

RULES AND REGULATIONS

Title 34—LABOR AND INDUSTRY

DEPARTMENT OF LABOR AND INDUSTRY

[34 PA. CODE CHS. 111 AND 131]

Special Rules of Administrative Practice and Procedure before the Workers' Compensation Appeal Board and Workers' Compensation Judges

The Department of Labor and Industry (Department), Workers' Compensation Appeal Board (Board) and Office of Adjudication (Office), amends Chapters 111 and 131 (relating to special rules of administrative practice and procedure before the Workers' Compensation Appeal Board; and special rules of administrative practice and procedure before workers' compensation judges) to provide additional guidance for the litigation of matters before the Board, the Office and workers' compensation judges (judges), and to refine the regulations governing practices and procedures before the Board, the Office and judges.

Statutory Authority

This final-form rulemaking is adopted under the authority in sections 401.1, 435(a) and (c) and 1608 of the Workers' Compensation Act (act) (77 P.S. §§ 710, 991(a) and (c) and 2708), section 2205 of The Administrative Code of 1929 (71 P.S. § 565) and section 414 of The Pennsylvania Occupational Disease Act (77 P.S. § 1514).

Background

In 1980, the Secretary of the Department established a Rules Committee (Committee) to develop rules and procedures for the workers' compensation system. The Committee is comprised of Board representatives, judges, equal numbers of representatives of the claimant and defense bar, and Department representatives. From time to time, this Committee reconvenes to review Chapters 111 and 131 and to consider whether amendments are necessary in light of changes in existing workers' compensation law, practice or procedures.

Chapters 111 and 131 have been amended in 1989, 1991, 2002 and 2009. Most recently, the Committee reconvened on November 18, 2011, for the purpose of reviewing Chapters 111 and 131 in light of recent appellate decisions and the advent of the Department's new computer system, Workers' Compensation Automation and Information System (WCAIS). The Committee also considered comments received from various stakeholders since the last amendments took effect in 2009. Additionally, the Committee discussed the need for rules to address issues raised by the creation of the Uninsured Employers Guaranty Fund (UEGF) in 2007.

After several meetings between 2011 and 2012, the Committee created a draft proposed rulemaking. In fall 2012, the draft was widely circulated throughout the workers' compensation community for the purpose of receiving additional comment. The Committee conducted interactive meetings with various groups, including the Pennsylvania Bar Association at the Workers' Compensation Fall Section Meeting, the Philadelphia Bar Association, the Allegheny County Bar Association and the Lancaster County Bar Association to discuss the proposed changes and solicit comments. Additionally, the Commit-

tee presented the suggested amendments to the Pennsylvania Self-Insurers Association and the Workers' Compensation Advisory Council.

Several Committee meetings were conducted for the purpose of reviewing the suggestions and revising the proposed changes, after which the Committee voted on and approved proposed revisions to Chapters 111 and 131 on May 2, 2013. Thereafter, a proposed rulemaking was published at 44 Pa.B. 996 (February 22, 2014). As a result, the Department received written comments from the following: Thomas C. Lowry, Esq.; Workers' Compensation Judge Geoffrey L. Seacrist; Samuel R. Marshall, Esq. (on behalf of The Insurance Federation of Pennsylvania, Inc. (IFP)); Wendy A. Fleming, Esq., Joseph Turchi, Esq. and Workers' Compensation Judge Holly A. San Angelo (on behalf of the Philadelphia Bar Association's Workers' Compensation Section (PBAWCS)); Workers' Compensation Judge Joseph Hakun; Workers' Compensation Judge Ada Guyton (on behalf of the Pennsylvania Workers' Compensation Judges Professional Association (PWCJPA)); Workers' Compensation Judge Karl Baldys; Ronald L. Calhoun, Esq.; Workers' Compensation Judge Kenneth P. Walsh; G. Michael Spates, Esq. (on behalf of Rawle & Henderson LLP); and Workers' Compensation Judges Susan E. Kelley, Paul E. Baker, Francine Lincicome and Kelly F. Melcher. The Department also received written comments from the Independent Regulatory Review Commission (IRRC) dated April 23, 2014.

In response to the comments received, the Department carefully reviewed and considered all of the suggestions and concerns raised by the commentators. The Department also participated in discussions with certain commentators and Committee members regarding their concerns relating to the new procedural rules involving the UEGF. The Committee met on May 16, 2014, to discuss the comments, after which several subcommittees were convened to consider specific comments. The Committee again met on July 11, 2014, to discuss revisions to the provisions, which included several changes in response to the comments. Ultimately, the Committee voted to approve, unopposed, the revisions that are incorporated into this final-form rulemaking.

Purpose

This final-form rulemaking updates Chapters 111 and 131 to promote efficiency and to address new technological and statutory changes. Chapters 111 and 131 have not been updated since 2009. Since that time, the Department has been working on implementing WCAIS, an online workers' compensation claims information system encompassing the processes handled by the Bureau of Workers' Compensation (Bureau), the Office and the Board. Also, during these years, the Department has monitored proceedings involving the UEGF and discovered inefficiencies and increased costs for the parties under the current system. The final-form rulemaking addresses these issues by incorporating necessary changes to improve the efficiency of the system, expand filing options and ensure that parties will continue to be advised of up-to-date rules for practice and procedures before the Board, the Office and judges.

Summary of Final-Form Rulemaking and Responses to Comments

This final-form rulemaking clarifies and provides detailed guidance for practice and procedure before the Board, the Office and judges.

IRRC made the general comment that the Department should make every effort to resolve and reach consensus among the regulated community as it prepares the final-form rulemaking. In response to the comments, the Department held discussions and met with certain commentators to discuss their concerns. These meetings included a discussion of the insurance community's concerns with Samuel R. Marshall, Esq. on behalf of IFP, as well as discussion of the judges' concerns about the UEGF provisions with Ada Guyton, who was present on behalf of the PWCJPA. Following these discussions, several changes were made to the final-form rulemaking consistent with the comments received. With regard to the UEGF provisions, the significant final-form changes represent an agreed-upon compromise which retains language which reasonably satisfies the need for rules specific to UEGF proceedings in a manner which accommodates the judges' ability to exercise discretion in conducting UEGF proceedings following the first hearing.

IFP commented that future projects should include insurers as well as other stakeholders since the defense bar is not always the same. The Department closely monitors its various regulations and is committed to seeking and considering input from all stakeholders, including the insurance community, regarding concerns or suggestions for improvement to promote the efficiency of the workers' compensation system. Insofar as the Chapter 111 and 131 regulations impact litigation before the Board and judges, the Committee established by the Department is primarily comprised of representatives directly involved in the litigation process, including attorneys with many years of experience representing both claimant and insurer interests in these proceedings. However, the Department will continue to strive to be as inclusive as possible to ensure that all stakeholders' interests are considered in future regulatory projects.

IRRC also generally commented that the Department should ensure that the preamble and Regulatory Analysis Form make clear the need for the changes implemented by the final-form rulemaking. Many of the changes implemented in the final-form rulemaking were necessary to accommodate electronic filings and transactions as the result of the Department's implementation of its new computer system, WCAIS, to eliminate multiple or duplicative filings or to reflect the current practice in the community. Further changes, including those in Chapter 131, Subchapter D (relating to proceedings involving the UEGF), were necessitated to address procedural issues that have developed since the creation of the UEGF in 2007 under the act of November 9, 2006 (P. L. 1362, No. 147). The Department has also addressed this issue more specifically throughout the preamble, as necessary, in its discussion of the comments to individual rules, as well as in the Regulatory Analysis Form.

Chapter 111. Special rules of administrative practice and procedure before the Workers' Compensation Appeal Board

The Department amends Chapter 111 to delete requirements that multiple copies of documents shall be filed with the Board.

Section 111.3 (relating to definitions) is amended to clarify filing dates if filing by mail, common carrier, electronically or by hand-delivery, and to provide that a United States Postal Service Certificate of Mailing, USPS Form 3817 or similar form can be used as evidence of the filing date.

IRRC questioned whether the proposed definition of "common carrier" in § 111.3 was intended to include

taxicabs and utility companies, commenting that the Department should clarify the definition of common carrier, as appropriate. IFP recommended consistency of the filing requirements in § 111.3 of the Board rules and § 131.11(a) (relating to filing, service and proof of service) of the judges rules. The Department does not intend to include taxicabs and utility companies as methods of filing by "common carrier." Therefore, in response to the comments from IRRC, the Department replaced the proposed definition of "common carrier" with language within the definition of "filing" which clarifies that an appeal may be delivered by a "common carrier of property" which is subject to the authority of the Pennsylvania Public Utility Commission or the United States National Surface Transportation Board. This language is now consistent with the common carrier filing provisions recently promulgated in other Department regulations. See §§ 63.25(c) and 101.82(b)(2) (relating to filing methods; and time for filing appeal from determination of Department). Upon further consideration, the Department also agrees with IFP that the filing requirements within the Board and judges rules should be consistent to avoid confusion within the workers' compensation community. Therefore, reference to the use of the United States Postal Service Certificate of Mailing has been added to the definition of "filing" in § 111.3, and the subsections within that definition have been reordered consistent with § 131.11(a).

Section 111.11 (relating to content and form) is amended to clarify that an appeal of a judge's decision is deemed to include all claim numbers, dispute numbers and petition numbers referenced in the decision being appealed.

IFP questioned whether the proposed language in § 111.11(a)(1) that an appeal is deemed to include "all claims, disputes and petitions" intends that there cannot be partial appeals. IRRC commented that if it is the Department's intent to disallow partial appeals under § 111.11(a), the Department should explain the need for, and reasonableness of, this requirement. IRRC asked the Department to clarify this provision if disallowance of partial appeals is not intended. In response, the Department does not intend this change to disallow partial appeals. Rather, this change is intended to streamline the appeal process by preventing the need for separate, duplicative appellate filings by the same party where the judge's decision involves matters which are identified by multiple claim numbers, dispute numbers or petition numbers in WCAIS. To clarify this, "numbers" was added after the references to claim, dispute and petition in this final-form rulemaking. Notwithstanding this provision, it remains that only issues properly raised in the appellate filing are on appeal, consistent with current case law.

Section 111.12 (relating to filing, service and proof of service) is amended to clarify requirements for appeals filed with the Board.

IRRC commented that § 111.12 does not provide information on where online electronic filing procedures will be located and asked that the Department clarify how electronic filing will be implemented. The electronic filing procedures are set forth in detail on the Department's web site at www.dli.state.pa.us. For clarity, the Department added a reference to the web site in this provision.

Section 111.13 (relating to processing of appeals and cross appeals) is amended to delete the requirement that the date of the acknowledgement is 3 days subsequent to the date the acknowledgement is mailed.

Section 111.14 (relating to motions to quash) is amended to delete the requirement that two copies of a motion to quash shall be filed with the original motion.

Section 111.16 (relating to briefs: content and form and time for filing) is amended to delete the requirement that two copies of a brief shall be filed with the original brief.

Section 111.21 (relating to content and form) is amended to clarify that the decision and order of the judge must be included with a request for supersedeas filed with the Board.

Section 111.22 (relating to filing) is amended to clarify the requirements for a request for supersedeas filed with the Board.

Section 111.24 (relating to disposition of request for supersedeas) is amended to specify that the Board will have 30 days from the date of the receipt of the request for supersedeas to rule on a request or the request will be deemed denied.

Section 111.31 (relating to applicability) is amended to clarify that Chapter 111, Subchapter D (relating to other petitions) also applies to petitions for reconsideration under section 426 of the act (77 P. S. § 871).

Section 111.32 (relating to form/content) is amended to delete the requirement that two copies of a petition or request shall be filed with the original petition or request.

Section 111.34 (relating to answers to petitions) is amended to delete the requirement that two copies of an answer shall be filed with the original answer.

Chapter 131. Special rules of administrative practice and procedure before workers' compensation judges

The Department amends Chapter 131 to replace reference to the Bureau with reference to the Department.

Section 131.3 (relating to waiver and modification of rules) is amended to provide that the judge cannot waive or modify the provisions in § 131.202 (relating to first hearing information and stay).

IRRC commented that the Department should revise the proposed language in § 131.3, which provided that the judge cannot waive or modify the provisions in "Subchapter D," to clarify the specific provisions in Chapter 131, Subchapter D that are being addressed. Joseph Hakun commented that references to "Subchapter D" in § 131.3 may be read as expanding the bar to a judge's ability to waive or modify rules, to all rules involving the UEGF. PWCJPA commented that reference to "Subchapter D" prohibits any exercise of discretion on the part of the judge. Susan E. Kelley, Paul E. Baker, Francine Lincicome and Kelly F. Melcher raised an identical concern to this section. Karl Baldys also noted his support of PWCJPA's comment. In response to the comments, and in connection with further changes made to Chapter 131, Subchapter D in this final-form rulemaking, the Department clarified the amendment to § 131.3 to specify that only the first hearing provisions of § 131.202 are included in the exception to the waiver and modification of rules.

Related comments to those received regarding § 131.3 were also received regarding the proposed rulemaking's exception of "Subchapter D" from the one-day trial provisions in § 131.53a(a) (relating to consolidated hearing procedure). The Department disagreed that the proposed amendment to § 131.53a(a) would operate as a complete bar or prohibition of all judicial discretion. However, based upon further consideration and discussion with some of the commentators, which discussion resulted in the previously discussed clarification to § 131.3 as well as

the Department's inclusion of new, discretionary language regarding the scheduling of hearings in UEGF matters in § 131.203 (related to hearing procedures), the proposed amendment to § 131.53a is no longer necessary and has been withdrawn.

Section 131.5 (relating to definitions) is amended to add definitions of "Board," "claim petition" and "UEGF claim petition." The Department adds a definition of "writing" to clarify that a "writing" can include electronic communications. The Department adds "UEGF" to the definition of "Uninsured Employers Guaranty Fund."

IFP and IRRC commented that the Department should explain the need for amending the definition of "party" in § 131.5 to include "employee" and how an employee differs from a claimant. Upon further consideration, the Department deleted the proposed reference to "employee" within the definition of "party" to avoid redundancy, as it is otherwise included within the definition of "claimant."

Section 131.11 is amended to clarify current filing and service requirements, including allowing filing by common carrier, and to provide that a United States Postal Service Certificate of Mailing, USPS Form 3817 or similar form can be used as evidence of the filing date.

IFP commented that the filing provisions in § 131.11 should be consistent with the revisions to the filing provisions in § 111.3, including filing by common carrier, or in the alternative, the Department should explain the reasons for differences in the filing requirements. IRRC commented that the Department should ensure that the proposed language in § 131.11(a)(3) provides clear filing requirements for the regulated community. IRRC also recommended that the filing and service information and address for the Department in § 131.11(e), and any changes thereto, be published both in the *Pennsylvania Bulletin* and on the Department's web site, not just in one or the other location. As addressed in the response to § 111.3, the Department agrees that the filing requirements in the final-form rulemaking should be consistent throughout and has made the necessary changes to § 131.11(a) to ensure clarity and consistency by including language similar to § 111.3 and its other regulations that also allows filing by a "common carrier of property." In addition, the Department agrees with the recommendation by IRRC regarding § 131.11(e), and amended this subsection to provide for publication in the *Pennsylvania Bulletin* and on the Department's web site.

Section 131.32 (relating to petitions except petitions for joinder and challenge proceedings) is amended to provide that a party shall file forms as prescribed by the instructions on the form. If a form is not prescribed by the Department, the party shall file an original of the petition with the Department.

Section 131.33 (relating to answers except answers to petitions for joinder and challenge proceedings) is amended to clarify requirements for filing answers to claim petitions and other petitions, except petitions for joinder and challenge proceedings.

IFP commented that the distinction between claim petitions and all other petitions in proposed § 131.33(a) is confusing. IFP also commented that the Department should explain the reason for the addition of petitions to review utilization review determination to § 131.33(a). The distinction between claim petitions and all other petitions in this section is based upon, and consistent with, section 416 of the act (77 P. S. § 821), which provides, in part, that the failure to timely answer and

deny facts alleged in a claim petition only, may result in those facts being deemed admitted. It is also consistent with the long-standing Commonwealth Court decision in *Yellow Freight Sys., Inc. v. WCAB (Madara)*, 423 A.2d 1125 (Pa. Cmwlth. 1981). To avoid confusion however, the Department agrees with IFP that the proposed additional reference to petitions to review utilization review determination should be deleted, as those petitions are separately addressed in § 127.554 (relating to petition for review by Bureau—no answer allowed).

Section 131.36 (relating to joinder) is amended to specify that petitions for joinder and answers to the joinder petitions should be filed with the Department.

Section 131.52 (relating to first hearing procedures) is amended to specify that, at the first hearing, parties shall identify Department documents that are relevant to the claim or dispute and, if not available electronically, provide actual copies of those documents to the judge.

IRRC commented that the proposed language in § 131.52(e) seems to move responsibility for obtaining documents to the judge and, therefore, asked that the Department explain the need for, and reasonableness of, this change. Geoffrey L. Seacrist commented that § 131.52(e) should not eliminate the requirement that the parties provide to the judge copies of all relevant documents filed with the Department. The Department's intent is not to move responsibility for obtaining documents to the judge, but rather to eliminate the duplicate filing of documents which are already electronically available to the judge within the Department's new electronic system, WCAIS. This section does not preclude the parties from also providing copies of the filed documents to the judge if necessary and, to this end, the Department has clarified this provision to provide that the parties shall provide the documents if not otherwise electronically available to the judge.

Section 131.53b (relating to bifurcation and motions for disposition of a petition) is amended to allow motions for disposition of a petition and establish guidelines for their handling.

IFP commented that the Department should clarify what motions were envisioned under the proposed language in § 131.53b(b), which as proposed involved motions for "summary disposition of a claim." IFP also commented that the Department should clarify the process after the motion is filed, including the opportunity for response, and questioned whether the motions have any particular requirements. IRRC commented that the proposed language in § 131.53b(b) was silent as to whether and when an opposing party may file a response to a motion. IRRC asked the Department to explain the need for, and reasonableness of, this provision, and to ensure it is clear. PBAWCS commented that the 45-day motion procedure in § 131.53b(b) adds unnecessary delay to the litigation process and appears to leave no mechanism for when or whether an opposing party may respond.

The Department intends § 131.53b(b) to streamline litigation by providing an expedited method, upon a party's motion, for judges to dispose of a petition pending before them. To clarify its purpose, the Department deleted the reference to "summary disposition of a claim" and replaced it with "disposition of a petition." The Department believes that requirements as to the form, as well as the timing, of a response, should be left to the discretion of the judge. To better clarify the process however, the Department added specific language indicating that the response shall be made within a time

specified by the judge, and that the judge will issue an order or provide reasons for not doing so within 30 days of the response due date. The Department also deleted the language that the articulated reasons for not ruling on the motion be "substantial and compelling." Insofar as the provision provides that pendency of the motion does not act as a stay, the Department disagrees with the comment that the procedure will add unnecessary delay to the litigation process. To the contrary, the Department believes that this procedure will aid in streamlining the litigation.

Section 131.55 (relating to attorney fees and costs) is amended to require claimant's counsel to submit a copy of the fee agreement or any other statement or claim for disbursements, costs and expenses, and to obtain approval from the judge or the Board before the agreement, statement or claim will be valid.

Thomas C. Lowry inquired whether § 131.55(a) precludes an attorney who is operating with a signed fee agreement from obtaining, without approval of a judge, an advance from the claimant to pay litigation costs as set forth in the agreement. Ronald L. Calhoun commented that if a claimant's attorney cannot charge or collect costs of litigation from a client unless approved by a judge under § 131.55(a), many injured workers will not be able to find representation because attorneys may not advance these costs. IRRC questioned the need for the proposed language in § 131.55(a), commenting that this requirement could delay legal representation or eliminate it altogether for a claimant seeking assistance. IRRC also asked whether an attorney must be expected to advance costs on behalf of a client even when there is a contingent fee in place. Further, IFP commented that the Department should clarify the meaning of "claim" in proposed § 131.55(a).

The amended language in § 131.55(a) was previously in § 121.24. In 2007, the Department rescinded that section by final-form rulemaking published at 37 Pa.B. 4181 (August 4, 2007), noting in the preamble that the requirements concerning attorney fees are more appropriately addressed in Chapter 131. This language is based upon, and consistent with, the approval requirements in sections 440, 442 and 501 of the act (77 P.S. §§ 996, 998 and 1021). This language is not intended to alter the existing fee approval requirements under sections 440, 442 and 501 of the act or to change the current practice for seeking fee approval, and therefore should not delay or eliminate legal representation for injured workers. The language neither requires nor prohibits the advancement of costs, but rather reinforces the existing requirements in the act and Rules of Professional Conduct regarding the need for executed fee contracts regardless of which party is ultimately determined to be liable for the payment of the fees and costs in the case. The Department believes that this section reasonably ensures that the necessary approval of fee agreements and claims for disbursements, costs and expenses is promptly obtained by counsel, both when and as required under sections 440, 442 and 501 of the act. Further, the Department intends that "claim" in this section refers to a claim for fees or other disbursements, costs or expenses. To clarify this meaning, the Department deleted the initial use of the term in the first sentence.

Section 131.63 (relating to time for taking oral depositions) is amended to provide that an oral deposition may be taken at any time subsequent to the date of the assignment, rather than the date of service, of the petition by the Department.

Section 131.81 (relating to subpoenas) is amended to provide for electronic subpoena requests and to prohibit service of subpoenas until 10 days after issuance by the judge unless otherwise agreed to by the parties.

IRRC made several comments regarding the proposed language in § 131.81(b) pertaining to the proposed 7-day period to object to subpoena requests. IRRC inquired about what was to occur following the filing of an objection, why objections were to be made to a request rather than service of a subpoena and how the Department determined that a 7-day period was appropriate. IRRC commented that the Department should explain the need for, and reasonableness of, the provision and ensure the procedures are clear. IFP also commented that the Department should explain how the 7-day period for objecting to a request for a subpoena was determined, and whether this new rule is consistent with the filing rules in § 131.11 or a different rule. Geoffrey L. Seacrist commented that the proposed period for objections to a subpoena in § 131.81(b) should begin on the date of service, not the date the request is made to the judge. G. Michael Spates commented that the proposed 7-day period for objections to a subpoena in § 131.81(b) is too short and should be extended to 10 calendar days. G. Michael Spates also suggested adding language to § 131.81(b) requiring that the judge circulate an interlocutory order on the party's objection prior to the issuance of the subpoena. Thomas C. Lowry questioned the requirement in § 131.81(a) that the party requesting a subpoena "shall complete the subpoena," noting his experience that a records deposition date was usually left blank due to the time delay between submission and return of a paper subpoena from a judge. Thomas C. Lowry also commented that § 131.81(c) should include a requirement that a copy of the service of a subpoena also be served on the judge.

In response to the comments about the proposed 7-day period to object to a subpoena request in § 131.81(b), and upon further consideration, the Department deleted this requirement from the final-form rulemaking. The Department agrees that the proposed 7-day period was both short and difficult to calculate. Moreover, the Department believes that the current practice for objecting to subpoenas under proposed § 131.81(c) (final-form § 131.81(d)) is sufficient. The Department has retained as modified the amended language in § 131.81(b) requiring that a subpoena may not be served until 10 days after its issuance absent agreement of the parties. The Department believes that this requirement will reasonably encourage prompt communication and resolution of potential concerns about subpoenas, and provide opportunity for objections to be raised promptly prior to service, if necessary. While a judge may issue an interlocutory order concerning an objection to a subpoena, the Department does not agree with the comment that this should be required by regulation, and this change has not been made. The Department believes that this should be left to the discretion of the judge. In addition, the amended language in § 131.81(a) requiring parties to "complete the subpoena" is not intended to change current practice, but rather to emphasize that it is the responsibility of the party, not the judge, to fill out the paper or electronic subpoena request. In response to the comment about delay in issuance of subpoenas, the Department notes that the new electronic system, WCAIS, has greatly reduced the time between the subpoena request and the issuance of the signed subpoena by the judge. In WCAIS, registered parties can file subpoena requests, and judges can issue subpoenas, electronically and almost immedi-

ately to those who have elected electronic service. Moreover, while the parties are not prohibited from providing a copy of service of the subpoena on the judge if they desire, it is not necessary. Therefore, the Department does not agree with the comment that § 131.81(c) should require this service in all cases, and this change has not been made.

Section 131.91(b) (relating to stipulations of fact) is amended to add a paragraph requiring stipulations to be signed by the claimant, all counsel and the employer, if the employer is unrepresented. The Department further adds paragraphs requiring the stipulation to expressly provide which petitions are being resolved, whether a petition is being withdrawn, granted or dismissed, and whether the parties are requesting an interlocutory order or a final order.

IFP commented that the Department should clarify what stipulations fall within the phrase "dispositive of the case," as used in the proposed language in § 131.91(b), to require satisfaction of the signature requirements in this subsection. IFP also sought clarification of the purpose of requiring a claimant to sign a stipulation when they are represented by counsel or the matter involves a petition to review utilization review determination. Upon further consideration, the Department deleted the reference to "dispositive of the case" from § 131.91(b)(3) to avoid confusion concerning the signature requirement. The final-form regulation now clarifies that the signatures, including the signature of claimant, are required for all stipulations. The Department believes that requiring the claimant's signature, even when represented by counsel, is reasonable and necessary to allow the judge to be satisfied, as required under § 131.91(b)(2), that the claimant understands the effect of the stipulation on future compensation and medical expenses. This is also reasonable and necessary for stipulations involving a petition to review utilization review determination, whether or not the petition was filed by the claimant, to ensure that the claimant understands the effect on his medical expenses for treatment with the provider under review.

