual to violate State or Federal firearms laws, or both.

Additionally, it is consistent with section 111(b) of the MHPA for the State Police to query the State Police

Mental Health Database to assist police officers who identify a specific investigative need, in the course of an investigation under the act, to determine if a person is prohibited from possessing a firearm due to being adjudicated as an incompetent or having been involuntarily committed under the MHPA. In many cases, officers are unable to conclusively determine if a person has been subject to a disqualifying adjudication or commitment, without checking the person against the State Police Mental Health Database, to find if a mental health prohibition exists. Over the past two decades, there have been many highly publicized incidents when individuals possessed firearms, even though they had a mental health history that would have otherwise prohibited possession. Without information confirming that a person is prohibited under the act from possessing firearms for mental health reasons, officers may be unable to take the necessary steps to seize firearms or make an arrest, or both.

The proposed amendments to § 33.103(e) provide clarity and allow the State Police to clearly and fully utilize its lawful authority under the MHPA to protect the public from individuals who are prohibited from possessing a firearm due to an adjudication of incompetency or an involuntary commitment to a mental health institution.

Description of this Proposed Rulemaking

This proposed rulemaking amends § 33.103(e) to bring it in line with the permitted use of mental health record information by the State Police under section 111(b) of the MHPA. As previously discussed, § 33.103(e) currently authorizes the mental health records information to be used by the State Police “only” for the purpose of determining whether a person applying to obtain a firearm or license to carry a firearm is prohibited from possessing, using, controlling, selling, transferring or manufacturing a firearm. Section 111(b) of the MHPA provides for a broader permissible use of this information and authorizes the State Police to disclose the information to any person to ensure compliance with 18 Pa.C.S. § 6105(c)(4).

Accordingly, the State Police is proposing to amend § 33.103(e) to provide for the permitted exceptions to the general rule of confidentiality for mental health records information maintained by the State Police under the MHPA and the act. Proposed § 33.103(e)(1) contains the current regulatory language concerning the permitted use for a person applying to obtain a firearm or license to carry a firearm; “only” is proposed to be deleted because these two uses are not the only exceptions provided by law. Proposed § 33.103(e)(2), which provides that the State Police may disclose the information in accordance with section 111(b) of the MHPA, creates consistency and aligns the regulation with the permitted use of mental health record information by the State Police under the MHPA. By directly tying the regulation to the MHPA, prior ambiguity caused by the interplay of the regulation and the MHPA as to the State Police’s ability to use the State Police Mental Health Database consistent with the MHPA will be removed.

Fiscal Impact and Paperwork Requirements

This proposed rulemaking will not have adverse fiscal impact on the Commonwealth or its political subdivisions. This proposed rulemaking will not impose additional paperwork requirements upon the Commonwealth, political subdivisions or the private sector.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on January 3, 2018, the State Police

submitted a copy of this proposed rulemaking and a copy of a Regulatory Analysis Form to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the Senate Law and Justice Committee and the House Judiciary Committee. A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, IRRC may convey comments, recommendations or objections to the proposed rulemaking within 30 days of the close of the public comment period. The comments, recommendations or objections must specify the regulatory review criteria in section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b) which have not been met. The Regulatory Review Act specifies detailed procedures for review prior to final publication of the rulemaking by the State Police, the General Assembly and the Governor.

Public Comment

Interested persons are invited to submit written comments, suggestions or objections regarding this proposed rulemaking to the Regulatory Coordinator, Legislative Affairs Office, State Police, 1800 Elmerton Avenue, Harrisburg, PA 17110, robailey@pa.gov within 30 days following publication of this proposed rulemaking in the *Pennsylvania Bulletin*. Reference 17-85, Procedures and Specifications for Firearm Record Forms under the Uniform Firearms Act, when submitting comments.

COLONEL TYREE C. BLOCKER,
Commissioner

Fiscal Note: 17-85. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 37. LAW

PART I. STATE POLICE

CHAPTER 33. PROCEDURES AND SPECIFICATIONS FOR FIREARM RECORD FORMS UNDER THE UNIFORM FIREARMS ACT

GENERAL

§ 33.103. Confidentiality.

* * * * *

(e) Mental health records information received or maintained by the State Police under section 6111.1(b) and (f) of the act (relating to Pennsylvania State Police) [**shall be**] **and section 109(d) of the Mental Health Procedures Act (50 P.S. § 7109(d)) are confidential and not subject to [public] disclosure[.], except for all of the following:**

(1) The information [**shall**] **will** be available [**only**] to the State Police for the purposes of determining, under sections 6109(d) and 6111.1(b) of the act, if the potential applicant is prohibited from possessing, using, controlling, selling, transferring or manufacturing a firearm, or obtaining a license to possess, use, control, sell, transfer or manufacture a firearm in this Commonwealth, as defined under Federal or State law, and for the purpose of informing the licensee/sheriff making inquiry under sections 6109(d) and 6111.1(b)(iii) of the act.

(2) **The State Police may disclose the information in accordance with section 111(b) of the Mental Health Procedures Act (50 P.S. § 7111(b)).**

[Pa.B. Doc. No. 18-60. Filed for public inspection January 12, 2018, 9:00 a.m.]