

### Pennsylvania Public Utility Commission Adopts Regulation Requiring Diversity Reporting Beginning in March 2023

At its public meeting on April 14, 2022, the Pennsylvania Public Utility Commission (commission) approved a Final Rulemaking Order adopting a regulation requiring major jurisdictional electric, natural gas, water, and wastewater public utilities to file annual diversity reports.<sup>1</sup> The regulation must still clear several hurdles before it takes effect, but it is expected to take effect in calendar year 2022, requiring the first reports to be submitted by March 31, 2023.

The commission currently has a Diversity Policy Statement.<sup>2</sup> That policy statement encourages but does not require major jurisdictional utility companies to implement diversity programs and file an annual report with the commission describing their diversity program activity during the prior year.<sup>3</sup>

The Final Rulemaking Order noted that the commission does not have the authority to require major jurisdictional utilities to implement diversity programs. Still, it does have the authority to require utilities to file reports.<sup>4</sup> The approved regulation establishes only a reporting requirement. The commission, however, has limited authority to require local exchange telecommunications companies to file reports. Consequently, the commission strongly encourages but does not require major telecommunications utilities to submit annual diversity reports.

The Final Rulemaking Order approved a reporting form. However, the regulation – not the form – lists the items that must be reported. Those items include:

1. a corporate policy committing to improving diversity in the workplace and the procurement process;
2. the demographic composition of the utility's workforce (reporting the number of employees by gender; race; ethnicity; Lesbian, Gay, Bisexual, Transgender, Queer, and Questioning (LGBTQ); persons with disabilities; and veterans);
3. a description of diversity recruiting, promotion, and retention efforts; and
4. a brief summary of the minority and woman-owned businesses with which the utility contracts for goods and services.

If a utility does not have any item that must be reported, the utility is to report that fact.

The Final Rulemaking Order discussed confidentiality at length. Employee self-reporting is to be confidential and voluntary on the part of the employee. Major jurisdictional utilities are to file the annual reports with the commission as confidential documents. The commission will treat the annual reports as exempt from public disclosure pursuant to several Pennsylvania Right to Know Law provisions. The commission will also assert that personal information relating to employees in the report is exempt from disclosure pursuant to the constitutional right to privacy.

Reports will be due by March 31 of each year for the prior calendar year, beginning in 2023. Failure to file the required report in a timely manner is punishable as provided by the Pennsylvania Public Utility Code (code). The code provides for penalties of up to \$1,000 per day for a continuing violation. Failure to file a report in a timely manner appears to be a continuing violation.

Although the regulation will not take effect for several months, utilities are advised to begin developing procedures to gather the information necessary to prepare these annual reports. The new regulation will likely create business opportunities in the utility industry for diversity consulting firms. It will also likely result in a reallocation of business opportunities for utility vendors within Pennsylvania.



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<sup>1</sup> *Diversity Reporting of Major Jurisdictional Utilities*, Docket No. L-2020-3017284 (Final Rulemaking Order entered April 14, 2022).

<sup>2</sup> 52 Pa. Code §§ 69.801 – 69.809.

<sup>3</sup> The commission indicated that the Diversity Policy Statement will be modified in the future to delete Sections 69.809 (“Filings”) and 69.802a (“Definitions for reporting vendor statistics”) but will otherwise remain in effect.

<sup>4</sup> While the commission admits that it cannot directly mandate utility diversity programs, the Commission could still – on the basis of the new regulation – reward and punish a utility through management audits and the rate-making process. Section 523 of the Pennsylvania Public Utility Code permits the commission to adjust a utility’s allowed return on equity on the basis of the utility’s performance. See 66 Pa. C.S. § 523 (“Performance factor consideration”). The commission has not imposed any form of restraint upon itself through the Final Rulemaking Order that would prevent the commission from increasing or decreasing a utility’s return on equity, based upon the contents of diversity reports. In essence, the commission could attempt to do indirectly what it is constitutionally prohibited from doing directly.

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