The Department adds Chapter 131, Subchapter D to provide specific guidelines concerning these proceedings.

IRRC commented that the Department should explain the need for, and reasonableness of, adding Chapter 131, Subchapter D based on the concerns regarding certain provisions raised by commentators. Joseph Hakun commented that the UEGF rules as proposed would bar the exercise of discretion by judges in procedural matters. PWCJPA, as well as Susan E. Kelley, Paul E. Baker, Francine Lincicome and Kelly F. Melcher, also commented that the UEGF rules as proposed would prohibit judicial discretion. However, each commentator also acknowledged that procedural rules may be appropriate to address legitimate needs of the UEGF. Karl Baldys noted his support of PWCJPA's comment.

Chapter 131, Subchapter D is intended to promote the efficient use of all parties' litigation resources through better coordination of the claim petition against the employer (LIBC-362 claim petition) with the related claim petition filed against the employer and the UEGF (UEGF claim petition). The UEGF is a secondarily liable party to a UEGF claim petition and does not have a pre-existing relationship with the parties which would provide it prelitigation access to much of the information or witnesses required to defend a claim. More so than other parties in typical workers' compensation proceedings, the UEGF must rely heavily on information brought out after

the filing of a UEGF claim petition through subsequent discovery and hearings. The Department believes, as acknowledged by the commentators, that procedural rules are appropriate to address the legitimate needs of this statutorily-created fund. Indeed, in enacting the UEGF, the General Assembly provided in section 1608 of the act that the Department “may promulgate regulations for the administration and enforcement” of the UEGF. The procedural rules in Chapter 131, Subchapter D benefit all parties, including the UEGF, by promoting quicker consolidation and resolution of the claims in UEGF proceedings and reducing the additional time and effort required to obtain information, join all appropriate parties and reach a judicial determination regarding potential liability and award of the claim. In doing so, the final-form rulemaking reasonably provides for judicial involvement as necessary to ensure that the litigation proceeds to a resolution efficiently and fairly for all parties.

Section 131.201 (relating to petitions) provides that all references to petitions in Chapter 131, Subchapter D are defined as under § 131.5.

Section 131.202 directs a judge to provide information about the UEGF to a claimant in an LIBC-362 claim petition when a UEGF claim petition has not been filed and there is not an insurer listed on the notice of assignment or the insurer has filed a motion for dismissal based on noncoverage. If the claimant indicates an intention to file a UEGF claim petition, the judge is directed to stay the proceedings on the LIBC-362 claim petition until 20 days after the assignment of the UEGF claim petition. If the UEGF claim petition is not filed within 45 days, the LIBC-362 claim petition will proceed. This section cannot be waived or modified, as otherwise provided in § 131.3.

IRRC commented that the Department should explain the need for, and reasonableness of, the requirement in § 131.202(a) that the judge is to inform the claimant of the existence of the UEGF. PWCJPA commented that the requirement of informing the claimant of the existence of the UEGF compromises the judge’s independence, may subject the judge to being called as a witness and is contrary to certain of the judges’ code of ethics requirements involving avoiding impropriety, performing duties impartially and upholding the integrity of the workers’ compensation system in section 1404(a) of the act (77 P. S. § 2504(a)). Susan E. Kelley, Paul E. Baker, Francine Lincicome and Kelly F. Melcher raised an identical concern to this section. Karl Baldys also noted his support of PWCJPA’s comment.

This regulation aims to promote due process and judicial economy by ensuring prompt inclusion of all potential parties, including the UEGF, to a claim against an uninsured employer. By requiring a judge to provide information about the UEGF and to stay the first hearing on an LIBC-362 claim petition until 20 days after the notice of assignment of the UEGF claim petition (if one is filed), this regulation promotes efficiency and reduces costs for all parties by eliminating duplicative hearings and depositions necessitated by the UEGF’s late arrival to the claim proceeding. The Department does not agree that requiring the judge to provide information on the existence of the UEGF either compromises judicial independence or is contrary to the judicial code of ethics. The Department also does not believe provision of this information will subject the judge to being called as a witness. First, it is anticipated that this information will be documentary in nature and will be done on the record. The Department recognizes that varying information concerning the UEGF’s existence is currently being provided

verbally by judges in some matters, sometimes on-the-record and sometimes off-the-record. This final-form rulemaking simply ensures that the provision of the information is uniform across this Commonwealth for all claimants, to allow claimants to make informed decisions as to whether they wish to file a UEGF claim petition. Moreover, insofar as this section relates to judicial procedures in these matters only, the requirement that a claimant inform the judge whether he intends to file a UEGF claim petition following provision of the information is not intended to preclude a later filing to the extent otherwise allowed by law. Second, this section is only applicable in the limited number of cases when a UEGF claim petition has not been filed and there is not an insurer listed on the notice of assignment for the LIBC-362 claim petition or the insurer has filed a motion for dismissal based on noncoverage. Due to the uniqueness of the UEGF from other types of workers’ compensation litigation, provision of this information by the judge at the first hearing on the LIBC-362 claim petition, and allowing for a stay for the filing of a UEGF claim petition, is reasonable and necessary to accomplish the goals of due process, judicial economy and fairness. For these reasons, although the Department has agreed to otherwise delete the nonwaiver provisions regarding the “one day one trial” procedure proposed in § 131.203 and proposed § 131.204 (relating to waiver and modification of §§ 131.202 and 131.203), the nonwaiver language regarding § 131.202 has been retained by adding § 131.202(e) in this final-form rulemaking. By way of compromise however, following discussions with PWCJPA, § 131.202(e) specifically recognizes that the nonwaivability of § 131.202 is “in the interests of judicial economy and due process to have all parties joined as soon as possible, and in recognition of the uniqueness of the UEGF from other types of workers’ compensation litigation.”

Section 131.203 provides that if the UEGF requests live testimony of witnesses before the judge, the judge will schedule hearings to accommodate the request, unless denied for good cause shown and stated on the record.

IRRC commented that the Department should explain the need for, and reasonableness of, the requirement of the agreement of all parties in writing or on the record for a judge to waive or modify this section and § 131.202, as found in proposed § 131.204(a). IRRC also asked the Department to explain how this is in the public interest. Joseph Hakun commented that requiring the agreement of all participating parties for waiver or modification of the rules under proposed § 131.204(a), rather than requiring a “good cause” standard, gives an employer who may be subject to criminal sanctions the ability to “veto” a waiver or modification. PWCJPA, Joseph Hakun and Kenneth Walsh commented that requiring agreement of all participating parties inappropriately prohibits any exercise of discretion on the part of the judge in cases involving the UEGF. PWCJPA specifically commented that the judge’s discretion should not be subject to employers’ consent. Susan E. Kelley, Paul E. Baker, Francine Lincicome and Kelly F. Melcher raised identical concerns to this section. Karl Baldys also noted his support of PWCJPA’s comment.

Upon further consideration and discussion with some of the commentators, the Department agreed to delete the waiver provision in proposed § 131.204 in its entirety, including the requirement that agreement of all parties was required. In addition, the Department deleted the proposed language in § 131.203 which provided that § 131.53a would not apply to Subchapter D proceedings.

The Department replaced the proposed language in § 131.203 with new language providing that if the UEGF requests live testimony of witnesses before the judge, the judge will schedule hearings to accommodate the request unless denied for good cause shown and stated on the record. The Department believes this language reasonably affords the UEGF, which has no pre-existing relationship with the other parties, the necessary opportunity to develop the facts of a case through testimony at a hearing prior to the final hearing in a matter, but also provides the judge with discretion to deny that request utilizing a good cause standard, as suggested by the commentators.

Final-form § 131.204 (proposed § 131.205) (relating to UEGF subpoenas and interrogatories) authorizes judges to issue subpoenas, order testimony and compel completion of written interrogatories concerning the uninsured employer's financial history, condition or ability to pay an award. Additionally, this section authorizes a judge to compel the attendance of the parties at mediation.

Joseph Hakun commented that the UEGF rules should be delayed because there may be interplay between the information to be obtained under proposed § 131.205(a) (final-form § 131.204(a)) and pending legislation in the 2013-2014 session of the General Assembly. The Department disagrees. The legislation as proposed has no impact on these procedural changes to the practice before judges, nor is there any interplay or overlap between the information to be obtained under this specific section and any of the provisions contemplated in the legislative bill.

Ronald L. Calhoun commented that the rule requiring that independent medical examinations take place within 45 days of the first hearing should be amended to include first hearings of any type, including hearings where testimony is not taken. This rule is found in § 131.53(g) (relating to procedures subsequent to the first hearing). This section, however, was not part of the Department's proposed rulemaking. The Department has taken this comment under advisement and will review and monitor the suggestion, with the assistance of the Committee, for a possible future rulemaking.

Affected Persons

Those affected by this final-form rulemaking include the Board Commissioners and officials, employees of the Department, the Office and judges, as well as attorneys and litigants in the workers' compensation system in this Commonwealth.

Fiscal Impact

There is no significant fiscal impact associated with this final-form rulemaking. However, the final-form rulemaking may provide savings to the regulated community through: (1) reduced copying and mailing costs, as the number of copies of filings has been reduced and documents may be filed electronically; and (2) reduced overall litigation expenses for all parties to claim proceedings involving the UEGF due to better coordination and handling of the litigation process in these matters.

Reporting, Recordkeeping and Paperwork Requirements

The final-form rulemaking does not require the creation of new forms. There are no other additional reporting, recording or paperwork requirements on either the Commonwealth or the regulated community.

Effective Date

This final-form rulemaking is effective upon publication in the *Pennsylvania Bulletin*.

Sunset Date

A sunset date is not necessary. The Department will continue to monitor the impact and effectiveness of the regulations.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on February 10, 2014, the Department submitted a copy of the notice of proposed rulemaking, published at 44 Pa.B. 996, to IRRC and the Chairpersons of the Senate Labor and Industry Committee and the House Labor and Industry Committee for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC and the House and Senate Committees were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing the final-form rulemaking, the Department has considered all comments from IRRC, the House and Senate Committees and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), on November 5, 2014, the final-form rulemaking was deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on November 6, 2014, and approved the final-form rulemaking.

Findings

The Department finds that:

- (1) Public notice of proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201 and 1202) and the regulations promulgated thereunder, 1 Pa. Code §§ 7.1 and 7.2.
- (2) A public comment period was provided as required by law and all comments were considered.
- (3) The final-form rulemaking is necessary and appropriate for the administration and enforcement of the authorizing statutes.

Order

The Department, acting under the authorizing statute, orders that:

(a) The regulations of the Department, 34 Pa. Code Chapters 111 and 131, are amended by adding §§ 131.201—131.204 and by amending §§ 111.3, 111.11—111.14, 111.16, 111.21—111.24, 111.31, 111.32, 111.34, 131.3, 131.5, 131.11, 131.21, 131.32, 131.33, 131.36, 131.50, 131.52, 131.53b, 131.55, 131.57, 131.58, 131.60, 131.63, 131.81 and 131.91 to read as set forth in Annex A, with ellipses referring to the existing text of the regulations.

(Editor's Note: The proposed amendments to § 131.53a published at 44 Pa.B. 996 have been withdrawn by the Department. Proposed § 131.204 has been withdrawn by the Department. Final-form § 131.204 was published in the proposed rulemaking as § 131.205.)

(b) The Secretary of the Department shall submit this order and Annex A to the Office of General Counsel and the Office of Attorney General for approval as to legality and form as required by law.

(c) The Secretary of the Department shall submit this order and Annex A to the Independent Regulatory Review Commission and the Senate and House Committees as required by law.

(d) The Secretary of the Department shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(e) This order shall take effect upon publication in the *Pennsylvania Bulletin*.

JULIA K. HEARTHWAY,
Secretary

(Editor's Note: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 44 Pa.B. 7424 (November 22, 2014).)

Fiscal Note: Fiscal Note 12-99 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 34. LABOR AND INDUSTRY

PART VII. WORKERS' COMPENSATION APPEAL BOARD

CHAPTER 111. SPECIAL RULES OF ADMINISTRATIVE PRACTICE AND PROCEDURE BEFORE THE WORKERS' COMPENSATION APPEAL BOARD

Subchapter A. GENERAL PROVISIONS

§ 111.3. Definitions.

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

Act—The Workers' Compensation Act (77 P. S. §§ 1—1041.4 and 2501—2708).

Appeal—A proceeding to review a ruling or decision by a judge.

Board—The Workers' Compensation Appeal Board.

Disease Law—The Pennsylvania Occupational Disease Act (77 P. S. §§ 1201—1603).

Filing—Filing is deemed complete upon one of the following:

- (i) Delivery in person.
- (ii) If by electronic submission, upon receipt and in a format as prescribed by the Department and published in the *Pennsylvania Bulletin* or the Department's web site located at www.dli.state.pa.us.
- (iii) If by mail, upon deposit in the United States mail, properly addressed, postage or charges prepaid, as evidenced by one of the following:

(A) United States Postal Service postmark.

(B) United States Postal Service Certificate of Mailing (USPS Form 3817 or other similar United States Postal Service form from which the date of deposit can be verified), enclosed with the filing or submitted separately to the Department.

(iv) An appeal may be delivered by a common carrier of property which is subject to the authority of the Pennsylvania Public Utility Commission or the United States National Surface Transportation Board. The date of filing is the date the document was delivered to the common carrier, as established by a document or other record prepared by the common carrier in the normal course of business. If the date of delivery to the common carrier cannot be determined by the documents in the record, the date of filing will be the date of its receipt by the Board.

Judge—A workers' compensation judge assigned by the Office of Adjudication as provided in section 401 of the act (77 P. S. § 701) or assigned by the Office of Adjudication to determine a petition filed under the Disease Law.

Office of Adjudication—The Office of the Department created under section 1401(a) of the act (77 P. S. § 2501(a)).

Party—A petitioner or respondent. An act required or authorized by this chapter, to be done by or to a party, may be done by or to that party's counsel of record.

Petitioner—Anyone seeking to review a ruling or decision by a judge or the moving party in a petition filed under Subchapter D (relating to other petitions).

Respondent—Anyone in whose favor the matter was decided by the judge or other than the moving party in any petition filed under Subchapter D.

Service—Delivery in person, by mail or electronics. If service is by mail, it is deemed complete upon deposit in the United States mail, as evidenced by a United States Postal Service postmark, properly addressed, with postage or charges prepaid.

Supersedeas—A temporary stay affecting a workers' compensation case.

(b) Subsection (a) supersedes 1 Pa. Code §§ 31.3, 31.11 and 33.34 (relating to definitions; timely filing required; and date of service).

Subchapter B. APPEALS

§ 111.11. Content and form.

(a) An appeal or cross appeal shall be filed with the Board on a form provided by the Board. All references to forms mean paper forms or an electronic format prescribed by the Board and published in the *Pennsylvania Bulletin* or the Department's web site located at www.dli.state.pa.us. All forms must contain the following information:

(1) The name and address of the claimant, name and address of the defendant, date of the injury, type of petition, insurance carrier and circulation date of the decision at issue. An appeal from a workers' compensation judge's decision is deemed to include all claim numbers, dispute numbers and petition numbers referenced in the decision and order which are the subject of the appeal. This paragraph does not supersede the other requirements of this section.

(2) A statement of the particular grounds upon which the appeal is based, including reference to the specific findings of fact which are challenged and the errors of the law which are alleged. General allegations which do not specifically bring to the attention of the Board the issues decided are insufficient.

(3) A statement of the relief which is requested.

(4) A statement whether the petitioner seeks an opportunity to file a brief or present oral argument or whether the case should be heard on the record without brief or oral argument.

(5) Identification of the judge whose decision is in question, including as an attachment, a copy of that judge's decision.

(6) A proof of service as specified in § 111.12(e) (relating to filing, service and proof of service).

(b) An appeal or a cross appeal shall be served on all parties and the judge.

(c) A request for supersedeas, if desired, shall be indicated on the appeal and conform to § 111.21 (relating to content and form).

(d) Subsections (a)—(c) supersede 1 Pa. Code §§ 31.5, 33.1—33.4, 33.11, 33.12, 35.17 and 35.20.

§ 111.12. Filing, service and proof of service.

(a) When filing other than electronically, an original of each appeal or cross appeal shall be filed. The appeal shall have attached a copy of the judge’s decision which is in question as required by § 111.11(a)(5) (relating to content and form).

(b) When filing electronically, the petitioner shall follow the online procedures established by the Department on its web site located at www.dli.state.pa.us.

(c) The petitioner shall serve a copy of any appeal upon all parties and the judge.

(d) The respondent shall serve a copy of any cross appeal upon all parties and the judge.

(e) The petitioner or respondent shall, concurrently with the filing of an appeal or cross appeal, on a form prescribed by the Board or in substantial compliance therewith, file a proof of service with the Board containing:

- (1) A statement of the date of service.
- (2) The names of parties and judge served.
- (3) The mailing address, the applicable zip code and the manner of service on the parties and judge served.

(f) Subsections (a)—(e) supersede 1 Pa. Code §§ 31.26, 33.15, 33.32, 33.33 and 33.35—33.37.

§ 111.13. Processing of appeals and cross appeals.

(a) Upon receipt of an appeal or a cross appeal, the Board will acknowledge receipt to all parties.

(b) The Board will, in addition to acknowledging receipt of the appeal or the cross appeal, establish the briefing schedule and indicate that the appeal and the cross appeal will be scheduled for oral argument unless all parties agree to submission of the case on only briefs or record.

(c) Subsections (a) and (b) supersede 1 Pa. Code § 33.31 (relating to service by the agency).

§ 111.14. Motions to quash.

(a) A party may submit a motion to quash an appeal or a cross appeal within 20 days of service of the appeal or the cross appeal.

(b) A motion to quash shall be served on all parties.

(c) A motion to quash shall be accompanied by a proof of service conforming to § 111.12(e) (relating to filing, service and proof of service), insofar as applicable.

(d) The Board shall dispose of a motion to quash in conformity with the procedures set forth in § 111.35 (relating to dispositions of petitions).

(e) An original motion to quash shall be filed.

(f) Subsections (a)—(e) supersede 1 Pa. Code §§ 31.26, 33.15, 33.32, 33.33, 33.35—33.37, 35.54 and 35.55 and also supersede 1 Pa. Code Chapter 35, Subchapter D (relating to motions).

§ 111.16. Briefs: content and form and time for filing.

(a) A brief on behalf of a petitioner shall be filed with the Board at or before the date of oral argument. If oral argument is waived, petitioner shall file a brief within 30

days of the date of the Board’s acknowledgment of receipt of the appeal as set forth in § 111.13 (relating to processing of appeals and cross appeals).

(b) A brief on behalf of a respondent shall be filed with the Board 30 days after oral argument. Otherwise, the respondent shall file a brief with the Board within 60 days of the date of the Board’s acknowledgment of receipt of the appeal as set forth in § 111.13.

(c) Upon written request of a party directed to the Secretary of the Board or upon oral request at the time of oral argument, and with notice to all parties, the Board may extend or shorten the time for filing of the party’s brief only for good cause shown. A party shall present a request to extend or shorten the time at or before the date set for filing that party’s brief.

(d) Briefs not filed with the Board in accordance with the schedule in this section or as modified by the Board under subsection (c) will not be considered and will result in disposition of the appeal without further notice or consideration of the brief of the party failing to comply with these deadlines or schedule.

(e) Briefs, except as otherwise allowed, shall consist of the following items, separately and distinctly set forth:

- (1) A short statement of the questions involved.
- (2) A statement of the facts by the petitioner, or counterstatement of the facts by the respondent.
- (3) The argument.
- (4) A short conclusion setting forth the precise relief sought.

(5) A proof of service as specified in § 111.12(e) (relating to filing, service and proof of service) insofar as applicable.

(f) An original brief shall be filed.

(g) Briefs shall be served on all parties.

(h) Subsections (a)—(g) supersede 1 Pa. Code §§ 31.15, 33.37, 35.212 and 35.221 and also supersede 1 Pa. Code Chapter 35, Subchapter F (relating to briefs).

Subchapter C. SUPERSEDEAS ON APPEAL TO THE BOARD AND COURTS

§ 111.21. Content and form.

(a) A request for supersedeas shall be filed as a separate petition from the appeal and be accompanied by the following:

- (1) A copy of the decision and order of the judge or order and opinion of the Board from which the supersedeas is requested.
- (2) A short statement setting forth reasons and bases for the request for supersedeas.
- (3) A specific statement as to the issues of law, if any, involved in the underlying appeal.
- (4) Information on the current employment status of the claimant, if known.
- (5) The court, if any, to which an appeal from the Board decision has been taken.

(6) Other relevant information for the Board’s consideration in determining whether the supersedeas request meets the following standards:

- (i) The petitioner makes a strong showing that it is likely to prevail on the merits.
- (ii) The petitioner shows that, without the requested relief, it will suffer irreparable injury.

(iii) The issuance of a stay will not substantially harm other interested parties in the proceeding.

(iv) The issuance of a stay will not adversely affect the public interest.

(7) A proof of service as specified in § 111.12(e) (relating to filing, service and proof of service), insofar as applicable.

(b) Requests for supersedeas shall be served on all parties.

(c) Subsections (a) and (b) supersede 1 Pa. Code §§ 35.1, 35.2, 35.17, 35.190 and 35.225.

§ 111.22. Filing.

(a) A request for supersedeas from the judge's decision shall be filed with the Board within the time specified in section 423 of the act (77 P. S. § 853).

(b) A request for supersedeas from a Board order shall be filed under the applicable Pennsylvania Rules of Appellate Procedure.

(c) An original request for supersedeas shall be filed. The supersedeas request shall have attached a copy of the judge's decision and order or Board opinion and order from which the supersedeas is requested.

(d) A request for supersedeas shall be served on all the parties and be accompanied by a proof of service as specified in § 111.12(e) (relating to filing, service and proof of service).

(e) Subsections (a)—(d) supersede 1 Pa. Code § 33.15 (relating to number of copies).

§ 111.23. Answers.

(a) An answer to a request for supersedeas may be filed with the Board within 10 days of service of the request for supersedeas.

(b) An original answer shall be filed.

(c) An answer filed under this subsection shall be served on all parties.

(d) An answer filed under this subsection shall be accompanied by a proof of service as specified in § 111.12(e) (relating to filing, service and proof of service), insofar as applicable.

(e) Subsections (a)—(d) supersede 1 Pa. Code §§ 33.15 and 35.35 (relating to number of copies; and answers to complaints and petitions).

§ 111.24. Disposition of request for supersedeas.

(a) The Board may grant the request for supersedeas in whole or in part.

(b) The Board will rule on requests for supersedeas within 30 days of the date of receipt by the Board of the request, or the request shall be deemed denied.

(c) Subsections (a) and (b) supersede 1 Pa. Code §§ 35.190 and 35.225 (relating to appeals to agency head from rulings of presiding officers; and interlocutory orders).

Subchapter D. OTHER PETITIONS

§ 111.31. Applicability.

This subchapter applies to the following petitions or requests:

(1) A petition under section 306 of the act (77 P. S. § 513).

(2) A petition for appointment of guardian under section 307 of the act (77 P. S. § 542).

(3) A petition alleging a meretricious relationship under section 307 of the act (77 P. S. § 562).

(4) A petition for commutation under section 316 of the act (77 P. S. § 604).

(5) A petition under section 317 of the act (77 P. S. § 603).

(6) A petition for rehearing or reconsideration under section 426 of the act (77 P. S. § 871).

(7) A petition for attorney's fees under section 442 or 501 of the act (77 P. S. §§ 998 and 1021).

§ 111.32. Form/content.

(a) Petitions and requests shall contain and be accompanied by the following:

(1) A short statement setting forth the reasons and basis for the petition or request.

(2) The facts upon which the petition or request is based.

(3) A specific statement as to the issues of law, if any, involved in the petition or request.

(4) An explanation as to the status of the case, including the status of a pending appeal or petition before a judge, the Board or a court.

(5) The employment status of the claimant.

(6) A proof of service as specified in § 111.12(e) (relating to filing, service and proof of service), insofar as applicable.

(b) Petitions and requests shall be served on all parties and on the judge if the case is pending before a judge.

(c) An original petition and request shall be filed.

(d) Subsections (a)—(c) supersede 1 Pa. Code §§ 31.5, 33.1—33.4, 33.11, 33.12, 33.15, 33.21—33.23, 35.1, 35.2 and 35.17.

§ 111.34. Answers to petitions.

(a) An answer to a petition or request may be filed with the Board within 20 days of service of the petition or request.

(b) An original answer shall be filed.

(c) An answer filed shall be served on all parties.

(d) An answer filed shall be accompanied by a proof of service as specified in § 111.12(e) (relating to filing, service and proof of service), insofar as applicable.

(e) Subsections (a)—(d) supersede 1 Pa. Code §§ 33.15 and 35.35 (relating to number of copies; and answers to complaints and petitions).

