

PROPOSED RULEMAKING

PENNSYLVANIA PUBLIC UTILITY COMMISSION

[52 PA. CODE CH. 3]

[L-2020-3017232]

Certificated Water and Wastewater Utility Acquisitions, Mergers, and Transfers; Advanced Notice of Proposed Rulemaking

Public Meeting held
April 30, 2020

Commissioners Present: Gladys Brown Dutrieuille, Chairperson; David W. Sweet, Vice Chairperson; John F. Coleman, Jr.; Ralph V. Yanora, statement follows

Application of 52 Pa. Code § 3.501 to Certificated Water and Wastewater Utility Acquisitions, Mergers, and Transfers; L-2020-3017232

Advance Notice of Proposed Rulemaking Order

By the Commission:

At the February 6, 2020 public meeting of the Pennsylvania Public Utility Commission (Commission), the Commission directed the Law Bureau and the Bureau of Technical Utility Services to prepare an advanced notice of proposed rulemaking regarding 52 Pa. Code § 3.501.¹

The Commission has long held its procedural regulations as a work in progress; Section 3.501 is no exception to this view. As the field of utility regulation evolves, so must the Commission's rules of practice before it. The certificate of public convenience is one of the principal tools the Commission uses to authorize fit and qualified entities to provide utility service in the Commonwealth. Pursuant to 66 Pa.C.S. § 1101, a public utility must obtain a certificate of public convenience from the Commission in order to offer, render, furnish, or supply public utility service in Pennsylvania. Section 1103 of the Public Utility Code, 66 Pa.C.S. § 1103, establishes the procedure to obtain a certificate of public convenience. That provision provides, in relevant part, that "[a] certificate of public convenience shall be granted by order of the commission, only if the commission shall find or determine that the granting of such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public."²

The Commission has promulgated regulations in 52 Pa. Code Chapter 3 governing practice before the Commission, including procedures for applications for certificates of public convenience under 66 Pa.C.S. § 1103. Section 3.501 governs applications for certificates of public convenience as a public water or wastewater collection, treatment, or disposal provider. Section 3.502 governs protests to applications filed under Section 3.501.

In the case of applications for certificates of public convenience to provide water and wastewater utility service, the last significant revision of the Commission's regulations occurred in 2006 when these regulations were amended along with many other Commission regulations regarding practice and procedure before the Commission.

The Commission has determined that it is an appropriate time to individually reexamine its regulations govern-

ing applications for certificates of public convenience for the provision of water and wastewater service.³ Toward this end, we are initiating this Advance Notice of Proposed Rulemaking. We encourage members of the regulated industry, the public, and any other interested parties to file comments with the Commission. The comments should include specific section references to the Commission regulations. Comments should delineate the rationale for the proposed change as well as specific proposed language for the regulations.

Background

Section 3.501 was initially promulgated in April 1976.⁴ The information required by the regulation was relatively limited, requiring a full description of the waterworks project's construction, a map showing the project and its boundaries, information regarding the topography of the project, the schedule of project construction, the transportation and distribution specifications, estimated customers at years 1, 5, and 10, and the ultimate future development of the project.⁵ Wastewater systems were not within the regulation's original scope.

The Commission greatly expanded Section 3.501 in October 1983 to require applicants to include information related to Department of Environmental Protection (DEP)⁶ approvals, various River Basin Commission approvals, and neighboring utilities, and to provide procedural mechanisms for opposition protests.⁷

In 1993, the Commission and DEP entered into a Memorandum of Understanding with the express purpose of limiting the non-viability of water systems. Among other things, the signatory agencies agreed to "[i]dentify policies and procedures that present barriers to small system restructuring and seek solutions to these institutional barriers."⁸ Over the course of 1995 and 1996, the Commission continued to advance compliance with the Public Utility Code and the Pennsylvania Safe Drinking Water Act, 35 P.S. § 721.1, et seq., by investigating and promulgating a policy statement to provide incentives for the acquisition and merger of small water and wastewater systems, with the ultimate goal of regionalization.⁹ The Commission has long held "[t]he regionalization of water and wastewater systems through mergers and acquisitions will allow the water industry to institute better management practices and achieve greater economies of scale."¹⁰

The Commission amended Section 3.501 again in January 1997 to specifically include wastewater service and to explain that, "[a]lthough more detail is required, most of the requirements can be met by submitting the same documents to the Commission as must be submitted to DEP."¹¹ The 1997 amendments include the requirement of demonstrating compliance with Section 5 of the Pennsylvania Sewage Facilities Act, 35 P.S. § 750.5, also known as an Act 537 plan.

