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|  | **PENNSYLVANIA**  **PUBLIC UTILITY COMMISSION**  **Harrisburg, PA 17105-3265** |  |

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|  | Public Meeting held February 28, 2019 |
| Commissioners Present: |  |

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| Gladys M. Brown, Chairman | | |
| David W. Sweet, Vice Chairman | | |
| Norman J. Kennard | |
| Andrew G. Place | |
| John F. Coleman, Jr. | |
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| Implementation of Section 1329  of the Public Utility Code | M-2016-2543193 |

**FINAL SUPPLEMENTAL**

**IMPLEMENTATION ORDER**

**BY THE COMMISSION:**

On April 14, 2016, Act 12 of 2016 amended Chapter 13 of the Pennsylvania Public Utility Code by adding Section 1329 to become effective June 13, 2016. 66 Pa. C.S. § 1329. On July 21, 2016, the Commission entered its Tentative Implementation Order addressing the implementation of Section 1329 and, subsequently, on October 27, 2016, the Commission entered its Final Implementation Order (FIO) to guide stakeholders in the implementation of Section 1329.

While Section 1329 has encouraged the sale of public water and wastewater assets at market rates, the Commission’s experience to date with Section 1329 applications indicates that our procedures and guidelines can be improved. Namely, the Commission issues this Order to improve the quality of valuations, ensure that the adjudication process is both fair and efficient, and, ultimately, reduce litigation surrounding Section 1329 determinations.

Aside from fundamental stakeholder disagreement over appropriate utility valuation principles, there are difficulties related to the six-month consideration period available to applicants under 66 Pa. C.S. § 1329(d)(2). That is, the six-month statutory deadline comes at the price of an accelerated litigation schedule. In addition, in some cases, the Commission has observed substantial variances in underlying valuation assumptions related to the same property. Further guidance can provide more consistency in final valuations as well as the testimony submitted in support of valuations. Lastly, to aid fair and efficient Section 1329 review, the initial application should include enough relevant information so that parties can meaningfully participate in the application without causing exhaustive discovery and within the statutory timeline of Section 1329.

Throughout 2018 the Commission conducted stakeholder workshops to informally develop proposed revisions to the standard materials required for Section 1329 applications, guidelines for selling utility valuations, testimony, and procedural guidelines. On September 20, 2018, with the benefit of these workshops and approximately two years of experience applying Section 1329, the Commission issued a Tentative Supplemental Implementation Order (TSIO). The Commission invited interested persons to submit comments and offer recommendations regarding the TSIO within thirty (30) days after publication in the *Pennsylvania Bulletin* and submit reply comments fifteen (15) days thereafter.

The Commission received comments from Aqua Pennsylvania, Inc. (Aqua), the Bureau of Investigation and Enforcement (BIE), the Chester Water Authority (CWA), Herbert, Rowland and Grubic, Inc. (HRG), the Office of Consumer Advocate (OCA), the Pennsylvania Municipal Authorities Association (PMAA), Pennsylvania-American Water Company (PAWC), SUEZ Water Pennsylvania, Inc. (SWPA), and the York Water Company (York Water). The Commission received reply comments from Aqua, BIE, the OCA, the PMAA, PAWC, and SWPA.[[1]](#footnote-1)

On January 25, 2018, PAWC filed a Petition for Leave to File Supplemental Comments on the TSIO. PAWC Supplemental Comments proposed a notice procedure and *pro forma* customer notice documents. On January 28, 2019, via Secretarial Letter, the Commission granted PAWC’s Petition and established a reply comment deadline of February 7, 2019. The Commission received reply comments from Aqua, BIE, the OCA, and the PMAA.

**Discussion**

After considering the TSIO comments, supplemental comments, and reply comments thereto, the Commission now issues this Final Supplemental Implementation Order (FSIO) to improve the Commission’s Section 1329 review process. As with the TSIO, the FSIO is organized in sequential order according to the procedural timeline of a Section 1329 application. To the extent that we have not addressed a particular comment, it has been duly considered and is not adopted.

**Checklist for Applications Requesting Section 1329 Approval**

Subsections 1329(d)(1)(i)-(v) enumerate categories of information that the Buyer[[2]](#footnote-2) is obligated to provide as part of a Section 1329 acquisition application. The Commission will not officially accept a Section 1329 application, thus initiating the six-month consideration period of Section 1329(d)(2), until a Buyer has shown that its application is complete. To clarify its expectations of what constitutes a complete application the Commission developed an Application Filing Checklist, which it requires applicants to attach to applications at the time of filing.