PART VIII. BUREAU OF WORKERS' COMPENSATION

CHAPTER 131. SPECIAL RULES OF ADMINISTRATIVE PRACTICE AND PROCEDURE BEFORE WORKERS' COMPENSATION JUDGES

Subchapter A. GENERAL PROVISIONS

§ 131.3. Waiver and modification of rules.

(a) The judge may, for good cause, waive or modify a provision of this chapter, except as otherwise provided in §§ 131.59b(a) and 131.202 (relating to mandatory mediation; and first hearing information and stay), upon motion of a party, agreement of all parties or upon the judge's own motion.

(b) Subsection (a) supersedes 1 Pa. Code §§ 33.61, 35.18, 35.54 and 35.55 and also supersedes 1 Pa. Code Chapter 35, Subchapter D (relating to motions).

§ 131.5. Definitions.

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

Act—The Workers’ Compensation Act (77 P. S. §§ 1—1041.4 and 2501—2708).

Additional defendant—An insurance carrier, the Commonwealth or an employer, other than the insurance carrier or employer against which the original petition was filed, joined under this chapter, not including the Uninsured Employers Guaranty Fund.

Adjudicating judge—A judge assigned to hold hearings and issue decisions relating to a petition or petitions.

Board—The Workers’ Compensation Appeal Board.

Challenge proceeding—A proceeding governed by § 131.50a (relating to employee request for special supersedeas hearing under section 413(c) and (d) of the act).

Claim petition—A petition filed with the Department under section 410 of the act (77 P. S. § 751).

Claimant—An individual who files a petition for, or otherwise receives, benefits under the act or the Disease Law.

Defendant—An employer, insurance carrier and the Commonwealth, unless specifically designated individually, and the Uninsured Employers Guaranty Fund, except for purposes of joinder, penalties or assessment of counsel fees under section 440 of the act (77 P. S. § 996).

Department—The Department of Labor and Industry of the Commonwealth.

Department record—Official copies of documents received by the Department, on forms prescribed by the Department, if forms prescribed by the Department are available, or official copies of documents received by the Department on forms prepared by a party if forms prescribed by the Department are not available, which record transactions between the parties and which are determined by the judge to pertain to the case.

Director of Adjudication—The individual specified in section 1402 of the act (77 P. S. § 2502).

Disease Law—The Pennsylvania Occupational Disease Act (77 P. S. §§ 1201—1603).

Insurer—A workers’ compensation insurance carrier or self-insured employer, as applicable.

Judge—A workers’ compensation judge assigned by the Office of Adjudication as provided in sections 401 and 401.1 of the act (77 P. S. §§ 701 and 710) or assigned by the Office of Adjudication to determine a petition filed under the act or the Disease Law.

Judge manager—A workers’ compensation judge with management responsibilities appointed under the Civil Service Act (71 P. S. §§ 741.1—741.1005).

Mandatory mediation—A mediation conducted by a mediating judge under § 131.59b (relating to mandatory mediation).

Mediating judge—A judge assigned to mediate petitions in accordance with sections 401 and 401.1 of the act and this chapter.

Mediation—A conference conducted by a judge, having as its purpose an attempt to reconcile any or all disputes under the act or this chapter existing between contending parties. Mediation can be either mandatory or voluntary.

Office of Adjudication—The Office of the Department created under section 1401(a) of the act (77 P. S. § 2501(a)).

Party—A claimant, defendant, employer, insurance carrier, additional defendant, health care provider and, if relevant, the Commonwealth and the Uninsured Employers Guaranty Fund. An act required or authorized by this chapter, to be done by or to a party, may be done by or to that party’s counsel of record.

Penalty proceeding—A proceeding governed by section 435(d) of the act (77 P. S. § 991(d)).

Records of work environment—Records and documents relating to work place health, safety, hazards and exposure, including records or documents which may be obtained under the Worker and Community Right-to-Know Act (35 P. S. §§ 7301—7320) and 29 CFR 1901.1—1928.1027 (relating to Occupational Safety and Health Administration, Department of Labor).

Resolution hearing—A procedure established by the Office of Adjudication with the sole purpose of providing a venue to present a compromise and release to a judge in an expedited fashion.

Statement previously made—A written statement signed or otherwise adopted or approved by the persons making it, or a stenographic, mechanical, electrical, computer-generated or other recording, or transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded. The term does not include statements made by parties which are protected by the attorney-client privilege or which are protected as the work product of counsel.

Supersedeas—A temporary stay affecting a workers’ compensation case.

UEGF—Uninsured Employers Guaranty Fund—The special fund established under Article XVI of the act (77 P. S. §§ 2701—2708).

UEGF claim petition—A petition filed with the Department under section 1604 of the act (77 P. S. § 2704)

Voluntary mediation—A mediation conducted by a judge under § 131.59a (relating to voluntary mediation) upon the agreement of the contending parties and the judge.

Writing—Includes electronic communications in a format as prescribed by the Department.

(b) Subsection (a) supersedes 1 Pa. Code §§ 31.3 and 33.33 (relating to definitions; and effect of service upon an attorney).

Subchapter B. TIME

§ 131.11. Filing, service and proof of service.

(a) Whenever filing is required by this chapter, it is deemed complete upon one of the following:

- (1) Delivery in person.
- (2) If by electronic submission, upon receipt at the electronic address and in a format as prescribed by the Department and published in the *Pennsylvania Bulletin* or the Department’s web site located at www.dli.state.pa.us.
- (3) If by mail, upon deposit in the United States mail, properly addressed, postage or charges prepaid, as evidenced by one of the following:
 - (i) United States Postal Service postmark.
 - (ii) United States Postal Service Certificate of Mailing (USPS Form 3817 or other similar United States Postal

Service form from which the date of deposit can be verified), enclosed with the filing or submitted separately to the Department.

(4) A filing may be delivered by a common carrier of property which is subject to the authority of the Pennsylvania Public Utility Commission or the United States National Surface Transportation Board. The date of filing is the date the document was delivered to the common carrier, as established by a document or other record prepared by the common carrier in the normal course of business. If the date of delivery to the common carrier cannot be determined by the documents in the record, the date of filing will be the date of its receipt by the Department.

(b) Whenever service is required by this chapter, it is deemed complete upon one of the following:

(1) Delivery in person.

(2) If by electronic submission, upon receipt and in a format as prescribed by the Department and published in the *Pennsylvania Bulletin* or the Department's web site located at www.dli.state.pa.us.

(3) Except as provided in § 131.81(b) (relating to subpoenas), if by mail, upon deposit in the United States Mail properly addressed, postage or charges prepaid and accompanied by proof of service.

(c) Any notice or other written communication required to be served upon or furnished to a party shall also be served upon or furnished to the party's attorney in the same manner as it is served upon the party.

(d) Whenever a proof of service is required by this chapter, the proof of service must contain the following:

(1) A statement of the date of service.

(2) The names of the judge and others served.

(3) The mailing address, the applicable zip code and the manner of service on the judge and others served, and, if applicable, the electronic address to which service was made.

(e) Unless otherwise specifically provided in this chapter, whenever the filing or service is required to be made upon the Department, it shall be made to an address as may be published in the *Pennsylvania Bulletin* and on the Department's web site located at www.dli.state.pa.us. Electronic filing and service on the Department shall be at the electronic address and in a format as prescribed by the Department and published in the *Pennsylvania Bulletin* and on the Department's web site located at www.dli.state.pa.us.

(f) Subsections (a)—(e) supersede 1 Pa. Code §§ 31.5, 31.11, 31.13, 31.14, 31.26, 33.32 and 33.34—33.36.

Subchapter C. FORMAL PROCEEDINGS

GENERAL

§ 131.21. Identifying number.

(a) Pleadings, documents and other submittals filed in a proceeding shall be identified by an identifying number assigned by the Department.

(b) Subsection (a) supersedes 1 Pa. Code §§ 31.5, 33.1 and 33.51 (relating to communications and filings generally; title; and docket).

PLEADINGS

§ 131.32. Petitions except petitions for joinder and challenge proceedings.

(a) Petitions shall be in the form prescribed by the Department.

(b) Any petition, filed in accordance with this chapter, shall be filed with the Department as prescribed by the form. If there is no applicable Department petition form available, an original of the petition shall be filed with the Department. The Department will serve a notice of assignment specifying the judge to whom the petition has been assigned. The notice will be served on the parties named in the petition.

(c) Concurrently with filing the petition with the Department, the moving party shall serve a copy of the petition on all other parties, including the insurance carrier, if the insurance carrier is known, and on the attorneys of all other parties, if the attorneys are known.

(d) The material facts on which a cause of action or defense is based shall be stated in a concise and summary form.

(e) Subsections (a)—(d) supersede 1 Pa. Code §§ 31.26, 33.15, 33.21—33.23, 33.31, 33.32, 33.37, 35.1, 35.2, 35.5—35.7, 35.9—35.11, 35.14, 35.17—35.20, 35.23, 35.24 and 35.27—35.32.

§ 131.33. Answers except answers to petitions for joinder and challenge proceedings.

(a) Answers to claim petitions shall be filed in accordance with section 416 of the act (77 P. S. § 821) within 20 days after the date of assignment to the judge. Except petitions for joinder under § 131.36 (relating to joinder), and challenge proceedings which require no answer, answers to all other petitions may be filed within 20 days after the date of assignment to the judge.

(b) Any answer filed in accordance with this chapter shall be filed with the Department as prescribed on the answer form. If there is no applicable Department answer form available, an original of the answer shall be filed with the Department.

(c) Concurrently with filing the answer, the responding party shall serve a copy of the answer on unrepresented parties and on counsel of record.

(d) An answer shall admit or deny each averment of fact in the petition or any part of the averment to which it is responsive. A party denying only a part of the averment shall specify so much of it as is admitted and shall deny the remainder. Where applicable, admissions and denials in an answer shall refer to the specific paragraph in which the averment admitted or denied is set forth.

(e) Subsections (a)—(d) supersede 1 Pa. Code §§ 33.15, 33.37, 35.35—35.41, 35.54, 35.55 and 35.161 and also supersede 1 Pa. Code Chapter 35, Subchapter D (relating to motions).

§ 131.36. Joinder.

(a) A party desiring to join another defendant to assert a claim relevant to the pending petition may do so as a matter of right by filing a petition for joinder.

(b) A petition for joinder shall set forth the identity of employers and insurance carriers sought to be joined and the reasons for joining a particular employer or insurance carrier as well as the specific facts and the legal basis for the joinder.

(c) The petition for joinder shall have attached to it copies of petitions and answers previously filed and a list of the dates and locations of all prior hearings held and depositions taken.

(d) The petition for joinder form shall be filed with the Department no later than 20 days after the first hearing at which evidence is received regarding the reason for

which joinder is sought, unless the time is extended by the judge for good cause shown.

(e) An answer to a petition for joinder shall be filed in accordance with section 416 of the act (77 P.S. § 821) within 20 days after the date of assignment by the Department to the judge and may include a motion to strike.

(f) A party filing a petition for joinder or an answer to it shall serve unrepresented parties and counsel of record.

(g) A proof of service shall be attached to the petition for joinder or answer.

(h) After joinder, the original petition shall be deemed amended to assert a claim of the claimant against an additional defendant. The additional defendant is liable to any other party as the judge orders. The additional defendant shall have the same rights and responsibilities under this chapter as the original defendant.

(i) The judge may strike the petition for joinder, and the judge may order the severance or separate hearing of a claim presented therein, or as a result of the joinder.

(j) The judge will issue an order when the motion to strike a petition for joinder is granted.

(k) An order to strike a petition for joinder does not preclude or delay further proceedings before the judge.

(l) Subsections (a)—(k) supersede 1 Pa. Code §§ 31.5, 33.41, 33.42, 35.11, 35.35, 35.40, 35.48—35.51, 35.54 and 35.55 and also supersede 1 Pa. Code Chapter 35, Subchapter D (relating to motions).

SUPERSEDEAS

§ 131.50. Return to work—modification or suspension.

(a) If an employee returns to work, the insurer may modify or suspend the workers' compensation benefits.

(b) The insurer shall complete and file the form prescribed by the Department. The form shall be provided to the employee, employee's counsel, if known, and the Department within 7 days of the effective date of the suspension or modification of the workers' compensation benefits.

(c) When the insurer previously modified or suspended the employee's benefits under sections 413(c) or 413(d) of the act (77 P.S. §§ 774.2 and 774.3), to effectuate a subsequent modification or suspension of the employee's workers' compensation benefits, the insurer shall file the form specified in subsection (b), indicating the change in the employee's wages and corresponding change in the employee's workers' compensation benefits.

(d) Subsections (a)—(c) supersede 1 Pa. Code § 33.33 (relating to effect of service upon an attorney).

HEARING PROCEDURE

§ 131.52. First hearing procedures.

* * * * *

(e) The parties shall identify and provide, if not otherwise electronically available to the judge, all documents required by law to be filed with the Department and which are relevant to issues in dispute with the same injury date and pertaining to the same claim. The judge will place those documents in evidence along with any other documents required to be filed by law with the Department or prior judges and which the judge deems

relevant to the proceeding. The judge and the employee may not introduce the First Report of Injury into evidence.

* * * * *

§ 131.53b. Bifurcation and motions for disposition of a petition.

(a) The judge may, upon request or upon the judge's own motion, consider bifurcation of issues to promote expeditious resolution of cases.

(b) A motion which may result in disposition of a petition may be filed at any time. A response shall be made within a time specified by the judge. The judge will issue an order granting or denying the motion, or will provide reasons why the motion will not be ruled upon, within 30 days of when the response is due. If the motion will not be ruled upon, the judge will articulate in writing or on the record the reasons for not ruling on the motion. Pendency of the motion will not operate as a stay.

(c) Subsections (a) and (b) supersede 1 Pa. Code §§ 35.54, 35.55, 35.177—35.180 and 35.225.

§ 131.55. Attorney fees and costs.

(a) In all cases, claimant's counsel shall submit a copy of the fee agreement, and a copy of any statement or claim for disbursements, costs and expenses. No agreement or claim for fees or other disbursements, costs or expenses by claimant's counsel shall be valid, and no payments shall be made pursuant thereto, unless approved for payment by the judge before whom the matter is heard or by the Board as provided by law. Except as otherwise approved, no further fee, cost or expense is to be charged.

(b) Under section 440 of the act (77 P.S. § 996), in a disputed claim under the act when the employer or insurer has contested liability in whole or in part, the employee or a dependent, in whose favor the proceeding has been finally decided, will be awarded attorney fees and costs against the employer or insurer, unless the employer or insurer had a reasonable basis for contesting the petition.

(c) Claimant's counsel may file an application for quantum meruit fees at or before the filing of proposed findings of fact, proposed conclusions of law and briefs, and if there are no proposed findings of fact, proposed conclusions of law or briefs requested, at or before the close of the record. The application shall detail the calculation of the fee requested, shall itemize the services rendered and time expended and shall address all factors enumerated in section 440 of the act in support of the application.

(d) Within 15 days after service of the application for quantum meruit fees, an opposing party may file a response to the application detailing the objections to the fee requested.

(e) A decision on the fee award will be made based on the record of the case and, if filed, the application and response. If deemed appropriate by the judge, a hearing may be held and evidence presented.

(f) The application and response will be made exhibits of record and shall be served on unrepresented parties and counsel of record as provided in § 131.34(a) (relating to other filings).

(g) Subsections (a)—(f) supersede 1 Pa. Code §§ 35.1 and 35.2 (relating to applications generally; and contents of applications).

§ 131.57. Compromise and release agreements.

(a) Under section 449 of the act (77 P. S. § 1000.5), upon or after filing a petition, the parties may engage in a compromise and release of any and all liability which is claimed to exist under the act on account of injury or death, subject to approval by the judge after consideration at a hearing.

(b) Proposed compromise and release agreements, including the stipulations of the parties, shall be recorded on a form prescribed by the Department. The parties may attach additional information to the form if circumstances so require.

(c) If another petition is pending before a judge at the time of the agreement of the parties to compromise and release the claim, any party may, in writing, request the judge to schedule a hearing on the proposed compromise and release agreement. The written request will be treated as an amendment of the pending matter to a petition to seek approval of a compromise and release agreement.

(d) The judge will expedite the convening of a hearing on the compromise and release agreement. The judge will circulate a written decision on the proposed compromise and release agreement within 30 days after the hearing. This subsection does not apply if a resolution hearing has been requested in accordance with § 131.60 (relating to resolution hearings).

(e) Subsections (a)—(d) supercede 1 Pa. Code §§ 33.42, 35.40, 35.41, 35.48—35.51, 35.101—35.106, 35.111—35.116, 35.121—35.128 and 35.155.

§ 131.58. Informal conferences.

(a) Under section 402.1 of the act (77 P. S. § 711.1), the parties upon, or after, filing a petition may agree to participate in an informal conference.

(b) All parties shall agree to participate in the informal conference.

(c) The request for the informal conference shall be recorded on a form prescribed by the Department and filed with the judge to whom the pending petition has been assigned.

(d) If no petition is pending, a petition and corresponding request for the informal conference shall be filed with the Department on a form prescribed by the Department.

(e) The informal conference will be governed by the instructions and procedures specified on the form prescribed by the Department and by section 402.1 of the act.

(f) The request shall be served on all parties and the adjudicating judge.

(g) Subsections (a)—(f) supersede 1 Pa. Code §§ 31.21—31.23 and 35.111—35.116.

§ 131.60. Resolution hearings.

(a) A resolution hearing must be requested in writing.

(b) Counsel for either party, or any unrepresented party, may request a resolution hearing at any time after all parties are prepared to proceed within the time limits prescribed by the act and this rule for resolution hearings.

(c) If a petition is pending before a judge, the request for a resolution hearing must be directed to the assigned judge.

(d) If a petition is not pending before a judge, the request for a resolution hearing must be directed to the

Judge Manager for the judge's office serving the county of the claimant's residence. If the claimant resides outside of this Commonwealth, the request must be directed to the Judge Manager for the judge's office most proximate to the claimant's residence. The Judge Manager will assign a judge to conduct the resolution hearing.

(e) The assigned judge's office will schedule the resolution hearing within 14 business days of receiving the request for a resolution hearing.

(f) The Judge Manager may reassign any case from one judge to another to ensure compliance with the resolution hearing requirements of sections 401 and 401.1 of the act (77 P. S. §§ 701 and 710). The Judge Manager will notify both judges of the reassignment.

(g) The judge conducting the resolution hearing will require proof that a petition has been filed with the Department under § 131.11 (relating to filing, service and proof of service), and will make the proof a part of the record. Upon receiving the proof, the judge shall proceed with the hearing and circulate a final decision within 5 business days of the hearing.

(h) The assigned judge need not comply with the procedures in this rule if any party is unable to proceed within the time limits established by the act for resolution hearings.

(i) Subsections (a)—(h) supersede 1 Pa. Code §§ 31.21—31.23, 35.48—35.51, 35.111—35.116, 35.185, 35.201—35.207 and 35.226.

EXCHANGE OF INFORMATION AND DEPOSITIONS AND DISCOVERY**§ 131.63. Time for taking oral depositions.**

(a) An oral deposition may be taken at any time subsequent to 30 days after the date of assignment of the petition by the Department.

(b) Oral depositions shall be completed so as not to delay unreasonably the conclusion of the proceedings, and within a time schedule agreed upon by the parties and approved by the judge provided that medical depositions shall be completed as specified in subsections (c) and (e).

(c) The deposition of a medical expert testifying for the moving party shall be taken within 90 days of the date of the first hearing scheduled unless the time is extended or shortened by the judge for good cause shown. The deposition of a medical expert testifying for the responding party shall be taken within 90 days of the date of the deposition of the last medical expert testifying on behalf of the moving party.

(d) A party wishing to present depositions for rebuttal or surrebuttal shall notify the judge in writing within 21 days after the conduct of the hearing or deposition at which the testimony to be rebutted or surrebutted has been given.

(e) Depositions for rebuttal or surrebuttal shall be taken in accordance with § 131.53(e) (relating to procedures subsequent to the first hearing).

(f) If a party fails to abide by the time limits established by this section for submitting evidence, the evidence will not be admitted, relied upon or utilized in the proceedings or the judge's rulings.

(g) Subsections (a)—(f) supersede 1 Pa. Code §§ 35.145—35.152, 35.161 and 35.162.

SUBPOENAS

§ 131.81. Subpoenas.

(a) Upon written or electronic request of a party or counsel of record in a pending proceeding, the judge will issue a subpoena to compel the attendance of a witness or require the production of books, documents, records, CD-ROMs, diskettes, other digital recordings or other things relevant to the proceeding at a scheduled hearing or deposition within the scope of, and scheduled under, this chapter. The party requesting a subpoena shall complete the subpoena and serve the judge with the original written request and shall serve a copy of the written request on unrepresented parties and counsel of record as provided in § 131.34(a) (relating to other filings).

(b) Subpoenas may not be served until 10 days from the date of issuance unless waived by agreement of the parties.

(c) The party, counsel of record or their respective agents requesting a subpoena shall serve the subpoena that the judge has issued upon the witness or person subpoenaed and upon opposing counsel.

(1) Service shall be made by one of the following:

(i) Personal service under the Pennsylvania Rules of Civil Procedure.

(ii) Any form of mail requiring a return receipt postage prepaid, restricted delivery or as provided in § 131.11(b) (relating to filing, service and proof of service).

(2) The fee for 1 day's attendance and roundtrip mileage shall be tendered upon demand at the time the person is served with the subpoena. If a subpoena is served by mail, a check in the amount of 1 day's attendance and round-trip mileage shall be enclosed with the subpoena. The fee for 1 day's attendance and roundtrip mileage is as prescribed in 42 Pa.C.S. §§ 5901—5988 (relating to depositions and witnesses).

(d) Upon the filing of written objections by a person served with a subpoena or a party, the judge may, after notice to counsel of record and unrepresented parties, promptly quash or limit the scope of a subpoena issued or served.

(e) If the person fails to appear, or has given notice of the intention not to appear, as required by a subpoena duly served, the judge will upon request of a party, communicate to the witness the requirements of the act that the person so appear and advise the person of the enforcement provisions under section 436 of the act (77 P. S. § 992).

(f) Subsections (a)—(e) supersede 1 Pa. Code §§ 35.139 and 35.142 (relating to fees of witnesses; and subpoenas).

STIPULATIONS

§ 131.91. Stipulations of fact.

(a) Stipulations of fact may be filed with the judge to whom the case has been assigned.

(b) The judge may issue a decision based on stipulations of fact, if the judge is satisfied that:

(1) The stipulations of fact are fair and equitable to the parties involved.

(2) The claimant understands the stipulations of fact and the effect of the stipulations of fact on future payments of compensation and medical expenses.

(3) The stipulation shall be signed and dated by the claimant, all counsel participating in the agreement and the employer, when unrepresented.

(4) The stipulation states which petitions are being resolved and which petitions are not being resolved.

(5) The stipulation states whether each petition should be withdrawn, granted or dismissed, and whether the parties are requesting an interlocutory or a final order.

(c) Subsections (a) and (b) supersede 1 Pa. Code § 35.155 (relating to presentation and effect of stipulations).

Subchapter D. PROCEEDINGS INVOLVING THE UEGF

- Sec.
- 131.201. Petitions.
- 131.202. First hearing information and stay.
- 131.203. Hearing procedures.
- 131.204. UEGF subpoenas and interrogatories.

§ 131.201. Petitions.

(a) All references to petitions in this subchapter are as defined under § 131.5 (relating to definitions).

(b) Subsection (a) supersedes 1 Pa. Code § 31.3 (relating to definitions).

§ 131.202. First hearing information and stay.

(a) At the first hearing on a claim petition where no UEGF claim petition has been filed and there is either no insurer listed on the notice of assignment or the listed insurer files a motion to dismiss for lack of coverage, the judge will inform the claimant on the record of the existence of the UEGF and give the claimant information about the UEGF, as provided by the Office of Adjudication.

(b) If the claimant informs the judge on the record that he may wish to file a UEGF claim petition, the judge will stay the proceeding in the claim petition until 20 days after the assignment of the UEGF claim petition. The stay may not apply to the exchange of information referenced in § 131.61 (relating to exchange of information).

(c) If no UEGF claim petition is filed within 45 days of the first hearing, the claim petition will proceed against the uninsured employer.

(d) If the claimant informs the judge on the record that he does not wish to file a UEGF claim petition, testimony may be taken as directed by the judge.

(e) In the interests of judicial economy and due process to have all parties joined as soon as possible, and in recognition of the uniqueness of the UEGF from other types of workers' compensation litigation, this section cannot be waived or modified as otherwise provided in § 131.3 (relating to waiver and modification of rules).

(f) Subsections (a)—(e) supersede 1 Pa. Code §§ 33.61, 35.18, 35.123—35.128, 35.187 and 35.188.

§ 131.203. Hearing procedures.

(a) If the UEGF requests live testimony of witnesses before the judge, the judge will schedule such hearings to accommodate the request, unless denied for good cause shown and stated on the record.

(b) Subsection (a) supersedes 1 Pa. Code §§ 35.101—35.106, 35.111—35.116, 35.121—35.128, 35.137, 35.138, 35.155 and 35.161—35.169.

§ 131.204. UEGF subpoenas and interrogatories.