The Commission revisited Section 3.501 most recently in April 2006, expanding its requirements further at the

³ See Motion of Commissioner Yanora, adopted by the Commission at Public Meeting of February 6, 2020, L-2020-3017232.

⁴ 6 Pa.B. 911.

⁵ *Id.*

⁶ At the time, known as the Department of Environmental Resources.

⁷ 13 Pa.B. 3221.

⁸ DEP MOU ¶11.

⁹ 26 Pa.B. 1380; 52 Pa. Code § 69.711.

¹⁰ 52 Pa. Code § 69.721(a) (Commission's general policy statement on water and wastewater system acquisitions).

¹¹ 27 Pa.B. 414, 419.

¹ Motion of Commissioner Ralph V. Yanora.

² 66 Pa.C.S. § 1103(a).

behest of the Independent Regulatory Review Commission (IRRC) and DEP. The Commission explained:

The final regulation in Section 3.501(a)(2)(vi) requires an applicant to provide a Map of Service Area including the County Comprehensive Plan, Municipal Comprehensive Plan, and Zoning Designations if requested. An applicant letter is required to address compliance with the applicable requirements of these plans pursuant to Section 3.501(a)(7) regardless of whether the Commission requests a copy of these voluminous documents. Section 3.501(b) provides additional considerations that the Commission will consider and may rely on. This includes Comprehensive Plans, Multimunicipal Plans, Zoning Ordinances and Joint Zoning Ordinances reflecting the Municipalities Planning Code. This reflects our agreement with IRRC and DEP about important considerations that should be considered when evaluating an application.¹²

As Section 3.501 currently stands, it treats all acquisitions of non-certificated entities under a single scheme, requiring largely the same information from both new and existing utilities.

Section 3.501 requires significant information related to compliance with DEP regulations and seeks information related to the types of financial and managerial fitness that certificated utilities are presumed to possess. The Commission's Orders amending Section 3.501 in 1983, 1997, and 2006 create necessary requirements to ensure small systems prove their viability prior to operation. This fits Commission policy that "[m]any small water systems in this Commonwealth are not viable and need to be restructured. Most new water systems being created in this Commonwealth are small and are likely candidates for becoming nonviable."¹³ The "objective of the Commission [is] . . . to substantially restrict the number of nonviable drinking water systems by discouraging the creation of new nonviable small systems."¹⁴

Discussion

In addition to the topics listed below, the Commission deems it prudent to explore whether a differential treatment of applications for certificates of public convenience is appropriate when a well-established water or wastewater utility seeks to acquire a non-certificated water or wastewater service provider. Particularly, the Commission is interested in comments addressing whether the documentation requirements required of well-established service providers are too extensive. Commentators are requested to address this question and what improvements might be made to Sections 3.501 and 3.502 to improve water and wastewater service to Pennsylvania residents through the regionalization of water and wastewater services.

The Commission requests input on the following topics:

A. Specific Updates to Sections 3.501 and 3.502

1. How might the Commission simplify the requirements of Section 3.501 for well-established utilities without hindering the traditional policy goals of Section 3.501 and 3.502?

2. What are the expected benefits of reducing requirements applicable to existing utilities? How would those benefits be passed on to ratepayers?

3. What, if any, issues arise from allowing existing utilities the option to meet the requirement of

3.501(a)(1)(ii)(A) following the completion of an original cost study after the transaction has closed, in lieu of submitting this information with an application?

4. What alternative documentation could be provided as evidence an application complies with the following subsections of Section 3.501:

- 3.501(a)(2)(vi): Providing a copy of county comprehensive plan, municipal comprehensive plan and applicable zoning designations.