(a) The judge may issue subpoenas, order testimony or compel the completion of written interrogatories with respect to the alleged uninsured employer's financial history, condition or ability to pay an award.

(b) The judge may compel the attendance of all parties at mediation.

(c) Subsections (a) and (b) supersede 1 Pa. Code §§ 35.111—35.116, 35.137—35.147, 35.150, 35.161, 35.162, 35.187 and 35.188.

[Pa.B. Doc. No. 14-2617. Filed for public inspection December 19, 2014, 9:00 a.m.]

Title 52—PUBLIC UTILITIES

PENNSYLVANIA PUBLIC UTILITY COMMISSION

[52 PA. CODE CH. 5]

[L-2014-2406251]

Electronic Access to Pre-Served Testimony

The Pennsylvania Public Utility Commission (Commission), on August 21, 2014, adopted a final rulemaking order proposing regulations regarding procedures to be followed for the electronic submission of testimony.

Executive Summary

On January 10, 2013, the Commission issued an Implementation Order regarding Electronic Access to Pre-Served Testimony at Docket No. M-2012-2331973 which proposed to require parties, serving pre-served testimony in certain proceedings, to comply with certain electronic filing requirements. On March 20, 2014, the Pennsylvania Public Utility Commission (Commission) issued a Proposed Rulemaking Order proposing to implement new regulations to specifically require parties serving pre-served testimony to, within thirty days after the final hearing in an adjudicatory proceeding, either electronically file (eFile) with or provide to the Commission's Secretary's Bureau a compact disc (CD) or other technology as prescribed by the Commission containing all testimony furnished to the court reporter during the proceeding.

The Commission proposed to implement these new regulations in order to allow Commission staff, as well as parties of record in an adjudicatory proceeding, to have electronic access to parties' public pre-served testimony through the Commission's case and document management system. Based upon our review and consideration of the comments filed in response to our March 20, 2014 Proposed Rulemaking Order by the PECO Energy Company, the Office of Consumer Advocate and the Independent Regulatory Review Commission, the Commission proposes to adopt the final regulations as set forth in Annex A of the Final Rulemaking Order.

Public Meeting held
August 21, 2014

Commissioners Present: Robert F. Powelson, Chairperson; John F. Coleman, Jr., Vice Chairperson; James H. Cawley; Peamela A. Witmer; Gladys M. Brown

Electronic Access to Pre-Served Testimony;
Doc. No. L-2014-2406251

Final Rulemaking Order

By the Commission:

On March 20, 2014, the Pennsylvania Public Utility Commission (Commission) issued a Proposed Rulemaking Order proposing to implement new regulations to require parties serving pre-served testimony to, within thirty days after the final hearing in an adjudicatory proceed-

ing, either electronically file (eFile) with or provide to the Commission's Secretary's Bureau a compact disc (CD) or other technology as prescribed by the Commission containing all testimony furnished to the court reporter during the proceeding. The Commission proposed to implement these new regulations in order to allow Commission staff, as well as parties of record in an adjudicatory proceeding, to have electronic access to parties' public pre-served testimony through the Commission's case and document management system. Based upon our review and consideration of the comments filed by the PECO Energy Company (PECO), the Office of Consumer Advocate (OCA) and the Independent Regulatory Review Commission (IRRC), we shall adopt the final regulations as set forth in Annex A to this Order.

Discussion

In response to our proposed regulations set forth in the March 20, 2014 Proposed Rulemaking Order and Annex A thereto, the Commission received formal comments from PECO, the OCA and IRRC.¹ In its comments, PECO commends the Commission in its efforts to find new and useful ways to take advantage of the Commission's eFiling system through providing electronic access to pre-served testimony.² PECO specifically comments that utilizing the Commission's eFiling system effectively affords interested parties proper and easy access to documents, with pre-served testimony being a prime example of that documentation.

The OCA also generally supports the Commission's proposed regulations. Through its comments, the OCA seeks clarification of the certain procedures to be followed for the electronic submission of pre-served testimony. The OCA first comments that Section 5.412a(b)(3) of the proposed regulations prescribes the labeling of pre-served testimony submitted to the Commission. The OCA, however, notes that there can be additional pieces of pre-served testimony that are not addressed in this section of the proposed regulations, such as "supplemental direct testimony" and "written rejoinder testimony." The Commission agrees that there are additional pieces of pre-served testimony that are not specifically set forth in Section 5.412a(b)(3) of the proposed regulations. As the purpose of this proposed section is to ensure that parties consistently label their pre-served testimony filed with the Commission, the Commission is merely providing examples of its preferred formatting for the labeling of pre-served testimony. Accordingly, the Commission will revise Section 5.412a(b)(3) of the proposed regulations to state as follows:

(3) *Labeling of electronically submitted testimony.*

Pre-served testimony electronically submitted to the Commission shall be labeled consistent with the following examples:

(i) "___ St. No. ___ Direct Testimony of _____."

(ii) "___ St. No. ___-R Rebuttal Testimony of _____."

(iii) "___ St. No. ___-SR Surrebuttal Testimony of _____."

In its comments, IRRC echoes the comments of the OCA in that there may be additional pieces of pre-served testimony that may be electronically filed which were not originally addressed in Section 5.412a(b)(3) of the pro-

¹ We also received informal internal comments from the Commission's Administrative Law Judge Susan D. Colwell.

² Although PECO filed its comments in response to the March 20, 2014 Proposed Rulemaking Order after the filing deadline, the Commission considered these comments as no party or entity, including the Commission, were prejudiced by this delay.

posed regulations. Because we have revised this section of our proposed regulation to clearly indicate that pre-served testimony must merely be labeled consistent with the examples set forth therein, the Commission believes that it has satisfied the OCA's and IRRC's concerns regarding the labeling of pre-served testimony documents.

Next, the OCA comments that Section 5.412a(c) of the proposed regulations requires parties to continue to submit two paper copies of the electronically submitted pre-served testimony to the court reporter at the hearing. In its comments, the OCA suggests that only one paper version of the electronically submitted pre-served testimony be provided to the court reporter. Upon further review of the electronic submission of pre-served testimony process, the Commission's Secretary's Bureau has confirmed that the Commission only requires one paper version of the pre-served testimony it receives from the court reporter. Therefore, the Commission will revise Section 5.412a(c) of the proposed regulations to require only one paper version of the electronically submitted pre-served testimony to be provided to the court reporter at hearing.

On a related note, IRRC points out that subsection (c) of the proposed regulations pertains to the submission of paper copies of pre-served testimony to the court reporter at hearing and asks why this provision is located under proposed Section 5.412a (relating to the electronic submission of pre-served testimony) rather than under Section 5.412 (relating to written testimony). We note that Section 5.412(g) of the Commission's regulations refers to the requirement for parties to provide copies of testimony to the court reporter at hearing when filing written testimony with the Commission whereas proposed Section 5.412a(c) requires parties to provide a copy of pre-served testimony to the court reporter at hearing when electronically submitting pre-served testimony to the Commission. Accordingly, by our proposed regulations regarding electronic access to pre-served testimony, the Commission has made a distinction between certain testimony documents, which may still be filed via hard copy, and pre-served testimony documents, which must be filed electronically. Accordingly, the Commission believes that the requirement to provide a copy of pre-served testimony to the court reporter at hearing when filing such testimony with the Commission should remain under proposed Section 5.412a as this section specifically relates to electronic filing of pre-served testimony, as distinguished from the filing of written testimony.³ We will, however, revise Section 5.412a(c) of the proposed regulations to clarify that such requirements regarding the submission of a paper copy of pre-served testimony to the court reporter at hearing are specifically applicable when electronically filing pre-served testimony with the Commission.

The OCA's next comment concerns access to pre-served testimony to the public through the Commission's website. In its May 20, 2014 Proposed Rulemaking Order, the Commission proposed that both Commission staff and all parties of record in an adjudicatory proceeding will have electronic access to pre-served testimony. The Commission specifically noted that the Commission's advisory staff is aware of the need to consult the transcript for purposes of determining which electronically submitted testimony has been admitted into the official record. Similarly, the Commission is confident that parties of record in an adjudicatory proceeding are equally aware of the need for

such consultation. However, while the Commission is confident that Commission staff and parties of record in an adjudicatory proceeding are aware of the need to consult the transcript for purposes of determining which electronically submitted testimony was admitted into the official record, the Commission is not certain that the public is similarly aware of the need for such consultation. Accordingly, the Commission did not propose to extend electronic access to pre-served testimony to the public at this time.

In its comments, the OCA requests public access to electronically submitted pre-served testimony that was admitted into the record through the Commission's website. The OCA specifically comments that if electronically submitted pre-served testimony is shown on the Commission's website with any strikeouts, corrections or modifications in place, then the public would not need to refer to the transcript in order to know what the final version of the testimony admitted into the record contains. However, as discussed in the March 20, 2014 Proposed Rulemaking Order, because presiding officers of the Commission maintain different practices regarding the submission of testimony containing words and/or provisions that have been modified or stricken at hearing, the testimony required to be electronically submitted to the Commission must match exactly the copy of the testimony that the presiding officer has required to be submitted to the court reporter at hearing. Accordingly, if a presiding officer does not require parties to make modifications to testimony before submitting the testimony to the court reporter (even though portions of that testimony are stricken during the hearing), that party will electronically submit to the Commission a clean copy of the testimony containing the stricken material.⁴

As a result of this requirement for parties to file an exact copy of the pre-served testimony that was submitted to the court reporter at hearing, the electronically submitted testimony that is submitted to the Commission which would be published for public viewing on the Commission's website may contain material which was not admitted into the official record. As the Commission is not able to provide the public with electronic access to hearing transcripts (per our court reporting contracts) in order for the public to determine which material was admitted into the official record, it is possible that the public might be viewing testimony that was not admitted into the record. As viewing testimony which was not admitted into the official record in a proceeding will likely be misleading and cause confusion to the public, the Commission does not agree with the OCA that electronically submitted testimony should be published on the Commission's website for public viewing at this time.⁵

In its comments, IRRC has specifically asked the Commission to explain how "barring" the public's electronic access to pre-served testimony is in the public's interest. It is important to note, however, that the Commission has never provided the public with electronic access to pre-served testimony documents through its website. Accordingly, the Commission is not taking away electronic access to pre-served testimony documents from the public, but rather providing electronic access to the Commission staff and parties of record in an adjudicatory proceeding for convenience purposes. In addition, elec-

⁴ When reviewing this type of electronically submitted testimony, both Commission staff and parties of record are provided with copies of the hearing transcript in order to appropriately determine which testimony has been admitted into the official record.

⁵ Additionally, the Commission does not currently have the resources required for its staff to manually modify all electronically submitted pre-served testimony to ensure such testimony contains only material which was admitted into the official record (by reviewing all transcript modifications) before making this testimony available to the public on the Commission's website.

³ By separate rulemaking, the Commission intends to propose the future revision of Section 5.412(g) of our regulations to require parties to submit only one paper original, rather than two paper copies, of written testimony documents filed with the Commission to the court reporter at hearing for consistency with the requirements set forth in this Final Rulemaking Order.

tronic access to these documents by the public from the Commission's website could result in pre-served testimony documents containing text that has been subsequently stricken to be widely distributed in error. Thus, the benefit of immediate website access to the public must be measured against the detriment of distributing pre-served testimony documents containing stricken material.

Although the public will not be provided with electronic access to these documents, the public can continue to access pre-served testimony documents in paper form (along with the hearing transcripts) through the Commission's Secretary's Bureau. As mentioned previously, the Commission is not permitted to place hearing transcripts provided by the court reporter on our website for public viewing. Therefore, the Commission believes that it is in the best interest of the public to continue to allow the public to access pre-served testimony documents in paper form (along with the transcripts) through the Commission's Secretary's Bureau rather than causing confusion by providing the public with electronic access to pre-served testimony documents without having electronic access to hearing transcripts.

In its comments, the OCA also asks how parties of record with Commission eFiling accounts would be able to access pre-served testimony on the Commission's website. However, the only documents placed on the Commission's website are those available for public viewing. As previously mentioned, the Commission is not providing access to electronically submitted pre-served testimony to the public at this time. Accordingly, parties of record may only obtain electronic access to parties' electronically submitted pre-served testimony through the Commission's case and document management system.

In its comments, IRRC asks that the Commission incorporate certain details contained in footnotes in the March 20, 2014 Proposed Rulemaking Order into our proposed regulations regarding the electronic submission of pre-served testimony so that parties are better able to meet the requirements for the submission of such testimony. Specifically, IRRC first requests that we explain in further detail how parties should revise testimony that has been stricken and/or modified at hearing prior to electronically submitting the testimony to the Commission. To address the specific details of these requirements, we will add subsections (b)(2)(i) and (ii) to our proposed regulations. Second, IRRC requests that we specifically discuss the types of documents excluded from our proposed electronic submission requirements. The Commission will specifically set forth the documents excluded from our proposed electronic submission requirements by adding an additional sentence to the end of Section 5.412a(b) of our proposed regulations. Third, IRRC requests that the Commission specifically provide in our proposed regulations that in order to view electronically submitted testimony and to receive action alerts that testimony has been electronically submitted to the Commission, parties must have an eFiling account with the Commission. To inform parties that they must have an eFiling account to view such testimony and to receive daily action alerts that such testimony has been submitted to the Commission, we will add subsection (f) to our proposed regulations.

Finally, IRRC requests that the Commission include the anticipated fiscal impact associated with the implementation of our proposed electronic submission of pre-served testimony regulations on the Commission itself. The Commission will include an analysis of such fiscal impact

on the Regulatory Analysis Form submitted to IRRC along with this Final Rulemaking Order.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on May 1, 2014, the Commission submitted a copy of the notice of proposed rulemaking, published at 44 Pa.B. 2868 (May 17, 2014), to IRRC and the Chairpersons of the House Consumer Affairs Committee and the Senate Consumer Protection and Professional Licensure Committee for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC and the House and Senate Committees were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing the final-form rulemaking, the Commission has considered all comments from IRRC, the House and Senate Committees and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), on November 5, 2014, the final-form rulemaking was deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on November 6, 2014, and approved the final-form rulemaking.

Conclusion

Requiring parties to, within thirty days after the final hearing in an adjudicatory proceeding (unless such time period is otherwise modified by the presiding officer), either eFile with or provide to the Secretary's Bureau a CD (or other prescribed technology) containing all testimony furnished to the court reporter during the proceeding will accommodate the need to provide Commission staff and parties of record electronic access to pre-served testimony through the Commission's case and document management system. The regulations contained in Annex A to this Order set forth the specific procedures to be followed for the electronic submission of pre-served testimony. The Commission, therefore, formally adopts the final regulations as set forth in Annex A to this Order.

Accordingly, under sections 332, 333 and 501 of the Public Utility Code (66 Pa.C.S. §§ 332, 333 and 501); and sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201 and 1202), and the regulations promulgated thereunder at 1 Pa. Code §§ 7.1, 7.2 and 7.5; section 204(b) of the Commonwealth Attorneys Act (71 P. S. § 732.204(b)); section 745.5 of the Regulatory Review Act (71 P. S. § 745.5) and section 612 of The Administrative Code of 1929 (71 P. S. § 232), and the regulations promulgated thereunder at 4 Pa. Code §§ 7.231—7.234, we will adopt as final the regulations as set forth in Annex A; *Therefore,*

It Is Ordered That:

1. The regulations of the Commission, 52 Pa. Code Chapter 5, are amended by adding § 5.412a and amending § 5.412 to read as set forth in Annex A.
2. The Secretary shall submit this order and Annex A to the Office of Attorney General for approval as to legality.
3. The Secretary shall submit this order and Annex A to the Governor's Budget Office for review of fiscal impact.
4. The Secretary shall submit this order and Annex A for review by the designated standing committees of both houses of the General Assembly, and for review and approval by the Independent Regulatory Review Commission.

5. The Secretary shall duly certify this order and Annex A with the Legislative Reference Bureau for publication in the *Pennsylvania Bulletin*.

6. These regulations shall become effective upon publication in the *Pennsylvania Bulletin*.

7. This order and Annex A be posted on the Commission's website.

8. A copy of this order and Annex A shall be served on the Bureau of Investigation and Enforcement, the Office of Consumer Advocate, the Office of Small Business Advocate, and all parties who commented on the March 20, 2014 Proposed Rulemaking Order.

9. The contact person for legal matters for this final rulemaking is Krystle J. Sacavage, Assistant Counsel, Law Bureau, (717) 787-5262. Alternate formats of this document are available to persons with disabilities and may be obtained by contacting Sherri DelBiondo, Regulatory Coordinator, Law Bureau, (717) 772-4597.

ROSEMARY CHIAVETTA,
Secretary

(Editor's Note: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 44 Pa.B. 7424 (November 22, 2014).)

Fiscal Note: Fiscal Note 57-303 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 52. PUBLIC UTILITIES

PART I. PUBLIC UTILITY COMMISSION

Subpart A. GENERAL PROVISIONS

CHAPTER 5. FORMAL PROCEEDINGS

Subchapter E. EVIDENCE AND WITNESSES

WITNESSES

§ 5.412. Written testimony.

(a) *General.* Use of written testimony in Commission proceedings is encouraged, especially in connection with the testimony of expert witnesses. Written direct testimony is required of expert witnesses testifying in rate cases.

(b) *Use.* The presiding officer may direct that expert testimony to be given upon direct examination be submitted as prepared written testimony. A reasonable period of time will be allowed to prepare written testimony.

(c) *Rules regarding use.* Written testimony is subject to the same rules of admissibility and cross-examination of the sponsoring witness as if it were presented orally in the usual manner.

(d) *Cross-examination.* Cross-examination of the witness presenting written testimony shall proceed at the hearing at which testimony is authenticated if service of the written testimony is made upon each party of record at least 20 days prior to the hearing, unless the presiding officer for good cause otherwise directs. In a rate proceeding, the presiding officer or the Commission will establish the schedule for the filing and authentication of written testimony, and for cross-examination by other parties.

(e) *Form.* Written testimony must normally be prepared in question and answer form, include a statement of the qualifications of the witness and be accompanied by exhibits to which it relates. A party offering prepared

written testimony shall insert line numbers in the left-hand margin on each page. A party should also use a logical and sequential numbering system to identify the written testimony of individual witnesses.

(f) *Service.* Written testimony shall be served upon the presiding officer and parties in the proceeding in accordance with the schedule established by this chapter. At the same time the testimony is served, a certificate of service for the testimony shall be filed with the Secretary. Pre-served testimony furnished to the court reporter during an adjudicatory proceeding before the Commission shall be filed with the Commission as required under § 5.412a (relating to electronic submission of pre-served testimony).

(g) *Copies.* At the hearing at which the testimony is authenticated, counsel for the witness shall provide two copies of the testimony to the court reporter.

(h) *Supersession.* Subsections (a)—(g) supersede 1 Pa. Code §§ 35.138, 35.150 and 35.166 (relating to expert witnesses; scope and conduct of examination; and prepared expert testimony).

§ 5.412a. Electronic submission of pre-served testimony.

(a) *General requirement for electronic submission.* A party serving pre-served testimony in proceedings pending before the Commission under § 5.412(f) (relating to written testimony) is required, within 30 days after the final hearing in an adjudicatory proceeding, unless the time period is otherwise modified by the presiding officer, to electronically file with, under § 1.32(b) (relating to filing specifications), or provide to the Secretary's Bureau a compact disc or technology prescribed by the Commission containing the testimony furnished by the party to the court reporter during the proceeding.

(b) *Form of electronic submission.* Electronically submitted testimony must be limited to pre-served testimony documents and be in Portable Document Format. Exhibits attached to pre-served testimony documents may be electronically submitted to the Commission in accordance with subsection (a). Exhibits not electronically submitted with pre-served testimony shall be submitted in paper form to the court reporter at hearing. The electronic submission requirements in this section do not apply to discovery requests or responses, or pre-filed testimony, including testimony filed under § 53.53(c) (relating to information to be furnished with proposed general rate increase filings in excess of \$1 million).

(1) *Electronic submission.* Each piece of pre-served testimony filed through the Commission's electronic filing system shall be uploaded separately. Each piece of pre-served testimony submitted to the Secretary's Bureau on a compact disc or other technology as prescribed by the Commission may be uploaded onto one compact disc, pending file size limitations.

(2) *Electronic submission of testimony modified at hearing.* Pre-served testimony submitted to the Commission must match exactly the version of testimony the presiding officer has required to be submitted to the court reporter at hearing. When a presiding officer requires a party to make hand-marked modifications to testimony during the hearing before submitting the testimony to the court reporter, the pre-served testimony electronically submitted to the Commission shall be marked to reflect the modifications. When a presiding officer does not require a party to make modifications to testimony at hearing

before submitting the testimony to the court reporter, the pre-served testimony electronically submitted to the Commission may not be marked. Testimony not admitted into the record during a hearing may not be electronically submitted to the Commission.

(i) *Electronic submission of testimony stricken at hearing.* Pre-served testimony which was stricken at hearing shall be revised to reflect that which was stricken by containing hand-marked strikethroughs or electronic strikethroughs on the testimony. A party may not completely electronically delete testimony which was stricken at hearing.

(ii) *Pagination of electronically submitted testimony documents.* Stricken or modified text on electronically submitted pre-served testimony documents must appear on the same page as the stricken or modified text on the pre-served testimony documents submitted to the court reporter at hearing.

(3) *Labeling of electronically submitted testimony.* Pre-served testimony electronically submitted to the Commission must be labeled consistent with the following examples:

- (i) “__ St. No. __ Direct Testimony of _____.”
- (ii) “__ St. No. __-R Rebuttal Testimony of _____.”
- (iii) “__ St. No. __-SR Surrebuttal Testimony of _____.”

(c) *Submission of paper copies of pre-served testimony to the court reporter when electronically filing pre-served testimony.* When electronically filing pre-served testimony with the Commission, one paper copy of pre-served testimony shall be provided to the court reporter at hearing.

(d) *Electronic submission of confidential or proprietary testimony.* Electronically submitted testimony confidential or proprietary in nature shall be submitted to the Secretary's Bureau on a compact disc or other technology as prescribed by the Commission. The compact disc must be labeled “CONFIDENTIAL” or “PROPRIETARY.” Confidential or proprietary testimony may not be filed through the Commission's electronic filing system. Electronically submitted testimony confidential or proprietary in nature must match exactly the version of the confidential or proprietary testimony submitted to the court reporter at hearing.

(e) *Electronic submission of improper testimony.* If a party in an adjudicatory proceeding discovers that improper testimony documents have been electronically submitted to the Commission, the party may raise the improper submission with the presiding officer assigned to the adjudicatory proceeding. The presiding officer or the Commission will make a determination regarding the submission of improper testimony.

(f) *Electronic access to electronically submitted testimony.* A party shall obtain an eFiling account with the Commission to view electronically submitted pre-served testimony and to receive daily action alerts from the Commission's case and document management database that pre-served testimony has been electronically submitted to the Commission.

[Pa.B. Doc. No. 14-2618. Filed for public inspection December 19, 2014, 9:00 a.m.]

PENNSYLVANIA PUBLIC UTILITY COMMISSION

[52 PA. CODE CH. 121]

[L-2012-2317274]

Review of Long-Term Infrastructure Improvement Plan

The Pennsylvania Public Utility Commission (Commission), on May 22, 2014, adopted a final rulemaking order which sets forth regulations for filing a Long-Term Infrastructure Improvement Plan to ensure that utilities are planning and executing expenditures that will maintain and improve safety, adequacy and reliability of existing distribution infrastructure.

Executive Summary

On February 14, 2012, Governor Corbett signed into law Act 11 of 2012 (Act 11), which, 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 petition for a distribution system improvement charge (DSIC). See 66 Pa.C.S. § 1353.

The DSIC is a ratemaking mechanism 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. A precondition to obtaining approval of a DSIC mechanism is the filing and approval of a long-term infrastructure improvement plan (LTIP). 66 Pa.C.S. §§ 1352 and 1353(b)(3). The purpose of an LTIP 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.

By Order entered March 14, 2013, the Commission issued a Proposed Rulemaking Order on Act 11 of 2012, which, inter alia, incorporated many of the proposed procedures set forth in the Commission's Final Implementation Order at Docket No. M-2012-2293611 (August 2, 2012) for filing and obtaining approval of an LTIP, including, but not limited to, the elements to be incorporated therein, the standard of review for approval of the LTIP and the procedures for the subsequent periodic review of the LTIP. The Commission reviewed the comments to the Proposed Rulemaking Order and at its May 22, 2014 Public Meeting adopted a Final Rulemaking Order. Specifically, the Final Rulemaking Order, entered May 23, 2014, sets forth the elements an LTIP must contain and outlines the procedures and process for the filing and review of LTIPs.

Public Meeting held
May 22, 2014

Commissioners Present: Robert F. Powelson, Chairperson; John F. Coleman, Jr., Vice Chairperson; James H. Cawley; Pamela A. Witmer; Gladys M. Brown

Review of Long-Term Infrastructure Improvement Plan;
L-2012-2317274

Final Rulemaking Order

By the Commission:

By Order entered March 14, 2013, the Commission issued a Proposed Rulemaking Order on Act 11 of 2012, which, 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 petition for a distribution system improvement charge (DSIC). See 66 Pa.C.S. § 1353. The DSIC is a ratemaking mechanism 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. A precondition to obtaining approval of a DSIC is the filing and approval of a long-term infrastructure improvement plan (LTIIP). 66 Pa.C.S. § 1352. This order constitutes a final rulemaking to establish the procedures and criteria for the filing and subsequent periodic review of LTIIPs.

Background

On February 14, 2012, Governor Corbett signed into law Act 11 of 2012 (Act 11), which amends 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 authorizes water and wastewater utilities, EDCs, and NGDCs or a city natural gas distribution operation to petition for a DSIC.

On April 5, 2012, the Commission held a working group meeting with stakeholders regarding implementation of Act 11. In particular, we sought input from stakeholders on the following key topics in advance of issuing a Tentative Implementation Order:

- Elements of a model DSIC tariff, including the necessary computation, reconciliation and consumer protection provisions (audits, reconciliations, percent caps and re-set to zero);
- Elements of and standards for approval of an LTIIP, ability to use previously approved plans, and subsequent periodic review parameters;
- Establishing a baseline for the current rate of infrastructure improvement;
- Examination of the relationship between the LTIIP under Act 11 and the NGDC pipeline replacement and performance plans required by Commission order at Docket No. M-2011-2271982;
- Determination of the equity return rate when more than 2 years have elapsed between the effective date of a final order in a base rate case and the effective date of the DSIC; and
- Standards to establish and ensure that DSIC work is performed by “qualified employees” of either the utility or an independent contractor.

On May 11, 2012, the Commission entered a Tentative Implementation Order at Docket No. M-2012-2293611 that reflected stakeholders’ concerns; set out a model draft tariff; proposed procedures and guidelines necessary to implement Act 11, including a DSIC process for investor-owned energy utilities, city natural gas distribution operations, and wastewater utilities; and set forth procedures to facilitate the transition from Section 1307(g) water DSIC procedures to Act 11 DSIC procedures.

The Tentative Implementation Order called for comments. Comments were received from various EDCs, NGDCs and water utilities. The Commission reviewed the comments and at its August 2, 2012 Public Meeting adopted a Final Implementation Order, which established procedures and guidelines to carry out the ratemaking provisions of Act 11 in Chapters 3 and 13 of the Code.

The Proposed Rulemaking Order took elements from the Final Implementation Order in establishing proposed procedures and criteria for the filing and subsequent

periodic review of LTIIPs. The Proposed Rulemaking Order was published in the *Pennsylvania Bulletin* on October 19, 2013. See 43 Pa.B. 6206. Comments were filed by the Independent Regulatory Review Commission (IRRC), the Pennsylvania Office of Consumer Advocate (OCA), PECO Energy Company (PECO), jointly by Peoples Natural Gas LLC and Peoples TWP LLC (collectively, “Peoples”), jointly by Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company (collectively, “the FirstEnergy Companies”), the Energy Association of Pennsylvania (EAP) and Duquesne Light Company (Duquesne).

Discussion

The DSIC mechanism, enacted via Act 11, allows EDCs, NGDCs, wastewater utilities, and city natural gas operations, like water utilities previously, to recover the reasonable and prudently incurred costs related to the repair, improvement, and replacement of utility infrastructure. The filing of an LTIIP is a necessary component of a DSIC petition. 66 Pa.C.S. § 1353(b)(3). However, water utilities with a previously-approved DSIC were not required to file an LTIIP until otherwise directed by the Commission. See 66 Pa.C.S. § 1360.

The purpose of an 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. The scope of the proposed regulations was to set forth the elements an LTIIP must contain and to outline the procedures and process for the filing and review of LTIIPs. We appreciate the comments that were filed in response to the proposed regulations. We will proceed section by section of the proposed regulations in addressing the comments.

Water Utilities

Comments

The OCA submits that the Commission should now require water utilities with existing DSIC mechanisms to file an LTIIP on a schedule established by the Commission. Additionally, the OCA states that the Commission should make clear that, once the initial LTIIP for the water utility has been filed and approved by the Commission, the water utility must adhere to the regulations going forward. In its comments, we note that IRRC referenced the OCA comments and directed that we explain what effect the rulemaking will have on water and wastewater utilities with a pre-approved DSIC mechanism in place.

Resolution

The Commission takes note of the OCA’s concern, and IRRC’s reference thereto, regarding providing clarification that utilities with existing DSIC mechanisms that predate Act 11, namely water utilities, should comply with requirements set forth in Act 11. We agree that water utilities should also comply with the requirements of Act 11. Pursuant to Section 1360(b), water utilities with a previously-approved DSIC are not required to file and obtain approval of their LTIIP unless and until directed by the Commission.

Given that this legislation has been in effect for over 2 years and that the Commission has reviewed and approved LTIIPs filed by natural gas and electric utilities, the Commission believes it is now appropriate to require each water utility with a DSIC tariff in place to file an LTIIP as well. The LTIIP filing and review process will

ensure that the DSIC funds collected by pre-Act 11 water companies from consumers are properly allocated to eligible projects that will now conform to the standards and requirements of Act 11. Accordingly, the Commission will issue a Secretarial Letter that sets forth a date certain by which water utilities with DSIC tariffs in place will be required to file an LTIIIP with the Commission.

Section 121.2. Definitions.

Comments

IRRC comments that the definition of “eligible property” set forth in the subsection of the proposed regulation should be amended to more accurately track the statute. IRRC Comments at 1. Additionally, IRRC had concerns regarding the definition of “major modification.” IRRC questions whether, in order for a modification to be considered a “major modification,” does it have to meet all four of the criteria set forth in the definition. IRRC states the Commission should clarify by either inserting the word “or” or “and” at the subparagraph (iii). *Id.* at 2. Likewise, Duquesne makes a similar statement in its comments. Duquesne Comments at 3.

Conversely, the FirstEnergy Companies suggest that the Commission should eliminate the first two criteria contained in subparagraphs (i) and (ii) set forth in the definition of “major modification.” FirstEnergy Companies Comments at 2. The FirstEnergy Companies state that criteria in subparagraphs (i) and (ii) about eliminating or changing the schedule for “a category of eligible property” could be a relatively insignificant category of property but, under the proposed regulation, would nevertheless constitute a “major” modification. *Id.* at 2-3. They suggest that the final two criteria, subparagraphs (iii) and (iv), would cover other circumstances which the Commission may view as major modifications. *Id.* at 3.

In its comments, EAP suggests that the Commission consider adjusting the proposed definition of “major modification” by eliminating criterion one and the reference to “category of eligible property” in criterion two. EAP Comments at 4. EAP states that with respect to the first criterion, the elimination of a category of eligible property from an LTIIIP may not comprise a major modification depending on whether the repair, improvement or replacement is actually a substantial portion of the work to be achieved under the LTIIIP or is a substantial percentage of the projected expenditures. EAP Comments 3-4. Further, EAP states that extending the schedule by more than two years for a specific category of eligible property may not be a major modification depending on whether the particular category of property represents a substantial portion of the work under the LTIIIP. *Id.*

In its comments, PECO states that the Commission should revise the first criterion for the definition of “major modification.” PECO states that rather than including a specific time period, the Commission should consider a major modification to include any extension which increases the schedule by more than 15%. PECO asserts that this revision to the criterion would capture more impactful schedule extensions on a total project plan basis. PECO Comments at 2. Additionally, PECO states that the 15% cost increase in the total estimated cost of the LTIIIP set forth in criterion three of the proposed definition of “major modification” is a low hurdle. PECO asserts that the cost estimates included in the LTIIIP are preliminary, as the work described therein may not be performed for a number of years. *Id.* PECO further states that estimates prior to completion of engineering and design work could easily be later revised by a factor of 25% or more. Accordingly, PECO recom-

mends that the percentage in criterion three be increased to 25% to account for this, as well as the impact of inflation. *Id.* at 3.

Lastly, Duquesne recommends the elimination of criterion four set forth in the proposed definition of “major modification.” Duquesne Comments at 3. Alternatively, Duquesne suggests that if this criterion were to remain, that an additional definition of “substantial change” is necessary in the final regulations. *Id.*

The OCA suggested that the proposed definition of “long term infrastructure improvement plan” should be clarified so that it is clear that the LTIIIP must be filed to demonstrate continuing eligibility to impose a DSIC surcharge. OCA Comments at 5.

Resolution

This section of the proposed regulations sets forth the definitions of the key terms that will be used throughout the regulations. We note IRRC’s comments regarding the proposed definition of “eligible property” and we amend the final form regulation to more accurately track the statute. The Commission also takes note of the comments regarding the proposed definition of “major modification.” The commentators suggest that the elimination of a category of eligible property or the extension of the repair, improvement or replacement of a category of eligible property by more than two years may not comprise a major modification. However, we do not agree with the substance of those comments, nor with the commentators’ suggestion that we delete subparagraphs (i) and (ii) of the proposed definition, for the reasons articulated below.

First, the Commission notes that the LTIIIP is limited to only “eligible property” as we determined that it was unnecessary for a utility to provide extensive data regarding components of its distribution system for which it is not seeking DSIC recovery. Hence, the LTIIIP filed by a utility need only identify the specific eligible distribution plant property, as defined in 66 Pa.C.S. § 1351, for which the utility has determined it will repair, improve or replace based upon the age, functionalities, reliability and performance of such property and for which it will seek DISC recovery. Accordingly, if a statutory category of property that the Commission has approved is proposed to be eliminated from the LTIIIP by the utility, in the Commission’s judgment, this qualifies as a major modification to the LTIIIP that necessitates Commission review.

Second, the Commission acknowledges that while the LTIIIP is a prospective document, nevertheless, it is incumbent for a utility to be as specific as possible in identifying which category of eligible property it will prioritize in regard to repairing, improving or replacing in order to maintain and ensure the safety, adequacy and reliability of its existing distribution system. See 66 Pa.C.S. § 1352. Hence, in its filed LTIIIP, the utility should have carefully examined its current distribution infrastructure, including its elements, age, and performance and established a plan that reflects reasonable and prudent planning of expenditures over the course of many years to replace and improve aging infrastructure in order to maintain the safe, adequate, and reliable service required by law. See generally 66 Pa.C.S. § 1501. Additionally, we are cognizant of the fact that the utility must show in its corresponding LTIIIP, the acceleration of the replacement of aging infrastructure and should establish an accurate proposed schedule to complete the work that reflects an acceleration of the replacement of aging infrastructure or maintains the accelerated pace already accomplished by the utility. *Id.* Thus, the Commission believes that any proposal by the utility to extend the

schedule for repair, improvement or replacement of a category of eligible property by two or more years qualifies as a major modification. Accordingly, we believe that the subparagraphs (i) and (ii) set forth in the final form regulation accurately address some types of “major” modifications to an LTIIIP. As a result, we will not delete these subparagraphs from the definition of major modification in the final form regulation.

The Commission takes note of PECO’s comments regarding subparagraph (iii) of the proposed definition of “major modification.” This subparagraph deals with a change in the total estimated costs for the work identified in the LTIIIP. We understand PECO’s position that cost estimates included in the LTIIIP are preliminary figures and that the estimates prior to the completion of engineering and design work could later be revised by a factor of 25% or more. We acknowledge that cost estimates for the work set forth in the LTIIIP are preliminary and may vary; however, we will only adopt PECO’s suggestion in part as we determine that an increase of 25% or more to the total cost estimate may be exorbitantly high given that the cost estimate is applicable to the total plan and not just a year-to-year fluctuations in spending. Therefore, we determine that an increase of 20% or more to the total cost estimate will be considered a major modification. The final form regulation incorporates this revision.

Further, the Commission takes note of IRRC’s comments regarding the proposed definition of “major modification” and will insert language to indicate a major modification is a change “which meets at least one of the following criteria.”

Lastly, the Commission notes Duquesne’s comments regarding subparagraph (iv) of the proposed definition of “major modification.” The Commission intended this subparagraph to be a miscellaneous or catch-all provision for any other “major” modifications it could not possibly foresee or list at this time. Therefore, it is necessary that this subparagraph be broad enough to allow the Commission to require an approval process for a change, not presently listed, that substantially alters the previously approved LTIIIP. Therefore, the Commission rejects Duquesne’s recommendation of revising this “catch-all” provision in the final form regulation.

Section 121.3. LTIIIP.

Comments

IRRC states that it has two concerns about this section of the proposed regulations. First, IRRC requests that the Commission explain the need for including three additional elements in a utility’s LTIIIP that are not included in the statute and why it believes these additional elements are consistent with the intent of the General Assembly and Act 11. IRRC Comments at 2. The three additional elements cited by IRRC relate to the establishment of a workforce management and training program, a description of the utility’s outreach and coordination activities with other utilities and other entities regarding their planned maintenance/construction projects and roadways and a description by NGDCs of their individual plans to address damage prevention, corrosion control, emergency response times, and identification of their critical valves. Secondly, IRRC suggests that this proposed section be clarified to state that the filing of an LTIIIP is not mandatory for all utilities and applies only to those utilities seeking to impose a DSIC. Id.

Likewise, EAP, PECO and Peoples state that the word “shall” when referring generally to the filing of an LTIIIP should be replaced with the word “may” so as not to infer

that all utilities are required to file an LTIIIP. EAP Comments at 4; PECO Comments at 3; Peoples Comments at 4.

EAP states that proposed subsection 121.3(a)(6) should be modified to include “a description either of the manner in which infrastructure replacement will be accelerated or the manner in which previously accelerated infrastructure replacement will be maintained...” EAP Comments at 5. EAP asserts that the additional language would account for utilities that have already engaged in such accelerated infrastructure replacement and is consistent with proposed subsection 121.4(e), under which the Commission will determine whether an LTIIIP “accelerates or maintains an accelerated rate of infrastructure replacement.” Id.

EAP and PECO both expressed concerns about proposed subsection 121.3(a)(8). Proposed section 121.3(a)(8) requires that utilities include a description of planned outreach and coordination efforts with other utilities, the Pennsylvania Department of Transportation (PennDOT) and local governments regarding the work outlined in the LTIIIP. EAP states that it believes this concept is better suited to a guideline or a policy statement and suggests that this subsection be eliminated from the proposed regulation. EAP Comments at 5. EAP asserts that attempting to delineate this type of activity in a forward-looking plan is difficult and may not in the course of LTIIIP implementation provide to be a reliable depiction of the actual practice as the very nature of such coordination involves numerous moving parts that continually evolve and change. Id. EAP states that it is concerned that a deviation from a described outreach and coordination plan as set forth in a utility’s LTIIIP not be a ground for termination of a DSIC under 66 Pa.C.S. § 1352(b)(2). Id. at 5-6. PECO requests that the Commission remove the proposed subsection of the regulation since it was not contained in Act 11 and goes beyond the intended scope for LTIIIPs. PECO Comments at 3.

Also, EAP, PECO and Peoples expressed concerns about proposed subsection 121.3(a)(9). EAP states that this requirement is not enumerated in the statute and should not be the basis of an order disapproving an LTIIIP. EAP Comments at 6. EAP further states that such information is evaluated in the context of the Distribution Integrity Management Program (DIMP) Plan that is required to be prepared and available under federal regulations to both federal authorities and state regulatory agencies. Id. EAP asserts that requiring such information to be included in an LTIIIP filed only by NGDCs exceeds the parameters set forth in Act 11 and should not be the basis for a termination of a DSIC under 66 Pa.C.S. § 1352(b)(2) without specific statutory authority.

Similarly, Peoples states that there is no current Commission requirement for an NGDC to prepare a plan to address damage prevention, corrosion control, emergency response times, and identification of the NGDC’s critical valves. Peoples Comments at 5-6. Peoples notes that this matter may be addressed in an NGDC’s DIMP Plan, but even in the DIMP, if each of these matters is addressed, it is as a part of the overall DIMP, and not a separate plan within the DIMP. Peoples Comments at 6. Peoples asserts that if NGDCs are required to prepare such plans, that proposal should be the subject of its own rulemaking proceeding and not “shoehorned” into this instant rulemaking. Id. Peoples further asserts that one of the main issues with these requirements when they were proposed in the abandoned rulemaking at Docket No. M-2011-2271982, was that the requirements were vague and without factual support. Id. Furthermore, PECO asserts

that the requested information is not duplicative of the LTIP but rather is beyond the scope of an NGDC's LTIP and should be deleted. *Id.* Likewise, PECO states this proposed subsection has nothing to do with main replacement and is not relevant to an LTIP. PECO Comments at 3.

The OCA states that proposed section 121.3(a) should be modified to make clear that an LTIP must be filed to both implement and continue a DSIC mechanism. OCA Comments at 5. The OCA adds that this modification will also make clear that water utilities with existing DSIC mechanisms at the time of the enactment of Act 11 must also file an LTIP to ensure that they are in compliance with the requirements of Act 11. *Id.* at 6. Additionally, the OCA recommends that the Commission publish a schedule in the *Pennsylvania Bulletin* that allows for the phased filing of LTIPs. *Id.* at 7. Specifically, the OCA suggests that the Commission modify Section 121.3(a) to address the point that after the approval of the initial LTIP, subsequent LTIPs must be filed in accordance with the Commission's phased filing schedule. *Id.* In its comments, IRRC references the OCA's suggestion for the phased filing of LTIPs and asks the Commission why it did not consider adopting a phased filing schedule for submissions by utilities seeking to implement a DSIC mechanism. IRRC Comments at 1.

Resolution

This section of the proposed regulations sets forth the specific elements that must be contained in a utility's LTIP. The Commission takes note of the comments requesting that this proposed section be clarified to state that the filing of an LTIP is not mandatory for all utilities and applies only to those utilities seeking to impose a DSIC. We agree with this position. Accordingly, in the final form regulation, the Commission revises subsection 121.3(a) to state that only those utilities seeking to implement a DSIC are required to file an LTIP, so as not to imply that all jurisdictional utilities are required to file an LTIP. Additionally, the Commission modifies subsection 121.3(a) to make clear that an LTIP must be filed to both implement and continue a DSIC mechanism. We agree with the OCA that adding this modification will make clear that all utilities, including water utilities with existing DSIC mechanisms at the time of the enactment of Act 11, are to be in compliance with the requirements of Act 11 and must file an LTIP to implement or continue to a DSIC mechanism.

However, the Commission disagrees with the OCA's recommendation that we publish a schedule in the *Pennsylvania Bulletin* that allows for the phased filing of LTIPs. The Commission notes that many of the non-water utilities seeking to implement a DSIC recovery mechanism have already filed individual initial LTIPs; therefore, it is unnecessary at this time to incorporate this suggestion. Furthermore, we also do not believe it is necessary to establish a phased filing schedule for water utilities to file their individual LTIPs. The Commission will issue a Secretarial letter establishing the end date that water utilities must have filed their LTIPs and start complying with the other requirements of Act 11. Just as we did for the non-water utilities, the Commission will leave it up to the discretion of each affected water utility as to when it determines it should file its LTIP in order to meet this deadline. Thus, the Commission will not incorporate this OCA recommendation in the final form regulation.

As noted above, IRRC requests the Commission to explain the need for including three additional elements

in a utility's LTIP that are not included in the statute and why it believes these additional elements are consistent with the intent of the General Assembly and Act 11. Those three additional elements relate to the establishment of a workforce management and training program, a description of the utility's outreach and coordination activities with other utilities and other entities regarding their planned maintenance/construction projects and roadways and a description by NGDCs of their individual plans to address damage prevention, corrosion control, emergency response times, and identification of their critical valves.

With regard to the importance for including workforce management plans in an LTIP as set forth in proposed subsection 121.3(a)(7), the Commission points to Section 1359 of the Code, 66 Pa.C.S. § 1359, which requires the Commission to set standards to ensure that DSIC-eligible work is performed and inspected by qualified personnel. See 66 Pa.C.S. § 1359(a) and (b). Clearly, with the inclusion of this statutory provision, Act 11 contemplates that the utilization of qualified personnel is essential to the successful implementation of any long-term plan to improve infrastructure. In order for the Commission to ensure that the utility is in compliance with 66 Pa.C.S. § 1359(a) and (b), the Commission determined that a workforce management and training plan designed to ensure that a utility will have access to a qualified workforce to perform work in a cost-effective, safe and reliable manner should be a necessary element of an LTIP. Therefore, the Commission will retain this requirement in the final form regulations. Also, the Commission will incorporate a definition of "qualified personnel" in the definitions section of the final form regulation. The Commission will adopt the general definition of a "qualified" person, as established by the U.S. Department of Labor, Occupational Safety and Health Administration, in its regulations at 29 C.F.R. § 1926.32.

With regard to the requirement set forth in proposed subsection 121.3(a)(8) that a utility include the description of planned outreach and coordination efforts with other utilities, PennDOT and local governments regarding the work outlined in its LTIP, the Commission believes this is a necessary requirement in an LTIP in order to ensure that LTIP projects are properly planned, coordinated with other stakeholders, and executed in an efficient and cost-effective manner. See generally Application of the Department of Transportation of the Commonwealth of Pennsylvania for the Approval to Replace the Existing Superstructure of the Bridge Carrying SR0462 Over the Single Track of the Norfolk Southern Railway Company (DOT #517 596 W) in Mountville Borough, Lancaster County; And the allocation of Costs Incident Thereto, Docket No. A-2009-2132946 (Order entered April 10, 2014). Hence, the Commission is not persuaded by the concerns of EAP and PECO regarding this requirement and disagrees with their suggestion that we should remove this requirement from being included as part of the LTIP. This is an essential element of good project planning for the success of their infrastructure improvement plans.

Furthermore, the implementation of a DSIC mechanism to non-water utilities will result in the initiation of numerous maintenance and construction projects throughout various parts of the state by those utilities. The Commission acknowledges that this may lead to significant disruptions as utilities perform work in the rights of way of the roadways and streets across the Commonwealth in order to replace or repair their infrastructure. It is incumbent for utilities to coordinate with

other utilities, PennDOT and local governments that may work near their facilities. The Commission notes that the number one cause of damage to underground utility infrastructure is excavation and not necessarily by the utility that owns the equipment, but by independent contractors or other utilities performing excavation work. Also, the Commission believes that coordinated efforts for the replacement or repair of infrastructure will result in cost-effective budgets and the ability of the utilities to keep their projected construction schedules.

Accordingly, the Commission believes it is imperative for utilities to coordinate and develop systematic procedures for centrally reporting, documenting, and exchanging information and that it is prudent for utilities to identify and maintain their coordination efforts so they can minimize multiple disruptions to locations where projects may overlap.

For these reasons, the Commission retains the requirement for a utility to provide a description of its outreach and coordination activities with other utilities, PennDOT and local governments regarding their planned maintenance/construction projects and roadways that may be impacted by the plan in the final form regulation.

IRRC also asked us to explain the reason for directing NGDCs to include additional information regarding damage prevention, corrosion control, emergency response times and identification of critical valves as set forth in proposed subsection 121.3(a)(9). As detailed above, EAP, PECO and Peoples strongly object to this requirement.

In response to IRRC, the Commission explains that it had decided against establishing a separate Pipeline Replacement and Performance Plan filing process at Docket M-2011-2271982,¹ as we believed it would be duplicative of the Act 11 DSIC regulatory process, specifically, the information contained in LTIIPs. Nevertheless, given the age of the existing natural gas distribution infrastructure throughout the Commonwealth and in order to safeguard the public, we initially determined that it was necessary for NGDCs to submit this information and indicate how their LTIIPs prioritize gas system safety and reliability. However, we understand their concerns, are persuaded by them in part and, therefore, have reconsidered the need to have this requirement in the LTIIP final form regulations, for the reasons expressed below.

The commentators assert that much of this same information is evaluated in the context of the DIMP plans filed by the NGDCs under federal regulations to both federal authorities and state regulatory agencies. Consequently, they assert that it would be duplicative and redundant for an NGDC to file this information in its LTIIP. Moreover, Peoples states that while these matters are addressed in the DIMP plans, the matters are not addressed as a separate plan but as items in the overall DIMP. The Commission notes that pursuant to Federal pipeline safety laws, NGDCs were required to implement, by August 2, 2011, a DIMP plan. See 49 C.F.R. § 192.1005. The DIMP was instituted to assure pipeline integrity for gas distribution pipelines similar to the integrity management regulations for hazardous liquid and gas transmission pipelines and is filed with the U.S. Department of Transportation (US DOT). The plan elements must include, inter alia, risk evaluation and ranking, performance measurement and monitoring, and periodic evaluation and improvement. See 49 C.F.R. § 192.1007. Accordingly, we determine that information

regarding damage prevention, corrosion control and emergency response times is outside the scope of the information that needs to be included in the LTIIP. Also, much of this information is included in the DIMP plans which are already filed by NGDCs with the Commission under separate regulatory action. Thus, it would be redundant to request an NGDC to file this same information in an LTIIP.

However, the Commission believes that its directive that NGDCs file information concerning identification of critical valves is within the spirit and scope of Act 11. If a NGDC identifies a critical valve that it will repair, improve upon or replace and for which it will seek DSIC recovery, then it must include such information its LTIIP. Nonetheless, beyond that particular element, we believe it is prudent to delete the other additional elements for NGDCs from inclusion in the LTIIP. Accordingly, section 121.3(a)(9) of the final form regulation has been revised.

Section 121.4. Filing and Commission review procedures.