- 3.501(a)(3)(ii): Identifying the future number of connections anticipated for the next 10 years.

- 3.501(a)(6)(iv): Providing a Pennsylvania Department of Environmental Protection (DEP) 5-year compliance history of other utilities owned or operated, or both, by the applicant, including affiliates, and their parent corporations regarding the provision of utility service.

- What are the costs and benefits of any proposed alternative documentation?

- What potential costs and benefits exist by applying these sections to Class A water utilities when those Class A utilities are solely applying for a certificate of public convenience to acquire a non-certificated water or wastewater service provider?

5. What are the potential costs and benefits to the addition of a requirement to Section 3.501(a)(6) requiring the applicant to provide a copy of any DEP-approved Sewage Facilities Planning Modules and/or the current Act 537 Official Sewage Facilities Plan, if applicable? What alternative documentation could be provided to show that an application complies with Act 537 and what are the costs and benefits of these alternatives?

6. What alternative documentation could be provided by wastewater utilities in an application which assures compliance with the requirements of Section 5 of the Pennsylvania Sewage Facilities Act (35 P.S. § 750.5) and what are the costs and benefits of these alternatives?

7. Should Section 3.501(a)(6) be revised to include providing evidence of DEP Chapter 105 Permits for water systems that have or will have impoundments with dams or reservoirs in accordance with DEP regulations in 25 Pa. Code § 105?

8. What alternative documentation could be provided by applicants to satisfy the present requirements of Section 3.501(a)(7) and what are the costs and benefits of these alternatives?

9. Should Section 3.501(d) be revised to use a less than 60-day protest period for an application either in limited circumstances or in all circumstances?

10. Should Section 3.501(d) be revised to require publication of the notice of an application once a week for two consecutive weeks in a newspaper of general circulation located in the territory covered by the application, rather than the requirement in Section 3.501(d) to publish daily for two consecutive weeks?

11. Should applicants be required to provide evidence that anticipated subdivisions and land developments to be served by the utility in the requested service territory have been granted preliminary and final plan municipal approval?

12. Parties should discuss the extent to which Section 3.501 should apply to applications filed pursuant to Section 1329 of the Public Utility Code, 66 Pa.C.S. § 1329, and the Commission's Section 1329 Application Filing Checklist, and what changes to Section 3.501 might be made in order to better comport with 66 Pa.C.S. § 1329.

¹² 36 Pa.B. 2097, 2098-99.

¹³ 52 Pa. Code § 69.701(a)(1) (Commission's general policy statement on the viability of small water systems).

¹⁴ Id. at (a)(3).

13. Parties should discuss whether applicants should follow additional processes and procedures regarding property owners that would be required to connect to an applicant's system upon application approval but which have not requested service from the utility, including, but not limited to, property owners located in municipalities which have adopted a mandatory connection ordinance.

14. Parties should discuss if an acquiring utility should identify the existence of lead service lines (LSLs) or damaged wastewater service laterals (DWSLs) and the projected costs to remove LSLs or replace DWSLs within the territory to be acquired.

15. Parties should propose any changes to Section 3.502 they deem relevant.

B. The Commission's Goals of Regionalization and Consolidation

1. Parties should discuss how the Commission's goals of regionalization and consolidation may be further improved to promote the acquisition of systems with fewer than 3,300 connections by larger more viable systems.

2. Parties should discuss the development of safety net programs to deal with nonviable or abandoned water systems as referenced in 52 Pa. Code § 69.701(b)(5). Specifically, parties should address the prospect of creating a fund dedicated to covering costs associated with receivership proceedings conducted pursuant to Section 529 of Public Utility Code, 66 Pa.C.S. § 529.

3. Should the Commission consider seeking to modify the 1993 Memorandum of Understanding between the Commission and the Department of Environmental Protection? If so, in what ways? Should the scope of the memorandum be broadened to also include wastewater service?