Comments

In its comments, EAP requests clarification of the term “parties” as used in proposed subsection 121.4(a) and throughout the proposed regulations in the context of effectuating service. EAP Comments at 6. EAP states the term “parties” should include the statutory advocates and those persons who formally intervened and participated in the most recent base rate case proceeding so as to reduce the burden and unnecessary cost of providing copies to persons who might have commented or provided input in the most recent base but were not litigants. *Id.* Likewise, PECO states that given the large number of parties that may intervene in a base rate case, many of whom are not active participants in the litigation process, PECO suggests amending the language in the proposed subsection to include only parties that are included in the official service list. PECO Comments at 3-4. Furthermore, Peoples asserts that since an LTIIP is not related to a utility’s most recent base rate case, a requirement to serve a copy of an LTIIP filing on parties to the most recent base rate case appears to be without reason, would create inconvenience if those parties have no interest in the LTIIP and would create unnecessary work and expense for the utility in that case. Peoples Comment at 6. Peoples states that if a party to the most recent base rate case has a legal interest in the LTIIP filing, it can intervene in the LTIIP proceeding and obtain a copy of the filing from the utility. *Id.* IRRC notes the above comments and asks the Commission to clarify what is meant by the term “parties” in this proposed subsection. IRRC Comments at 2.

In its comments, the OCA states that proposed subsection 121.4(b) does not specify the time frame in which proprietary treatment should be sought for the LTIIP filing. OCA Comments at 8. The OCA asserts that given the short time frames for review and comment of an LTIIP, the regulations should make clear that proprietary treatment must be sought and received by the utility prior to the filing of the LTIIP with the Commission. *Id.* IRRC notes the OCA’s concern and asks the Commission to explain when a utility is required to obtain the aforementioned approval and clarify the regulation accordingly. IRRC Comments at 2.

Additionally, the OCA states that proposed subsection 121.4(c) allows for only a twenty-day comment period following the submission of the LTIIP. The OCA asserts that a twenty-day comment period is an insufficient amount of time to allow for thorough review and comment by interested parties. OCA Comments at 6. The

¹ Natural Gas Pipeline Replacement and Performance Plans, Docket No. M-2011-2271982 (Order entered February 28, 2013).

OCA proposes that interested parties should have at least sixty days to review the LTIIIP itself, rather than twenty. Id. IRRC notes the OCA's proposal and asks the Commission what factors did it consider when determining that a twenty-day comment period was appropriate for reviewing LTIIIPs. IRRC Comments at 3.

Duquesne requests the Commission to consider revising the language of proposed subsection 121.4(e)(1) so that the LTIIIP does not limit the requirement of reflecting or acknowledging acceleration to replacement of infrastructure alone. Duquesne Comments at 4. Duquesne states the LTIIIP should state how it will reflect the acceleration or how it will maintain the accelerated rate of infrastructure "repair, improvement and replacement." Id.

In their comments, EAP, PECO and Peoples raise concerns about proposed subsection 121.4(f). EAP states that this proposed subsection implies that if an LTIIIP is filed, the Commission has the authority to direct a particular work plan or schedule whereas the statute delineates specific criteria which the Commission should consider in determining whether to approve or disapprove the LTIIIP. EAP Comments at 7. EAP asserts that it remains a utility's option either to amend the proposed LTIIIP to meet the statutory requirements or withdraw the plan and forego the opportunity to use a DSIC. Id. PECO states it believes that this subsection should be clarified to make it clear that if the Commission does not find an LTIIIP to be sufficient to ensure and maintain service, then the utility has the right to withdraw its LTIIIP foregoing recovery of any additional amounts under its DSIC. PECO Comments at 4. PECO asserts that because filing an LTIIIP is voluntary, there should be no requirement to file a new or revised LTIIIP if the utility does not desire to do so. Id. Peoples has similar concerns regarding proposed subsection 121.4(f). Peoples suggest that it would be reasonable that the utility also have the option to withdraw the LTIIIP and not go forward with implementation or continuance of a DSIC. Peoples Comments at 7.

IRRC states that the proposed subsection should reference both sections 121.3 and 121.4 since the elements of an LTIIIP are found in the preceding section of the proposed regulation. IRRC Comments at 3. Additionally, based upon the above comments, IRRC asks the Commission whether it can direct a particular work plan or schedule and under what statutory authority this can be accomplished. Id. Furthermore, IRRC states that the Commission should consider adding a provision that specifically states a utility has the right to withdraw an LTIIIP. Id.

Resolution

This section of the proposed regulations sets forth the filing procedures for LTIIIPs, the public comment period, and the manner in which the Commission will review a utility's LTIIIP filing in order to implement a new DSIC mechanism or continue a previously-approved DSIC mechanism. The Commission takes note of the comments requesting clarification of the term "parties" in the context of effectuating service of the filed LTIIIP as set forth in proposed subsection 121.4(a). We agree with the commentators that a requirement to serve a copy of the LTIIIP filing on all parties, including those who may have only filed comments and not participated in the litigation process, may create unnecessary work and extra expense for the utility. Consequently, the Commission revises the regulation to provide that a utility only has to file a copy of its LTIIIP on the statutory advocates, the Commission's Bureau of Investigation and Enforcement (BI&E), and

parties of record in its most recent base rate case proceeding. We incorporate this revision to subsection 121.4(a) in the final form regulation.

The OCA states that proposed subsection 121.4(b) does not specify the time frame in which proprietary treatment should be sought for the LTIIIP filing and requests that given the short time frames for review and comment of an LTIIIP, the regulations should make clear that proprietary treatment must be sought and received by the utility prior to the filing of the LTIIIP with the Commission. We decline to adopt this suggestion. Section 5.365 of our regulations governs the issuance of a protective order. 52 Pa. Code § 5.365. We note that section 5.365(c)(4) states that a party may not refuse to provide information which a party reasonably believes to be proprietary to a party who agrees to treat the information as if it were covered by a protective order until the request for protective order is issued or denied. See 52 Pa. Code § 5.365(c)(4). Thus, the Commission is of the opinion that it is unnecessary to require a utility to obtain a protective order prior to the filing of its LTIIIP as the party seeking to obtain the protective order still has to furnish the information.

Similarly, OCA asserts that a twenty-day comment period set forth in proposed subsection 121.4(c) is an insufficient amount of time to allow for thorough review and comment by interested parties and requests a sixty-day review period. We decline to adopt OCA's suggestion for a sixty-day review period, but agree that the comment period should be lengthened. Accordingly, in order to give interested parties sufficient time to comprehensively and thoroughly review the filed LTIIIP, we will extend the time for interested parties to respond to the LTIIIP to 30 days. Subsection 121.4(c) of the final form regulation incorporates this extended responsive time period. Additionally, this subsection of the final form regulation indicates that, if the response or answer to the LTIIIP petition raises material factual issues, the Commission may refer the petition to the Office of Administrative Law Judge (OALJ) for hearing and decision.

The Commission takes note of Duquesne's request that we consider revising the language of proposed subsection 121.4(e)(1) so that the LTIIIP does not limit the requirement of reflecting or acknowledging acceleration to replacement of infrastructure alone. We agree with Duquesne's suggestion and will adopt it. In its Final Implementation Order, the Commission previously stated that the LTIIIP should reflect and maintain an acceleration of the infrastructure replacement over the utility's historic level of capital improvement. This is consistent with the language of the Act. See 66 Pa.C.S. § 1352(a)(6). Additionally, the Commission also agrees that the LTIIIP should state both how it will reflect the acceleration and/or how it will maintain the accelerated rate of the "improvement and replacement" of infrastructure. Thus, we incorporate this requirement into subsection 121.4(e)(2) of the final form regulation. Furthermore, the Commission notes that we inadvertently did not include as an element of the LTIIIP that the filing contain measures to ensure that the projected annual expenditures are cost effective. To be consistent with the statute, we have incorporated this element into subsection 121.4(e)(1) of the final form regulation.

The Commission takes note of the comments regarding proposed subsection 121.4(f). This proposed subsection states that the Commission will order the utility to file a new or revised LTIIIP if the filed LTIIIP does not meet the statutory criteria of being sufficient to ensure and maintain adequate, efficient, safe and reliable and reasonable service. EAP states that clarification is necessary regard-

ing this proposed subsection as it implies that if an LTIIIP is filed, the Commission has the authority to direct a particular work plan or schedule whereas the statute delineates specific criteria which the Commission should consider in determining whether to approve or disapprove the LTIIIP.

We disagree with EAP's position. The statute provides that if the LTIIIP is "not adequate to maintain adequate, efficient, safe, reliable and reasonable service, the Commission shall order a new or revised plan." See 66 Pa.C.S. § 1352(a)(7)(emphasis added). Clearly, if the Commission determines that a utility's filed LTIIIP does not meet this statutory criteria, Act 11 expressly grants the Commission the authority to order a utility to file a new or revised LTIIIP. It makes little sense for the Commission to order a "new or revised plan" with no further guidance on the necessary parameters of the plan. Thus, the Commission believes that Section 1352(a)(7) implies that the Commission can specifically direct a utility to incorporate a particular infrastructure improvement project in the new or revised plan for which it has deemed is necessary and in the public interest. Moreover, the Commission retains a fundamental duty under the Code to ensure that each public utility, including those covered by Act 11, "shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of the public." 66 Pa.C.S. § 1501. Therefore, both preexisting Section 1501 and the recently added Section 1352(a)(7) of the Code authorize the Commission to direct, after notice and opportunity to be heard and with an appropriate mechanism for cost recovery, the implementation of infrastructure maintenance and improvement projects deemed necessary to ensure safe and reliable service. By providing parameters for the "new or revised plan" in sufficient detail to bring the utility into compliance with Act 11, the Commission is fulfilling this statutory duty. Accordingly, this subsection is consistent with the Act 11 and the Commission's duties under Section 1501 in this regard and will remain the same in the final form regulation.

Additionally, EAP, PECO and Peoples assert that if the LTIIIP does not meet the Act 11 statutory requirements, it remains the utility's option either to amend the proposed LTIIIP in order to meet those statutory requirements or withdraw the plan and forego the opportunity to use a DSIC. We agree with this position in part. The Commission acknowledges that the filing of an LTIIIP is voluntary. The Commission will not approve an LTIIIP filing that will result in sub-standard service or sub-standard reliability from the utility. When the Commission finds that a public utility's proposed LTIIIP that has been filed in order to initiate a DSIC mechanism or to continue a previously-approved DSIC mechanism is not adequate and sufficient to ensure and maintain adequate service to the public, the Commission will order the public utility to modify its LTIIIP and resubmit a new and revised LTIIIP incorporating the suggested modifications.

However, upon such a finding of inadequacy or insufficiency and the issuance of a Commission order to file a revised LTIIIP, a utility may opt to withdraw its proposed LTIIIP filing pursuant to sections 1.82 or 5.94 of the Commission regulations, 52 Pa. Code §§ 1.82 and 5.94. Subsection 121.4(g) of the final form regulation incorporates this concept. However, at that point, the utility will no longer qualify for the DSIC mechanism and the utility will no longer be afforded the benefit of obtaining accelerated cost recovery for its repairs, improvements and replacements.

Nonetheless, as we mentioned above, in accordance with Sections 1501 of the Code, 66 Pa.C.S. § 1501, the Commission is under the duty to ensure that each public utility provides adequate, efficient, safe and reliable service. Thus, where the lack of adequate infrastructure planning and construction threaten the public welfare, the Commission may, after notice and opportunity to be heard via a separate proceeding, nevertheless order the infrastructure improvements that it deems necessary and in the public interest. Under this scenario, the utility would only be able to seek cost recovery for these Commission-mandated repairs and replacements through the traditional manner of filing a base rate proceeding, not through the DSIC process.

IRRC states the proposed subsection should reference both sections 121.3 and 121.4 since the elements of an LTIIIP are found in the preceding section of the proposed regulation. We agree with this position and revise subsection 121.4(f) accordingly in the final form regulations.

Finally, IRRC notes that the citation to 5.423 in subsection 121.4(b) is not accurate. The Commission has made this correction in the final form regulation to accurately reference § 5.365 of our regulations.

Section 121.5. Modifications to and expiration of an LTIIIP.

Comments

As above, the OCA states that the proposed subsection 121.5(a) allows for only a twenty-day comment period following the submission of a petition for modification of an LTIIIP. The OCA asserts that a twenty-day comment period is an insufficient amount of time to allow for review of such modifications to the LTIIIP. OCA Comments at 6. Accordingly, the OCA recommends that this proposed subsection be modified to allow interested parties to have at least thirty days to review a petition for modification of an LTIIIP. Id. IRRC notes the OCA's proposal and requests the Commission to detail the factors it considered when determining that a twenty-day comment period was appropriate. IRRC Comments at 3.

In its comments, PECO notes proposed subsection 121.5(b) refers to "major changes." PECO states that the correct reference should be to "major modifications," which is defined in proposed Section 121.2. PECO Comments at 4. Additionally, PECO notes that "minor modifications" are to be addressed concurrent with Commission staff's review of the AAO Plan. PECO asserts that a utility is not required to file an AAO Plan unless it has an approved DSIC. Id. Accordingly, PECO states if a utility desires to make a minor modification to its LTIIIP, but does not have an approved DSIC, there is no process in the current proposed regulation for this to be handled. Id. IRRC notes PECO's comment about the concurrent review of minor modifications with the AAO Plan and asks the Commission to explain how this provision will be implemented. IRRC Comments at 3.

In their comments, EAP, Peoples, the FirstEnergy Companies and PECO all state that proposed subsection 121.5(c) should be revised to make it clear that a utility may choose not to file a new LTIIIP. EAP Comments at 7; Peoples Comments at 7; FirstEnergy Companies Comments at 3-4; PECO Comments at 5. The FirstEnergy Companies assert that the proposed subsection, as currently drafted, implies that an LTIIIP must always be in place regardless of whether the utility determines to continue or discontinue a DSIC mechanism. FirstEnergy Companies Comments at 3. Likewise, EAP and PECO express a similar concern about this proposed subsection.

EAP Comments at 7; PECO Comments at 5. EAP requests that this proposed subsection be amended to clarify that the filing of an LTIIIP is required only in conjunction with the DSIC. *Id.* EAP, PECO and the FirstEnergy Companies assert that the business decision to utilize a DSIC which requires the filing of an LTIIIP remains with the utility and it may choose to withdraw its LTIIIP at some point in the future. *Id.* at 7; PECO Comments at 5; FirstEnergy Companies Comments at 4. Additionally, Peoples states that such a revision to the proposed subsection would affect the voluntariness of both the filing of an LTIIIP and the utilization of a DSIC for future cost recovery by a utility. *Id.* Peoples further states that the revision should allow a utility to continue to recover through its DSIC the investment costs related to infrastructure improvements made during the term of the expiring LTIIIP but would not allow a utility to recover future investment costs related to future infrastructure improvements if it does not file a new LTIIIP. Peoples Comments at 8.

In its comments, the OCA states that proposed subsection 121.5(c) be modified to include references to the five-year interval for filing a new LTIIIP. OCA Comments at 9. Additionally, the OCA states that this proposed subsection should include language indicating that the filing time frames will be in accordance with the phased schedule it requested that the Commission implement above. *Id.*

Resolution

This section of the proposed regulations sets forth the procedures for modifying a Commission-approved LTIIIP to reflect any major modifications thereto during its term and for filing a new LTIIIP prior to the expiration of a previously filed plan. Proposed subsection 121.5(a) essentially states that major modifications to the LTIIIP will require the filing of a separate petition that is subject to comment from interested parties, while minor modifications will be considered along with the AAO Plan and disposed of via Staff action.

The Commission notes that the OCA states that proposed subsection 121.5(a) allows for only a twenty-day comment period following the submission of a petition for modification of an LTIIIP which it believes is an insufficient amount of time to allow for review of such modifications to the LTIIIP. The OCA recommends that this proposed subsection be modified to allow interested parties to have at least thirty days to respond to a petition for modification. We agree with the OCA's suggestion. The petition will set forth major modifications to the LTIIIP; therefore, we believe that there is a compelling reason to extend the response time. Accordingly, the period to respond to a petition for modification of an LTIIIP is extended to thirty days. Subsection 121.5(a) of the final form regulation incorporates this revision.

The Commission agrees with PECO's comments regarding proposed subsection 121.5(b) and will revise the term "major changes" to "major modifications" as defined in Section 121.2. The final form regulations will incorporate this revision.

The Commission notes the comments of EAP, Peoples, the FirstEnergy Companies and PECO stating that proposed subsection 121.5(c) should be revised to make it clear that a utility may choose not to file a new LTIIIP before the expiration of the prior LTIIIP. The commentators assert that the proposed subsection, as currently drafted, implies that an LTIIIP must always be in place regardless of whether the utility determines to continue

or discontinue a DSIC mechanism. FirstEnergy Companies Comments at 3. We agree with this assertion only in part.

The Commission believes that the decision to file a new LTIIIP before the expiration of the prior LTIIIP in order to continue with an approved DSIC mechanism, or even after the expiration of an LTIIIP in order to re-qualify for implementing a DSIC mechanism, to some degree, is a voluntary business decision by the utility. Thus, if a utility allows its LTIIIP to expire and chooses not to file a new LTIIIP the Commission believes that the utility has that option. Subsection 121.5(c) of the final form regulation incorporates this concept.

Nevertheless, the Commission cautions all utilities that simply electing not to file a new LTIIIP upon the expiration of the prior LTIIIP filing does not grant them the discretion or authority to forego necessary infrastructure improvements. As we stated above, a utility is under a statutory directive to provide reasonable, safe and reliable service. See 66 Pa.C.S. § 1501. If the Commission determines, after notice and opportunity to be heard, that infrastructure improvements are necessary for safe and reliable service, the public utility may not forgo performing these repairs. Act 11 was implemented to allow a utility to recover reasonable and prudently incurred costs related to the repair, improvement, and replacement of utility infrastructure outside of the traditional manner of filing a base rate case, not to give utilities the discretion to ignore making necessary repairs, replacements and improvements to aging distribution infrastructure. Accordingly, a utility has continuing statutory responsibility to repair and upgrade its distribution infrastructure in order to maintain adequate, efficient, safe and reliable service, regardless of the manner in which it can obtain cost recovery for the repairs, replacements and improvements to distribution infrastructure it has performed. 66 Pa.C.S. § 1501.

In its comments, the OCA requests that proposed subsection 121.5(c) be modified to include references to the five-year interval for filing a new LTIIIP. Additionally, the OCA states that this proposed subsection should include language indicating that the filing time frames will be in accordance with the phased schedule it requested that the Commission implement above. We did not establish a standard term for an LTIIIP per se, as we left it to the discretion of the utility whether to go with a five- or ten-year term for its individual LTIIIP. A utility is required to file a new LTIIIP within five years, only if the term of its prior LTIIIP is for five years. Thus, we will not revise this section of the regulations to include a reference to the five-year interval for filing a new LTIIIP. It is only incumbent for the utility to file its new LTIIIP 120 days before the expiration of the term [5 or 10 ten years] of its prior LTIIIP, if the utility desires to do so. Additionally, as we stated above, we also are not establishing a phased filing schedule for filing LTIIIPs. Thus, this subsection of the final form regulation will not incorporate OCA's requested revisions.

Lastly, the Commission takes note of PECO's comments concerning the absence of the process in the current proposed regulation for when a utility desires to make a minor modification to its LTIIIP, but does not have an approved DSIC. In the proposed regulations, we state that "minor" modifications to an LTIIIP will be addressed concurrent with the review of the filed AAO Plan. However, a utility that does not have a DSIC mechanism does not need to file an AAO Plan. Consequently, if a utility has an approved LTIIIP, but has not filed a DSIC, the utility need only file a revised, black-lined LTIIIP incorpo-

rating its minor modifications. In the alternative, the Commission strongly recommends that a utility file for a DSIC mechanism shortly after receiving approval of its LTIP, so the utility can promptly commence the repairs, replacements and improvements to its infrastructure that will ensure and maintain reliability and for which it can seek cost recovery. Therefore, we will not incorporate this concept into the final form regulation.

Section 121.6. Asset Optimization Plan Filings.

Comments

In their comments, both EAP and the FirstEnergy Companies seek clarification of the term “interested parties” as used in proposed subsection 121.6(a). EAP Comments at 7-8. FirstEnergy Companies Comments at 4. EAP states that a liberal construction of this term to include all parties involved in most recent base rate filings would be unwieldy. EAP Comments at 8. EAP and the FirstEnergy Companies recommend that the language of the proposed subsection be modified so that “interested parties” includes the statutory advocates or those persons who formally intervened and participated in the most recent base case proceeding. *Id.* at 8; FirstEnergy Companies Comments at 4.

The OCA states that proposed subsection 121.6(a) does not specify a time frame for comment regarding the annual filing of the AAO Plan. OCA Comments at 6. The OCA suggests that interested parties should be given forty-five days to review and comment on an AAO Plan. Additionally, the OCA further requests that the Commission establish a phased filing approach to ensure that Commission staff and interested parties have sufficient time to properly review the AAO Plans. *Id.* at 8.

In similar fashion, both EAP and PECO request that the Commission consider moving the March 1st deadline to submit the AAO Plan to April 1st since NGDCs are already obligated to file an annual report by March 15th with the United States Department of Transportation, which includes much of the relevant information requested to be included in the AAO Plan. PECO states that this will provide utilities with some additional time in order to comply with this new regulatory filing requirement, but will not create a material delay for other parties to review. PECO Comments at 5. IRRRC notes the concerns regarding the deadline to file the AAO Plan and the subsequent time frame for interested parties to file comments thereto and asks the Commission to consider the recommendations so that it can be provided with more accurate information and also provide interested parties with a more meaningful time frame for reviewing AAO Plans on a staggered basis. IRRRC Comments at 3.

Both EAP and PECO request clarification is needed as to whether the 12-month period in proposed subsection 121.6(b)(2) is a calendar year, a fiscal year or the twelve months beginning with the approval date of the DSIC. EAP Comments at 8; PECO Comments at 6. PECO recommends that the 12-month period be based on the utility’s fiscal year as this would align the annual utility budget and construction plans with the AAO Plan. *Id.* PPL recommends that the filing date for the AAO Plan be set three months after the end of the 12-month period used by the utility in its LTIP. PPL Comments at 5.

In their comments, EAP, PECO, Peoples and the FirstEnergy Companies all express concern about the requirement to include system reliability data for the prior five years set forth in proposed subsection 121.6(b)(3). EAP, PECO and the FirstEnergy Companies all note that Commission regulations covering electric

service reliability at 52 Pa. Code § 57.191(a)(3) already require EDCs to file an annual report addressing each of the electric reliability indices (SAIFI, CAIDI and SAIDI) for the EDCs’ individual service territories for each of the preceding three years. EAP Comments at 8; PECO Comments at 6; FirstEnergy Companies Comments at 4. EAP states it believes that a referral to the annual reliability reports will meet this requirement for EDCs inasmuch as Act 11 does not refer to reliability data as a separate component of an AAO. EAP Comments at 8. Similarly, PECO asserts that there should be no need to refile this information in a second report. PECO Comments at 6. The FirstEnergy Companies assert that this requirement is redundant of other Commission regulations. FirstEnergy Companies Comments at 4. Further, EAP states that clarification is needed how this requirement to include system reliability data affects NGDCs and whether the Commission would accept the type of information supplied annually by NGDCs in the context of the Winter Reliability Meeting. EAP Comments at 8.

Conversely, PECO states that if this requirement only relates to electric utilities, since they already furnish this same information in another report filed with the Commission, the requirement should be removed from the AAO Plan. PECO Comments at 6. Peoples asserts that system reliability data is not mentioned anywhere in Act 11, nor is an explanation given for its inclusion in the proposed regulation. Peoples Comments at 8. Peoples states that there is no apparent reason for the five-year system reliability requirement to be set forth in proposed paragraph 121.6(b)(3), and it is beyond the scope of Act 11. *Id.* Peoples states that, at a minimum, the Commission should explain how system reliability data relates to the AAO Plan and then clarify what system reliability data should be included with the AAO Plan filing. *Id.* Accordingly, Peoples states that the requirement should be deleted from the proposed regulation. *Id.* As an alternative, EAP also agrees with the suggestion to remove the requirement from the proposed regulation.

IRRC notes the above comments and asks the Commission to explain how the five-year system reliability requirement is consistent with Act 11, the relevancy of this type of information for utilities other than electric utilities and why the information is needed. IRRRC Comments at 4.

PPL, PECO, Duquesne, EAP and the FirstEnergy Companies all express concerns with the entirety of the process associated with the review of the AAO Plan set forth in proposed subsections 121.6(d) and (e). Specifically, PPL states that the AAO Plan could subject the LTIP to detailed review and scrutiny on an annual basis. PPL Comments at 4. PPL notes that depending on the Commission’s final definition of the term “major modification,” pursuant to proposed subsection 121.6(d), a utility may need to file for major modifications on a regular basis, which would mean that the LTIP would be subject to intense review on an annual or more than annual basis. *Id.* PPL asserts that the proposed review process for AAO Plans would be administratively burdensome, potentially redundant and a burden on limited Commission resources. *Id.*

Additionally, Duquesne states that the Commission’s review of an AAO Plan should be limited to whether the utility adhered to its LTIP, as it may not have sufficient information to make the determination that an additional major modification is necessary to ensure reliable service. Duquesne Comments at 5.

Similarly, PECO states that it believes that the intent of the AAO Plan filing requirement was to provide the Commission a means to determine if the utility was following its approved LTIIIP. PECO asserts that if a utility is not in compliance with its approved LTIIIP, it should not be required to modify its LTIIIP, rather it should be required to conform to the provisions of its approved plan. PECO Comments at 6. PECO further asserts that if the LTIIIP requires modifications because it is not in conformity with the law or Commission requirements, it should be handled separately in proposed Section 121.7 in connection with the periodic review of the LTIIIP. Id.

PPL states that AAO Plan filings should be treated as informational, rather than subjecting the utility to a mandatory review process. PPL proposes that the AAO Plan be treated as informational in the first instance, with no automatic opportunity for parties to comment and without the requirement of Commission approval within 60 days. PPL Comments at 4. Accordingly, PPL recommends that the AAO Plan be treated in a manner similar to a utility's annual maintenance filings pursuant to 52 Pa. Code § 57.198. Id. PPL states that this modification will not deprive the Commission of its opportunity to review the LTIIIP at any time, but will reduce potential redundancy in the filing and review process for the Commission without compromising the purpose of the AAO Plan. Id. at 5.

Furthermore, PECO states that it is unclear what would constitute an "adverse comment" as set forth in proposed subsection 121.6(e). PECO Comments at 7. PECO states that there is no definition provided for the term "adverse comment," and that it could be difficult to determine whether a comment is truly "adverse" based on its technical drafting. Id. Accordingly, PECO requests that the phrase be removed from the proposed subsection. Id. Additionally, PECO states that the intent of the AAO Plan is to provide a "check" for the Commission and other interested parties to ensure that the utility is operating in compliance with its LTIIIP. PECO states that there is no requirement in Act 11 for an AAO Plan to be approved as there is for the LTIIIP.

Likewise, EAP also requests that the term "adverse comments" be eliminated from proposed subsection 121.6(e). EAP Comments at 9. EAP states that the AAO Plan is an annual report to the Commission providing information and is not subject to public comment or approval. Id. EAP states that while the information in the AAO Plan may form the basis for an inquiry into whether the DSIC should be terminated, the AAO Plan filing itself is informational and not an adversarial or formal proceeding. EAP asserts that the use of the term "adverse comments" blurs that distinction, causes confusion and is not necessary. Id.

The FirstEnergy Companies also agree with PECO and EAP's suggestion that the term "adverse comments" be removed from proposed subsection 121.6(e). FirstEnergy Companies Comments at 4. Similar to EAP, the Companies assert state that the AAO Plan filing is not an adversarial or formal proceeding, but rather is an annual informational report to the Commission and is not subject to public comment. Id.

Based upon the above comments, IRRC asks the Commission to explain the rationale for proposed subsection 121.6(e) and why it is appropriate that the filing of "adverse comments" could delay the approval of an AAO Plan. IRRC Comments at 4.

Resolution

This section of the proposed regulations sets forth the procedures for filing the AAO Plan and the elements for such a plan. This section also states that the AAO plan will be reviewed to determine whether the utility has adhered to its LTIIIP and whether any changes to the initial LTIIIP are necessary in order to maintain and improve the safety, adequacy and reliability of its existing distribution infrastructure. Absent any major modifications or changes, adverse comments or Commission action within 60 days, the filing will be deemed approved.

The Commission takes note of the commentators who express concern with the entirety of the process associated with the review of the AAO Plan. It is the position of the commentators that there is no corresponding requirement in Act 11 for an AAO Plan to be approved, or for a detailed review of the sufficiency of the LTIIIP. The commentators suggest that since the AAO Plan is simply an informational filing or nothing more than a status report to reflect the utility's progress in making the infrastructure improvements set forth in its approved LTIIIP, there is no need to have an automatic opportunity for parties to comment and they also request the elimination of the requirement that the Commission give its approval of the Plan within 60 days. The Commission agrees with the commentators' assertions only in part.

The public utility's filed LTIIIP indicates that it has carefully examined its current distribution infrastructure, including its elements, age, and performance, and established a reasonable and prudent schedule and planning of expenditures in order to accelerate the repair, improvement and replacement of this eligible property needed to maintain the safe, adequate, and reliable service over the term of the LTIIIP. The Commission acknowledges that the sole purpose of the AAO Plan is to subject the LTIIIP to a compliance review on an annual basis so as to track the utility's progress with performing the requisite repairs, replacements and improvement for the corresponding 12-month timeframe. It is the Commission's duty to determine whether the utility has fully complied with its LTIIIP and a review and approval of the filed AAO plan will ensure that the utility is operating in compliance with its LTIIIP.

However, the Commission believes that the review of an AAO Plan should be solely limited to whether the utility has complied with the work schedule and made the capital improvements set forth in the approved LTIIIP for the preceding 12-month period. The Commission is persuaded by PPL's recommendation that the review of the AAO Plan should be treated in a manner similar to a utility's annual inspection and maintenance filings pursuant to 52 Pa. Code § 57.198. Accordingly, the Commission will incorporate the concept that the AAO Plan will be treated in a similar fashion to a utility's annual inspection and maintenance filing in subsection 121.6(a) of the final form regulation.

With this determination to treat the AAO Plan similar to the maintenance reports filed under section 57.198 of our regulations, the commentators' concerns regarding the term "interested parties" as used in proposed subsection 121.6(a) and what constitutes an "adverse comment" to the AAO Plan in proposed subsection 121.6(e) are now moot. Therefore, the Commission deletes those provisions from the final form regulation. Additionally, for the reasons stated above, the Commission will not adopt the OCA's suggestion that "interested" parties be given forty-five days to comment on a filed AAO Plan as these plans do not require public comment.

The Commission takes note of the various recommendations regarding the filing date of the AAO Plan. The OCA requests that the Commission establish a phased filing approach to ensure that Commission staff and interested parties have sufficient time to properly review the AAO Plans. Similarly, PPL recommends that the filing date for the AAO Plan be set three months after the end of the 12-month period used by the utility in its LTIP. In regard to the filing date of the AAO Plan, both EAP and PECO request that the Commission consider moving the March 1st deadline to submit the AAO Plan to April 1st since NGDCs are already obligated to file an annual report by March 15th with the United States Department of Transportation, which includes much of the relevant information requested to be included in the AAO Plan.

The Commission agrees with the OCA that a phased filing schedule for the AAO Plan is necessary so that the Commission and interested parties are not inundated all at once with AAO plans from each utility that has an approved DSIC mechanism. Therefore, we will adopt in part PPL's recommendation that the AAO Plan be filed in a specified time frame after the end date of the 12-month period used by the utility in its LTIP. The Commission revises subsection 121.6(a) so that the filing date for a utility to file its AAO Plan is 60 days after the 12-month period used by the utility in its LTIP. The final form regulation incorporates this revision.

Both EAP and PECO suggest that clarification is needed as to whether the 12-month period in proposed subsection 121.6(b)(2) is a calendar year, a fiscal year or the twelve months beginning with the approval date of the DSIC. Section 1356 of the Code states that the AAO Plan shall include a description that specifies all eligible property repaired, improved and replaced in the immediately preceding 12-month period pursuant to the utility's LTIP and prior year's AAO Plan (if applicable). 66 Pa.C.S. § 1356. Thus, the Commission opines that if the utility's filed LTIP was based on a fiscal year or reflected a calendar year, then the 12-month time frame reflected in the subsequently filed AAO Plan should correspond to that same specific 12-month time frame used in the LTIP. Accordingly, we decline to specify in the final form regulation whether the 12-month time frame in an AAO Plan set forth in subsections 121.6(b)(1) and (2) is a fiscal year, calendar year or the anniversary date of the approval of the LTIP.

The Commission takes note of the comments of EAP, PECO, and Peoples, which all express concern about the requirement set forth in proposed subsection 121.6(b)(3) to include system reliability data for the prior five years in the AAO Plan. Peoples asserts that system reliability data is not mentioned anywhere in the Act 11, nor is an explanation given for its inclusion in the proposed regulation. Furthermore, EAP, PECO and the FirstEnergy Companies all note that Commission regulations covering electric service reliability at 52 Pa. Code § 57.191(a)(3) already require EDCs to file an annual report of each of the electric reliability indices (SAIFI, CAIDI and SAIDI) for the EDCs' individual service territories for each of the preceding three years. EAP also states it believes that a referral to the annual reliability reports will meet this requirement for EDCs inasmuch as Act 11 does not refer to reliability data as a separate component of an AAO Plan. We agree with this position.

The Commission determines that there is no need to include system reliability data for the prior five years in the AAO Plan. First, we determine that requesting this information is beyond the scope of the AA&O Plan review. Section 1356(a) only requires that the AA&O Plan include

the following: (1) a description that specifies all eligible property repaired, improved and replaced in the immediately preceding 12-month period pursuant to the utility's long term infrastructure improvement plan and (2) a detailed description of all the facilities to be improved in the upcoming year. 66 Pa.C.S. §§ 1356(a)(1) and (2). Secondly, the Commission notes that water, wastewater companies and NGDCs are not required to file any system reliability or performance data with us. NGDCs file this information in their annual reports filed to US DOT as per 49 CFR Part 191. Additionally, water and wastewater companies are not required to file system reliability data with the Commission but rather with the Pennsylvania Department of Environmental Protection and the U.S. Environmental Protection Agency. As such, there is no need to request this information in the AAO Plans submitted by NDGCs, water and wastewater companies. Additionally, the Commission's regulations already require EDCs to report annually their electric service reliability indices for their individual service territory for each of the preceding three years, it would be redundant to require the filing of this same or similar information in the AAO Plan. In any event, as we determine below, the Commission can review this reliability information when it conducts the periodic review of the LTIP to determine if the plan is sufficient to ensure and maintain adequate, efficient, safe, reliable and reasonable service. During that review, EDCs can supply a reference to their reliability reports filed subject to another section of our regulations. Accordingly, there is no need to have this as a separate detailed component of the AAO Plan since this information is not filed with us in the first instance or is already required to be filed pursuant to another section of our regulations and more appropriately reviewed in the periodic review of the LTIP. Thus, this requirement is removed from the final form regulation.

The Commission also notes PECO's comments that if a utility is not in compliance with its approved LTIP, it should not be required to modify its LTIP but rather should be required to conform to the provisions of its approved plan. However, if a review of the utility's AAO Plan indicates that it was unable to comply with its own schedule as it may have been ambitious in first developing it or because extraneous circumstances may have arose that have impacted its planned schedule, we believe it appropriate that the utility be given the option to file a petition for modification to the LTIP. For unforeseen reasons, a utility may need to file for major modifications, but we do not believe that this would be administratively burdensome, potentially redundant or a burden on limited Commission resources. Nonetheless, if an AAO Plan indicates that a utility has a pattern of non-compliance with its filed LTIP, then that will be addressed by the Commission separately in proposed Section 121.7 in connection with the periodic review of the LTIP.

Section 121.7. Periodic Review of LTIP

PECO states it is unclear why the periodic review of the LTIP at least once every five years is necessary as set forth in proposed subsection 121.7(a), if the LTIP is already reviewed annually as set forth in proposed Section 121.6 in connection with the filing of the AAO Plan. PECO Comments at 7. PECO asserts that since the Commission will already be checking the adequacy and reliability of the LTIP annually as part of the AAO Plan review process, it believes that there is no additional need for further review every five years, unless the proposed AAO Plan review process is revised to determine only whether a utility is in compliance with its LTIP and not

as a tool to analyze the appropriateness of the LTIP. Id. at 8. PPL also recommends that this proposed subsection be modified to provide that the five year review requirement might be satisfied by the review of a proposed LTIP which replaces an expiring five-year LTIP. Id.

Duquesne requests the Commission to consider modifying the language contained in proposed subsection 121.7(b)(2) to limit the review to a determination of whether the utility has adhered to its LTIP. Duquesne states that it is concerned that the Commission may not have sufficient information to make the determination that changes to the LTIP are necessary to maintain the efficiency, safety, adequacy and reliability of the utility's existing distribution infrastructure.

Additionally, PECO states the proposed subsection 121.7(d) should be modified so that the utility may have the ability to withdraw its LTIP if found to be inadequate or if the utility does not wish to continue with it. Id.

Lastly, Duquesne states that it believes that the proposed regulation does not address how previously-approved DSIC charges would be treated while awaiting the Commission's action to approve a refiled LTIP. Duquesne Comments at 4. Duquesne suggests the Commission add language stating the following, "DSIC charges currently in effect pursuant to a previously-approved LTIP may continue to be charged if the Commission does not approve the new LTIP within the 120 days or rejects the new LTIP." Id.

IRRC references these suggestions in its comments and asks the Commission to explain why the language of this section is reasonable. IRRC Comments at 4.

Resolution

This section of the proposed regulations sets forth the procedures for the periodic review of the LTIP, as required by Act 11. 66 Pa.C.S. § 1352(b)(1). The proposed section states that a periodic review shall be conducted "at least once every five years" or more frequently if deemed necessary and, upon such review, the utility may have to revise or update its LTIP.

The Commission acknowledges those comments that state that the periodic review of the LTIP at least once every five years is unnecessary as set forth in proposed subsection 121.7(a), if the LTIP is already extensively reviewed annually as has been set forth in proposed Section 121.6 in connection with the filing of the AAO Plan. However, we have revised and limited the scope of the entire AAO Plan review, so that now the periodic review of the LTIP remains a necessary and integral part of the entire DSIC process. The Commission determines that during this periodic review, the utility's LTIP will be subject to a determination of whether it has remained adequate and sufficient to ensure reliable and reasonable service during its term. See generally 66 Pa.C.S. § 1352(a)(7).

The Commission determines that the periodic review of the LTIP process will include (1) whether the utility has adhered to the parameters of its LTIP and (2) whether changes to the LTIP are necessary to continue to maintain the efficiency, safety, adequacy and reliability of the utility's existing distribution infrastructure. However, the Commission is of the opinion that this periodic review can be a rather streamlined process. While the periodic review of the LTIP will entail a thorough, comprehensive and detailed review of the utility's LTIP, the Commission

notes that most of the information the utility would have to submit in order to meet the threshold determinations above are already being filed or prepared by it under different regulations. For example, the utility would have already filed AAO Plans that indicate that it is in compliance with the work schedule and capital expenditures set forth in the LTIP. Additionally, as of the result of the accelerated work that has been performed by the utility, the reliability of the utility's distribution infrastructure should have increased and the risk of outages should have been reduced.

Thus, during this periodic review, the Commission foresees EDCs supplying a reference to the reliability reports they already file with us subject to another section of our regulations. See generally 52 Pa. Code §§ 57.191—57.198. Furthermore, we also expect NGDCs to include a reference to system leak data that is required by the annual US DOT 7100 filed pursuant to 49 CFR Part 191. Moreover, we state that the Commission would also accept a reference to the type of information supplied by NGDCs in the context of the Winter Reliability Meeting. The Commission believes that this information is necessary in order to determine whether the repairs, improvements or replacements performed by the utility at the time of the periodic review have resulted in increased reliability. See generally 66 Pa.C.S. § 1352(a)(6).

Furthermore, we decline to adopt PPL's recommendation that the five year review requirement might be satisfied by the review of a proposed LTIP which replaces an expiring five-year LTIP. In order to be truly effective, the periodic review must be done during the term of the LTIP, not when it is set to expire.

The Commission takes note of the comments that state proposed subsection 121.7(d) should be modified so that the utility may have the ability to withdraw its LTIP if found to be inadequate, or if the utility does not wish to continue with it. We agree with this suggestion. If during the periodic review, the Commission determines that the LTIP has not increased the reliability of a utility's infrastructure or is no longer sufficient or adequate to ensure or maintain efficient, adequate, safe and reliable service, the Commission shall direct the utility to revise its LTIP, update or re-submit its LTIP. See 66 Pa.C.S. § 1352(a)(7).

Notwithstanding this statutory provision, consistent with our statements above, the utility may also elect to withdraw its LTIP pursuant to the pertinent Commission regulations. See generally 52 Pa. Code §§ 1.82 and 5.94. However, if the utility determines to withdraw its LTIP, the utility will risk not being able to recover any future expenses under its DSIC mechanism. Conversely, if the utility decides to resubmit or refile a revised plan, the utility may recover the previously-approved DSIC charges for the remaining term of the LTIP if the necessary future repair and replacement work is performed by the utility. The Commission incorporates this position in the final form regulation.

Section 121.8. Enforcement of LTIP Implementation.

Comments

In its comments, EAP contends that an LTIP is not a stand-alone obligation but rather a detailed infrastructure replacement plan filed by a utility seeking approval of a DSIC. EAP Comments at 9. Accordingly, EAP states that Act 11 provides a specific and suitable remedy for failure of a utility to comply to the LTIP, which is revocation of,

and zeroing-out of, the DSIC. Id. EAP suggests that the reference to civil penalties and “other remedies” is not in accord with the statutory language and should be removed from the proposed enforcement actions identified in proposed subsection 121.8(c).

Likewise, PECO states that it does not believe that a remedy for non-compliance with an approved LTIIP should include “civil penalties.” PECO Comments at 8. PECO states that the non-compliance standard is too indefinite to provide any meaningful assurance that a utility will not find itself subject to a civil penalty for a deviation that is not deemed after the fact to be “minor.” Additionally, PECO asserts that if a utility is not in compliance with its LTIIP, the appropriate remedy is for the utility to cease being permitted to use its DSIC and the ability to collect thereunder. Id.

Furthermore, the FirstEnergy Companies state that proposed subsection 121.8(c) implies that Act 11 creates separate, identifiable penalty provisions outside the pre-existing statutory framework of the Code. FirstEnergy Comments at 4. The FirstEnergy Companies assert that the existing penalty provisions of Chapter 33 of the Code provide adequate penalty measures for violations of the Code, including Act 11, and should not be augmented by Commission regulations not anticipated in Act 11. FirstEnergy Comments at 5. The FirstEnergy Companies state the only measure specifically identified in Act 11 that can remotely be considered a penalty is provided at 66 Pa.C.S. § 1352(b), and that is the termination of the utility’s DSIC if the utility is found to be noncompliant with its LTIIP. Id.

The OCA states that proposed subsection 121.8(c) is not consistent with Act 11. OCA Comments at 10. The OCA states that clearly the legislative language concerning termination of the DSIC is mandatory, not optional, in instances where the Commission determines that the utility is not in compliance with the approved LTIIP. Id. Accordingly, the OCA asserts that this proposed subsection should be changed to bring the regulation into conformity with the requirement of the statute that the DSIC mechanism terminate if the Commission finds that a utility is not in compliance with its plan. Id.

In light of the above comments regarding proposed subsection 121.8(c), IRRC asks the Commission to explain why the imposition of penalties is reasonable.

Resolution

This section of the proposed regulations addresses the enforcement of Act 11 and the remedies the Commission may prescribe for a utility’s noncompliance with its Commission-approved LTIIP. The section also provides that variations in individual years and non-material changes from the Commission-approved LTIIP will not be a basis for an enforcement action. Any enforcement actions filed will be referred to the Office of Administrative Law Judge (OALJ) for hearing and decision.

The Commission takes note of the comments regarding the inclusion of civil penalties as a remedy for non-compliance with an approved LTIIP. We agree that Act 11 expressly provides one remedy for failure for a utility to comply with the LTIIP, which is the termination of the utility’s DSIC mechanism. When the Commission has determined, after notice and opportunity to be heard, that certain infrastructure improvements, as set forth in the utility’s LTIIP, are necessary to maintain safe and adequate service to consumers and where the utility nevertheless, and without adequate justification, fails to adhere

to its LTIIP, the appropriate remedy in the instant LTIIP enforcement proceeding is termination of the utility’s approved DSIC mechanism.

However, by not being in compliance with its LTIIP, the utility will have raised a substantial question as to whether it is in compliance with the statutory directive set forth in section 1501 of the Code of providing adequate, efficient, safe and reasonable service and facilities, and civil penalties may also be applicable in a separate proceeding.

As explained earlier herein, the utility is obligated to make the repairs and improvements necessary to ensure safe and reliable service. Failure to do so is a violation of Section 1501 of the Code. 66 Pa.C.S. § 1501. And, both civil penalties under Section 3301 and specific performance are potential remedies for failure to adhere to a Commission-approved LTIIP. Accordingly, the Commission retains separate statutory authority to impose other remedies for the failure of a utility to perform the necessary infrastructure improvements to ensure and maintain reasonable service. 66 Pa.C.S. §§ 1501 and 3301. Whether any such remedies are appropriate would be determined, on a case by case basis, after notice and opportunity to be heard in a separate enforcement proceeding, not in the LTIIP enforcement proceeding.

Therefore, for purposes of these regulations under Act 11, the Commission removes the reference to imposing “civil penalties” and “other remedies” in an enforcement action identified in subsection 121.8(c) of the final form regulation.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on October 3, 2013, the Commission submitted a copy of the notice of proposed rulemaking, published at 43 Pa.B. 6206 (October 19, 2013), to IRRC and the Chairpersons of the House Consumer Affairs Committee and the Senate Consumer Protection and Professional Licensure Committee for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC and the House and Senate Committees were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing the final-form rulemaking, the Commission has considered all comments from IRRC, the House and Senate Committees and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P.S. § 745.5a(j.2)), on November 5, 2014, the final-form rulemaking was deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on November 6, 2014, and approved the final-form rulemaking.

Conclusion

We again thank those interested parties who filed comments on the proposed subsections of the regulation. We find that the regulations to establish procedures for the implementation and review of a long term infrastructure improvement plan as set forth in Annex A should be approved. 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, sections 1201 and 1202 of the act of July 31, 1968 (P.L. 769, No. 240) (45 P.S. §§ 1201, et seq.) and the regulations promulgated thereunder at 1 Pa. Code §§ 7.1—7.5, section 204(b) of the Commonwealth Attorneys Act (71 P.S. § 732.204(b)); section 745.5 of the Regulatory Review Act (71 P.S. § 745.5); and section 612

of The Administrative Code of 1929 (71 P. S. § 232), and the regulations promulgated thereunder at 4 Pa. Code §§ 7.231—7.235, we add the regulations at 52 Pa. Code §§ 121.1—121.7 to read as set forth in Annex A; *Therefore,*

It Is Ordered That:

1. The regulations of the Commission, 52 Pa. Code, are amended by adding §§ 121.1—121.8 to read as set forth in Annex A.

2. A copy of this Order and Annex A shall be served upon the Energy Association of Pennsylvania, all jurisdictional electric distribution companies, natural gas utilities, all water and wastewater utilities, the Bureau of Investigation and Enforcement, the Office of Consumer Advocate, and the Office of Small Business Advocate.

3. The Secretary shall certify this Order and Annex A and deposit them with the Legislative Bureau for publication in the *Pennsylvania Bulletin*.

4. The Secretary shall submit this order and Annex A to the Office of Attorney General for approval as to legality.

5. The Secretary shall submit this order and Annex A to the Governor's Budget Office for review of fiscal impact.

6. The Secretary shall submit this order and Annex A for review by the designated standing committees of both houses of the General Assembly, and for review and approval by the Independent Regulatory Review Commission.

7. The final regulations become effective upon publication in the *Pennsylvania Bulletin*.

8. The contact person for this rulemaking is Assistant Counsel David E. Screven, Law Bureau (717) 787-2126, dscreven@pa.gov. Alternate formats of this document are available for persons with disabilities and may be obtained by contacting Sherri DelBiondo, Regulatory Coordinator, (717) 772-4597.

ROSEMARY CHIAVETTA,
Secretary

(Editor's Note: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 44 Pa.B. 7424 (November 22, 2014).)

Fiscal Note: Fiscal Note 57-294 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 52. PUBLIC UTILITIES

PART I. PUBLIC UTILITY COMMISSION

Subpart G. DISTRIBUTION SYSTEM IMPROVEMENT CHARGE

Chap.

121. LONG-TERM INFRASTRUCTURE IMPROVEMENT PLAN

CHAPTER 121. LONG-TERM INFRASTRUCTURE IMPROVEMENT PLAN

Sec.	
121.1.	Purpose.
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121.7.	Periodic review of an LTIP.
121.8.	Enforcement of LTIP implementation.

§ 121.1. Purpose.

To be eligible to recover the reasonable and prudently incurred costs regarding the repair, improvement and replacement of eligible property from a DSIC, a utility shall submit an LTIP for Commission approval. See 66 Pa.C.S. § 1353 (relating to distribution system improvement charge). The LTIP must show the acceleration of the replacement of aging infrastructure by the utility and be sufficient to ensure and maintain adequate, efficient, safe, reliable and reasonable service to customers.

§ 121.2. Definitions.

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

AAO plan—Annual asset optimization plan—The plan and supporting documents identified in 66 Pa.C.S. § 1356 (relating to asset optimization plans) that specify the eligible property repaired, improved or replaced by a utility under its Commission-approved LTIP.

DSIC—Distribution system improvement charge—A charge imposed by a utility to recover the reasonable and prudent costs incurred to repair, improve or replace eligible property that is part of the utility's distribution system under 66 Pa.C.S. § 1353 (relating to distribution system improvement charge).