C. Cross-Connections and Back Flow Prevention

1. What methods within the Commission's jurisdiction might be used to reduce or eliminate the presence of contaminants such as lead, PFOA/PFOS and Legionella from the drinking water supplies of systems subject to approval under Sections 3.501 and 3.502?

2. Whether the Commission should exercise its authority pursuant to 66 Pa.C.S. §§ 501 and 504 to require public utilities to provide copies of current cross-connection control programs approved by the Department of Environmental Protection pursuant to 25 Pa. Code § 109.709(b) for systems subject to approval under Sections 3.501 and 3.502.

3. Whether it would be reasonable for the Commission to condition approval of acquisition applications filed pursuant to 66 Pa.C.S. § 1102(a)(3) and 52 Pa. Code §§ 3.501 and 3.502 upon implementation of a DEP-approved cross-connection control program and/or a Commission-approved cross-connection control plan.

Conclusion

Due to the breadth of topics addressed in this rulemaking and the potential complexity of the regulatory sections which are open for review, interested parties will be given sixty (60) days from the date of publication of the Advance Notice of Proposed Rulemaking in the *Pennsylvania Bulletin* for the submission of comments. Comments should include, where appropriate, a numerical reference to the existing regulation or regulations which the comment addresses, the proposed language for revision, and a clear explanation for the recommendation. The Commission is committed to completing any revisions to its regulations in a timely fashion; *Therefore*,

It Is Ordered:

1. That a rulemaking proceeding is hereby initiated at this docket to consider the revision of the regulations appearing in Title 52 of the *Pennsylvania Code*, relating to the Commission's rules governing the applications for certificates of public convenience for water and wastewater service providers.

2. That the Law Bureau shall deposit this Order with the Legislative Reference Bureau to be published in the *Pennsylvania Bulletin*.

3. That written comments referencing Docket No. L-2020-3017232 be submitted within 60 days of publication in the *Pennsylvania Bulletin* to the Secretary, Pennsylvania Public Utility Commission, Commonwealth Keystone Building, 400 North Street, 2nd Floor, Harrisburg PA 17120. Comments may also be filed electronically through the Commission's e-File System. Filing instructions may be found on the Commission's website at: http://www.puc.pa.gov/filing_resources.aspx.

4. That the Secretary shall serve this Order upon all certificated water utilities, certificated wastewater utilities, the Pittsburgh Water and Sewer Authority, the Department of Environmental Protection, the Office of Consumer Advocate, and the Office of Small Business Advocate.

5. The contact persons for this matter are Assistant Counsel Christian McDewell, (717) 787-7466, cmcdewell@pa.gov, and Supervisor, Water/Wastewater, Bureau of Technical Utility Services, Sean Donnelly, (717) 783-2505, sdonnelly@pa.gov.

ROSEMARY CHIAVETTA,
Secretary

Statement of Commissioner Ralph V. Yanora

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is an Advance Notice of Proposed Rulemaking (ANOPR) regarding the application of 52 Pa. Code § 3.501 to certificated water and wastewater utility acquisitions, mergers, and transfers. The ANOPR implements my Motion of February 6, 2020, and solicits comments addressing whether differential treatment of applications for certificates of public convenience is appropriate when well-established water or wastewater utilities seek to acquire non-certificated water or wastewater service providers.

Specifically, the Commission seeks comments on the following topic areas: (1) documentation and notice requirements for well-established utilities under Section 3.501; (2) modification of the 1993 Memorandum of Understanding between the Commission and the Department of Environmental Protection;¹⁵ (3) promotion of the Commission's long-standing goals of regionalization and consolidation; and (4) Commission enforcement of cross-connection control programs.

I thank the Commission's Law Bureau and Bureau of Technical Utility Services for their work on developing this ANOPR and look forward to reviewing the input and comments received from all interested stakeholders throughout this rulemaking process.

RALPH V. YANORA,
Commissioner

[Pa.B. Doc. No. 20-657. Filed for public inspection May 15, 2020, 9:00 a.m.]

¹⁵ Memorandum of Understanding between the Pennsylvania Department of Environmental Resources and the Pennsylvania Public Utility Commission (entered into December 2, 1993).