Eligible property—Property that is part of a distribution system and eligible for repair, improvement and replacement of infrastructure as defined in 66 Pa.C.S. § 1351 (relating to definitions).

LTIP—Long-term infrastructure improvement plan—The plan and supporting documents identified in 66 Pa.C.S. § 1352(a) (relating to long-term infrastructure improvement plan) that shall be submitted to and approved by the Commission for a utility to be eligible to recover costs from a DSIC mechanism, which includes information regarding the utility's eligible property and its repair and replacement schedule.

Major modification—A change to a utility's previously approved LTIP which meets at least one of the following criteria:

(i) Eliminates a category of eligible property from the LTIP.

(ii) Extends the schedule for repair, improvement or replacement of a category of eligible property by more than 2 years.

(iii) Increases the total estimated cost of the LTIP by more than 20%.

(iv) Otherwise reflects a substantial change to the current Commission-approved LTIP.

Qualified personnel—An individual who, by possession of a recognized degree, certificate or professional standing, or who by extensive knowledge, training and experience, has successfully demonstrated his ability to solve or resolve problems relating to the subject matter, the work or the project as established by the United States Department of Labor, Occupational Safety and Health Administration in 29 CFR 1926.32 (relating to definitions).

Utility—A natural gas distribution company, electric distribution company, water utility, wastewater utility or city natural gas distribution operation subject to the jurisdiction of the Commission.

§ 121.3. LTIIIP.

(a) A utility seeking to implement a DSIC mechanism or to continue a previously-approved DSIC mechanism shall file an LTIIIP. The LTIIIP must include the following elements:

- (1) Identification of types and age of eligible property owned and operated by the utility for which it is seeking DSIC recovery.
- (2) An initial schedule for planned repair and replacement of eligible property.
- (3) A general description of location of eligible property.
- (4) A reasonable estimate of quantity of eligible property to be improved or repaired.
- (5) Projected annual expenditures and means to finance the expenditures.
- (6) A description of the manner in which infrastructure replacement will be accelerated and how repair, improvement or replacement will ensure and maintain adequate, efficient, safe, reliable and reasonable service to customers.
- (7) A workforce management and training program designed to ensure that the utility will have access to a qualified workforce to perform work in a cost-effective, safe and reliable manner.
- (8) A description of a utility's outreach and coordination activities with other utilities, Department of Transportation and local governments regarding the planned maintenance/construction projects and roadways that may be impacted by the LTIIIP.

(b) The LTIIIP must address only the specific property eligible for DSIC recovery.

§ 121.4. Filing and Commission review procedures.

(a) A utility seeking to implement a DSIC mechanism or to continue a previously-approved DSIC mechanism shall file an LTIIIP for Commission approval. The LTIIIP shall be filed with the Commission's Secretary's Bureau with copies served upon the Bureau of Investigation and Enforcement, the Office of Consumer Advocate, the Office of Small Business Advocate and the parties of record in the utility's most recent base rate case. Service is evidenced by a certificate of service filed with the LTIIIP.

(b) An LTIIIP is a public document. If a utility believes that a portion of the information in the LTIIIP qualifies as confidential security information under section 2 of the Public Utility Confidential Security Information Disclosure Protection Act (35 P.S. § 2141.2) or should be afforded proprietary and confidential treatment, the utility shall request proprietary treatment of the information pursuant to a protective order. See §§ 5.365 and 102.1—102.4 (relating to orders to limit availability of proprietary information; and confidential security information). Confidential security information in the LTIIIP shall be marked confidential by the utility and excluded from the public version of the filing.

(c) LTIIIP filings are subject to a 30-day comment period. The LTIIIP will be reviewed by Commission staff. The LTIIIP will be referred to the Office of Administrative Law Judge for hearings and a decision if comments raise material factual issues.

(d) A utility has the burden of proof to demonstrate that its proposed LTIIIP and associated expenditures are reasonable, cost effective and are designed to ensure and maintain efficient, safe, adequate, reliable and reasonable service to consumers.

(e) The Commission will review the filed LTIIIP and determine if the LTIIIP:

- (1) Contains measures to ensure that the projected annual expenditures are cost-effective.
- (2) Specifies the manner in which it accelerates or maintains an accelerated rate of infrastructure repair, improvement or replacement.
- (3) Is sufficient to ensure and maintain adequate, efficient safe, reliable and reasonable service.
- (4) Meets the requirements of § 121.3(a) (relating to LTIIIP).

(f) If the utility's LTIIIP, which has been filed for the purpose of implementing a DSIC mechanism or to continue a previously-approved DSIC mechanism, does not meet the criteria in this section or in § 121.3(a), the Commission will order the utility to file a new or revised LTIIIP.

(g) If the Commission determines that the utility must file a new or revised LTIIIP under subsection (f), the utility may elect to withdraw its filed LTIIIP under § 1.82 or § 5.94 (relating to withdrawal or termination; and withdrawal of pleadings in a contested proceeding). If the utility elects to withdraw its LTIIIP filing, the utility is not eligible to implement its proposed DSIC mechanism or to continue its previously-approved DSIC mechanism.

§ 121.5. Modifications to and expiration of an LTIIIP.

(a) If a utility elects to modify a Commission-approved LTIIIP during its term to incorporate a major modification to any of the elements in § 121.3(a) (relating to LTIIIP), the utility shall file a separate petition for modification. The utility shall clearly identify the change and explain the operational, financial or other justification for the change in its petition. The petition will be subject to notice and an opportunity to be heard by interested parties. Parties shall have 30 days to file comments to the petition.

(b) Minor modifications to an LTIIIP that are changes that do not qualify as major modifications as defined in § 121.2 (relating to definitions) will be addressed concurrently with Commission staff's review of the utility's AAO plan, if applicable.

(c) A utility seeking to continue its DSIC mechanism after expiration of its LTIIIP shall file a new LTIIIP with the Commission at least 120 days prior to the expiration of a currently-effective LTIIIP. The new LTIIIP must contain the elements in § 121.3(a) and is subject to the review under § 121.4 (relating to filing and Commission review procedures). If the utility fails to file a new LTIIIP before the expiration of its prior LTIIIP, the approved DSIC mechanism will terminate upon expiration of the prior LTIIIP.

§ 121.6. AAO plan filings.

(a) A utility with an approved DSIC shall file with the Commission, for informational purposes, an AAO plan. The AAO plan shall be filed annually with the Commission 60 days after the 12 months of its LTIIIP has expired and under this time frame for each successive year of the term of the LTIIIP.

(b) An AAO plan must include:

- (1) A description that specifies all the eligible property repaired, improved and replaced in the prior 12-month period under its LTIIIP and prior year's AAO plan.

(2) A description of the eligible property to be repaired, improved and replaced in the upcoming 12-month period.

(c) If a utility determines that a major modification to its LTIP is necessary once it has finalized its AAO plan, it shall submit a separate petition for modification as set forth in § 121.5(a) (relating to modifications to and expiration of an LTIP) to the Commission.

(d) An AAO plan will be reviewed by the Commission only to determine whether the utility is in substantial compliance with the repairs, improvements or replacements of the specific eligible property in its approved LTIP for the corresponding 12-month time frames.

(e) Absent any major modifications to the LTIP or Commission action to reject an AAO plan within 60 days of its submission to the Commission, the AAO plan will be deemed approved. The Commission may extend its consideration period if necessary.

(f) If an AAO plan is rejected by the Commission, the utility will be notified of the plan's deficiencies and actions needed to repair, improve or replace eligible property to bring the utility into compliance with the work schedule in its approved LTIP. If the utility concludes that it needs to revise its LTIP to comply with the Commission's determinations, it shall file a petition for modification under § 121.5.

§ 121.7. Periodic review of an LTIP.

(a) The Commission will review a utility's LTIP at least once every 5 years or more frequently if deemed necessary to address safety, reliability or other issues related to the approved LTIP.

(b) The Commission's review will determine:

(1) If the utility has adhered to its LTIP.

(2) If changes to the LTIP are necessary to maintain and improve the efficiency, safety, adequacy and reliability of its existing distribution infrastructure.

(c) Unless otherwise directed, the Commission's periodic review will begin at the midpoint of the term of the current LTIP. The Commission will, by means of a Secretarial Letter, establish a schedule for comments and reply comments to aid in its periodic review.

(d) If the Commission determines during this periodic review that a utility's approved LTIP is no longer adequate to ensure and maintain efficient, adequate, safe, reliable and reasonable service, the Commission will direct the utility to revise, update or resubmit its LTIP as appropriate. If the utility elects to withdraw its LTIP filing under § 5.94 (relating to withdrawal of pleadings in a contested proceeding), the utility's approved DSIC mechanism will immediately terminate and the utility may not recover the expenses for the work it has performed until it files a base rate proceeding.

§ 121.8. Enforcement of LTIP implementation.

(a) A utility with a Commission-approved LTIP is obligated to comply with the infrastructure replacement schedule and elements of that LTIP. Compliance with the LTIP will be evaluated on a multiyear basis over the life of the LTIP. Construction expenditure variations in individual years and minor changes or deviations from the Commission-approved LTIP may not be the basis for an enforcement complaint.

(b) A Commission-approved LTIP may be subject to enforcement complaints brought by statutory advocates and other interested persons. Enforcement complaints may be referred to the Office of Administrative Law Judge for hearings and a decision, as appropriate.

(c) The remedy for noncompliance with an approved LTIP is the termination of the utility's approved DSIC mechanism.

[Pa.B. Doc. No. 14-2619. Filed for public inspection December 19, 2014, 9:00 a.m.]

Title 58—RECREATION

FISH AND BOAT COMMISSION

[58 PA. CODE CHS. 95, 109 AND 111]

Boating

The Fish and Boat Commission (Commission) amends Chapters 95, 109 and 111 (relating to manufacturer installed equipment; specialty boats and waterskiing activities; and special regulations counties). The Commission is publishing this final-form rulemaking under the authority of 30 Pa.C.S. (relating to Fish and Boat Code) (code).

A. *Effective Date*

The final-form rulemaking will go into effect on January 1, 2015.

B. *Contact Person*

For further information on the final-form rulemaking, contact Wayne Melnick, Esq., P. O. Box 67000, Harrisburg, PA 17106-7000, (717) 705-7810. This final-form rulemaking is available on the Commission's web site at www.fish.state.pa.us.

C. *Statutory Authority*

The amendments to §§ 95.3 and 109.2 (relating to lights for boats; and paddleboards and sailboards) are published under the statutory authority of section 5123 of the code (relating to general boating regulations). The amendment to § 111.49 (relating to Northumberland County) is published under the statutory authority of section 5124 of the code (relating to particular areas of water).

D. *Purpose and Background*

The final-form rulemaking is designed to improve, enhance and update the Commission's boating regulations. The specific purpose of the amendments is described in more detail under the summary of changes. The Commission solicited the advice and opinion of its Boating Advisory Board on the proposed amendments prior to final adoption.

E. *Summary of Changes*

(1) Section 95.3 provides boaters with information on the requirements for types, configurations and locations of navigation lights on boats. These provisions are within the actual wording of the regulation and by reference to former Appendix A and the Inland Navigation Rules Act of 1980 (repealed).

Based on a recent review of § 95.3, the Commission determined that it should be amended for a number of reasons. While there is a reference in § 95.3 to the Inland Navigation Rules Act of 1980, Pennsylvania courts have found there is not explicit language within the regulation that states a boater must comply with these specific Federal rules. In addition, the Inland Navigation Rules Act of 1980 was moved in 2010 to 33 CFR Part 83 (relating to rules).

Section 95.3 also does not specifically incorporate the language of 33 CFR 83.20(b) (relating to application (Rule 20)), also referred to as Rule 20, which states:

Rules concerning lights complied with from sunset to sunrise; other lights. The Rules concerning lights shall be complied with from sunset to sunrise, and during such times no other lights shall be exhibited, except such lights as cannot be mistaken for the lights specified in these Rules or do not impair their visibility or distinctive character, or interfere with the keeping of a proper lookout.

Pennsylvania courts have strictly construed the language of § 95.3 and have not interpreted it to mean that a boater must refrain from using other lights or if other lights are used they may not impair the visibility or distinctive character of the required lights. The Commission's waterways conservation officers have encountered challenges with successfully prosecuting more severe violations such as boating under the influence when lighting deficiencies have been cited as probable cause to conduct a boarding.

For these reasons, the Commission amends § 95.3 to more closely reflect the lighting requirements in 33 CFR Part 83 and delete the reference to Appendix A. The Commission further deletes Appendix A and relies solely on the narrative. These amendments are not a substantive change to lighting requirements for recreational boaters. The Commission amends § 95.3 to read as set forth in Annex A.

(2) In recent years, paddleboarding has been gaining popularity. Paddleboards were traditionally used to surf in the ocean but are now being used in lakes and rivers. Paddleboards resemble oversized surfboards and models are designed for use on various water conditions. Paddleboards are primarily operated by a person standing on the board using a paddle in a manner similar to a canoe.

The Commission amends § 109.2 to classify paddleboards as boats, to address safety issues and concerns, and to provide clarity for operators regarding legal requirements for paddleboards that include a United States Coast Guard approved wearable life jacket for each person on board, a sound producing device, visual distress signals (if operating on Lake Erie) and proper navigation lights. In addition, a Commission use permit, boat registration, or Pennsylvania State Parks launch permit or mooring permit is required if launching or retrieving a paddleboard at a Commission-owned or Commission-controlled lake or access area or State park or forest. The Commission amends § 109.2 to read as set forth in Annex A.

(3) The Commission did not take action on the proposed amendments to § 109.4 (relating to waterskiing, aquaplaning, kiteskiing and similar activities) with respect to the use of airborne devices.

(4) Section 111.49 designates a slow, no wake zone on the southeastern shore of Packer's Island (incorrectly referred to as Packard's Island) in the Susquehanna River adjacent to Shikellamy State Park in Sunbury. The river at Sunbury is dammed by an inflatable structure controlled by the Department of Conservation and Natural Resources. The water impounded by this dam forms a 3,060-acre lake known as Lake Augusta. The lake extends several miles up both the West Branch and the main

stem of the Susquehanna River and provides a variety of angling and boating opportunities. Shikellamy State Park is located on the tip of Packer's Island, which is also the location of a number of homes, cottages, campsites, a boat club and an airport.

The current slow, no wake zone is approximately 1/3 mile in length and was established by regulation in 1995 due to the number and activity of motorboats in this area and the resulting congestion problem around the Shikellamy State Park launch ramp and boat club. The presence of two bridges immediately upstream of the Shikellamy State Park launch ramp limits visibility for boaters and provided additional justification for the slow, no wake designation. Buoys mark the upper and lower limits of the control zone, and appropriate intermediate points. The lengthy nature of this control zone results in boater confusion and unnecessarily inhibits use of a significant segment of the boating pool in this area. The Commission therefore proposed changing the upper limit of the slow, no wake zone to a distance of 200 feet above the Route 147 bridge.

In this final-form rulemaking, the Commission amends § 111.49 with one point of clarification in addition to the amendments in the proposed rulemaking. The Commission clarifies that the downriver boundary is 250 feet downriver from the Shikellamy State Park boat launch. The Commission adopts the upper limit as being 200 feet above the Route 147 bridge and corrects the name of the island as proposed. The Commission amends § 111.49 to read as set forth in Annex A.

F. Paperwork

The final-form rulemaking will not increase paperwork and will not create new paperwork requirements.

G. Fiscal Impact

The final-form rulemaking will not have adverse fiscal impact on the Commonwealth or its political subdivisions. The final-form rulemaking will not impose new costs on the private sector or the general public.

H. Public Involvement

Notice of proposed rulemaking was published at 44 Pa.B. 4360 (July 12, 2014). The Commission did not receive comments regarding the proposed amendments to §§ 95.3 and 109.2. Regarding the proposed amendment to § 111.49, the Commission received 6 public comments before and 39 during the formal comment period supporting the amendment. Copies of all public comments were provided to the Commissioners. In addition, the Commission held a meeting at Shikellamy State Park on July 31, 2014, to gather public input on the proposed amendment.

Findings

The Commission finds that:

(1) Public notice of intention to adopt the amendments adopted by this order has been given under sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201 and 1202) and the regulations promulgated thereunder, 1 Pa. Code §§ 7.1 and 7.2.

(2) A public comment period was provided and all public comments that were received were considered.

(3) The adoption of the amendments of the Commission in the manner provided in this order is necessary and appropriate for administration and enforcement of the authorizing statutes.

Order

The Commission, acting under the authorizing statutes, orders that:

(a) The regulations of the Commission, 58 Pa. Code Chapters 95, 109 and 111, are amended by amending §§ 95.3, 109.2 and 111.49 and deleting Chapter 95, Appendix A to read as set forth in Annex A.

(*Editor's Note:* The proposed amendments to § 109.4 published at 44 Pa.B. 4360 are not adopted in this final-form rulemaking.)

(b) The Executive Director will submit this order and Annex A to the Office of Attorney General for approval as to legality and form as required by law.

(c) The Executive Director shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(d) This order shall take effect on January 1, 2015.

JOHN A. ARWAY,
Executive Director

Fiscal Note: Fiscal Note 48A-258 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 58. RECREATION

PART II. FISH AND BOAT COMMISSION

Subpart C. BOATING

CHAPTER 95. MANUFACTURER INSTALLED EQUIPMENT

§ 95.3. Lights for boats.

(a) *General rule.* The navigation lights requirements in this section shall be complied with in all weather from sunset to sunrise on the waters of this Commonwealth. During these times other lights may not be exhibited, except lights that cannot be mistaken for the lights specified in this section, lights that do not impair their visibility or distinctive character, or interfere with the keeping of a proper lookout. The lights prescribed in this section must, if carried, be exhibited from sunrise to sunset in restricted visibility and may be exhibited in all other circumstances when it is deemed necessary. The lights specified in this section must comply with United States Coast Guard specifications.

(b) *Definitions.* The following words and terms, when used in this section, have the following meanings, unless the context clearly indicates otherwise:

All-round light—A light showing an unbroken light over an arc of the horizon of 360°.

Docking light—A flood or spotlight type of light permanently installed or permanently mounted on a motorboat that is used to illuminate a boat's forward course of travel.

Flashing light—A light flashing at regular intervals at a frequency of 120 flashes or more per minute.

Masthead light—A white light placed over the fore and aft centerline of the boat showing an unbroken light over an arc of the horizon of 225° and fixed as to show the light from right ahead to 22.5° abaft the beam on either side of the boat, except that on a boat of less than 39.4 feet (12 meters) in length, the masthead light must be placed as nearly as practicable to the fore and aft centerline of the boat.

Restricted visibility—A condition in which visibility is restricted by fog, mist, falling snow, heavy rainstorms, sandstorms or other similar causes.

Sailboat—A boat under sail provided that propelling machinery, if fitted, is not being used.

Sidelights—A green light on the starboard (right) side and a red light on the port (left) side, each showing an unbroken light over an arc of the horizon of 112.5° and fixed as to show the light from right ahead to 22.5° abaft the beam on its respective side. On a boat of less than 65.6 feet (20 meters) in length, the side lights may be combined in one lantern carried on the fore and aft centerline of the boat. On a boat of less than 39.4 feet (12 meters) in length, the sidelights when combined in one lantern must be placed as nearly as practicable to the fore and aft centerline of the boat.

Special flashing light—A yellow light flashing at regular intervals at a frequency of 50 to 70 flashes per minute, placed as far forward and as nearly as practicable on the fore and aft centerline of the tow and showing an unbroken light over an arc of the horizon of not less than 180° nor more than 225° and fixed as to show the light from right ahead to abeam and no more than 22.5° abaft the beam on either side of the boat.

Sternlight—A white light placed as nearly as practicable at the stern showing an unbroken light over an arc of the horizon of 135° and fixed as to show the light 67.5° from right aft on each side of the boat.

Underway—A boat that is not at anchor, made fast to the shore or aground.

(c) *Visibility of lights.*—The lights prescribed in this section must have an intensity as specified by the United States Coast Guard so as to be visible at the following minimum ranges:

(1) In a boat of 164 feet (50 meters) or more in length: a masthead light, 6 miles; a sidelight, 3 miles; a sternlight, 3 miles; a towing light, 3 miles; a white, red, green or yellow all-round light, 3 miles; and a special flashing light, 2 miles.

(2) In a boat of 39.4 feet (12 meters) or more in length but less than 164 feet (50 meters) in length: a masthead light, 5 miles; except that when the length of the boat is less than 65.6 feet (20 meters), 3 miles; a sidelight, 2 miles; a sternlight, 2 miles; a towing light, 2 miles; a white, red, green or yellow all-round light, 2 miles; and a special flashing light, 2 miles.

(3) In a boat of less than 39.4 feet (12 meters) in length: a masthead light, 2 miles; a sidelight, 1 mile; a sternlight, 2 miles; a towing light, 2 miles; a white, red, green or yellow all-round light, 2 miles; and a special flashing light, 2 miles.

(4) In an inconspicuous, partly submerged boat or object being towed: a white all-round light, 3 miles.

(d) *Motorboats underway.*

(1) A motorboat underway must exhibit the following lights:

(i) A masthead light forward.

(ii) A second masthead light abaft of and higher than the forward one. A boat of less than 164 feet (50 meters) in length may exhibit this light.

(iii) Sidelights.

(iv) A sternlight.

(2) An air-cushion boat when operating in the nondisplacement mode must, in addition to the lights

prescribed in paragraph (1), exhibit an all-round flashing yellow light where it can best be seen.

(3) A motorboat of less than 39.4 feet (12 meters) in length may, instead of the lights prescribed in paragraph (1), exhibit an all-round white light and sidelights.

(e) *Sailboats underway and unpowered boats.*

(1) A sailboat underway must exhibit the following lights:

- (i) Sidelights.
- (ii) A sternlight.

(2) In a sailboat of less than 65.6 feet (20 meters) in length, the lights prescribed in paragraph (1) may be combined in one lantern carried at or near the top of the mast where it can best be seen.

(3) A sailboat underway may, in addition to the lights prescribed in paragraph (1), exhibit at or near the top of the mast, where they can best be seen, two all-round lights in a vertical line, the upper being red and the lower green. These lights may not be exhibited in conjunction with the combined lantern permitted by paragraph (2).

(4) A sailboat of less than 23 feet (7 meters) in length must, if practicable, exhibit the lights prescribed in paragraph (1) or (2). If these lights are not exhibited, the sailboat must have ready at hand an electric torch or lighted lantern showing a white light that must be exhibited in sufficient time to prevent collision.

(5) An unpowered boat may exhibit the lights prescribed in this subsection for sailboats. If these lights are not exhibited, the unpowered boat must have ready at hand an electric torch or lighted lantern showing a white light that must be exhibited in sufficient time to prevent collision.

(f) *Anchored boats and boats aground.*

(1) A boat at anchor must exhibit an all-round white light where it can best be seen:

- (i) In the fore part.
- (ii) At or near the stern and at a lower level than the light prescribed in subparagraph (i).

(2) A boat of less than 164 feet (50 meters) in length may exhibit an all-round white light where it can best be seen instead of the lights prescribed in paragraph (1).

(3) A boat aground must exhibit the lights prescribed in paragraph (1) where they can best be seen.

(4) A boat of less than 65.6 feet (20 meters) in length, when at anchor in a special anchorage area designated by

the United States Coast Guard, is not required to exhibit the anchor lights and shapes required under this subsection.

(g) *Boats being towed.* When, for any sufficient cause, it is impracticable for a boat or object being towed to exhibit the lights prescribed in this section, all possible measures shall be taken to light the boat or object towed or at least to indicate the presence of the unlighted boat or object.

(h) *Docking lights.* It is unlawful for a boat operator to use docking lights while underway except when docking and the boat is traveling at slow, no wake speed and is within 100 feet of approaching a dock, a mooring buoy or the shoreline.

Appendix A. (Reserved)

CHAPTER 109. SPECIALTY BOATS AND WATERSKIING ACTIVITIES

§ 109.2. Paddleboards and sailboards.

(a) *Paddleboards.* For purposes of this subsection, a paddleboard is a boat with no freeboard propelled by a paddle, oar, pole or other device. It is unlawful for a person to operate or attempt to operate a paddleboard on waters of this Commonwealth without having a United States Coast Guard approved wearable personal flotation device on board for each person, unless otherwise required to be worn in accordance with § 97.1 (relating to personal flotation devices). This prohibition does not apply to persons operating or attempting to operate a paddleboard in designated swimming, surfing or bathing areas.

(b) *Sailboards.* For purposes of this subsection, a sailboard is a type of single or double hulled boat equipped with an articulating mast and designed to be operated by a person standing on the board and maneuvering through the trim of the hand-held sail and distribution of body weight on the board. It is unlawful for a person to operate or attempt to operate a sailboard on waters of this Commonwealth unless the person is wearing a United States Coast Guard approved wearable personal flotation device. Inflatable personal flotation devices may not be used to meet this requirement.

CHAPTER 111. SPECIAL REGULATIONS COUNTIES

§ 111.49. Northumberland County.

Susquehanna River. Boats are limited to slow, no wake speed from 250 feet downriver of the Shikellamy State Park boat launch on the south side of Packer's Island upriver a distance of 200 feet above the Route 147 bridge.

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