The TSIO proposed revisions to the Application Filing Checklist in its Appendix A. General changes included formatting for ease of future edits and sequencing checklist items to reflect the chronology in which checklist items may be complied. Checklist instructions also clarify that an individual document may be used to satisfy more than one checklist item so long as appropriate cross-references are used to direct attention to exactly where the required information may be found in the filing. The general instructions further provided that service of an accepted filing on affected political subdivisions may be accomplished electronically if the recipient can accept electronic service. We directed stakeholders to review the entire proposed revised Checklist, including specific revisions to Items 2-4, 7-10, 13, 14, 17-20, 22, and 25. We requested comments on whether the Checklist was too broad, is complete, or should be expanded to include additional items.

Below we first address comments and reply comments on the proposed revised Application Filing Checklist in its entirety. We then address comments and reply comments regarding specific revisions to the Items identified in the TSIO. The parties generally do not oppose revisions to Items 2, 3, 7, 10, 17, 19, 22, and 25. Accordingly, these revisions remain intact and we will not address them further. A copy of the final Application Filing Checklist is attached hereto as Appendix A.

**Comments**

As to the entire Checklist, the OCA suggested that page numbers should be filled in on the Checklist included with a filing. OCA Comments at 4. In addition, the OCA suggested the use of Bates stamping for all pages in a filing. *Id.* The OCA opined that Bates stamping would allow all parties to be able to reference specific pages and sections of the filing in a consistent way. *Id.*

SWPA recommended that the Commission create a modified checklist and an expedited process based on the size of the purchased system. SWPA Comments at 2. In particular, SWPA recommended a “short form” checklist for systems with less than 1,000 customers or a purchase price of less than $10 million. *Id.* SWPA opined that it is unreasonable to require the same extensive information for a small acquisition that is required of a large acquisition. *Id.* SWPA further suggested that the modified checklist should be used if the average of the two independent valuations are within ten percent of each other and the purchase price is within ten percent of the purchasing company’s investment per customer. *Id.*

Similarly, York Water argued that the Checklist is onerous with many of the items regarding costs, values, and environmental issues being either unnecessary or redundant. York Water Comments at 1. York Water suggested the use of a materiality threshold where acquisitions falling below the threshold would have a streamlined approval process. *Id.* York Water recommended that the threshold be established on a “cost/customers” basis or an overall cost not to exceed a certain amount, such as $5 million. *Id.*

**Reply Comments**

Aqua opposed the OCA’s suggestion to use Bates stamping. Aqua Reply at 3. Aqua argued that the applications filed to date have provided clear, sufficient numbering of exhibits to allow parties to reference information in the filing. *Id.* Aqua also noted that large, multi-exhibit filings, such as rate cases, do not require Bates stamping. *Id.*

PAWC also opposed the use of Bates stamping. PAWC Reply Comments at 7. PAWC noted that its applications are divided into exhibits that match the items on the Checklist. *Id.* PAWC argued that the OCA failed to consider that Bates stamping could only be done once the application is completed and, once Bates stamping is done, it would be difficult to insert a page at the last minute, if need be. *Id.*

Conversely, BIE supported the use of Bates stamping for purposes of organization and efficiency due to the size of the filings. BIE Reply Comments at 2. BIE noted that some Section 1329 applications have consisted of 1,400 pages. *Id.*

In response to SWPA and York Water’s concerns regarding the length of the Checklist, BIE pointed out that, by filing the information sought in the Checklist, the discovery exchange after an application is transferred to the Office of Administrative Law Judge (OALJ) would be lessened. *Id.* at 3. BIE noted that, due to the six-month deadline, it is imperative that the parties and the Administrative Law Judge (ALJ) have as much information as possible from the outset of the proceeding in order to provide the Commission with a full and complete record. *Id.*

The OCA rejected SWPA’s proposed modified checklist and York Water’s proposed materiality threshold. OCA Reply Comments at 2. The OCA argued that the use of a cost per customer basis to determine level of review in SWPA’s proposal may not be a reliable indicator. *Id.* The OCA also argued that some applications that might meet the threshold in York Water’s proposal may still have a major impact on rate base and rates that would need to be fully examined. *Id.* With regard to both proposals, the OCA argued that shortening the Checklist will put the Commission’s Bureau of Technical Utility Services (TUS) and the parties at a major disadvantage in reviewing applications within the statutory deadline.  *Id.*

PAWC, on the other hand, agreed with SWPA’s proposal to create a modified checklist. PAWC Reply Comments at 5. PAWC also agreed with York Water that a reduced checklist should be used for small transactions. *Id.* at 6. PAWC noted that, if additional information is necessary for small transactions, parties may request that information in discovery. *Id.* at 5-6.

**Conclusion**

We decline to adopt Bates stamping and note that it is clear that page references are required in the filed checklist. We agree with Aqua and PAWC that applicants have clearly and sufficiently identified exhibits to enable the parties to reference the information contained therein. As PAWC noted, requiring Bates stamping would limit applicants from making additions to the application that may be received only shortly before filing and we encourage the submission of complete applications. Indeed, the 10-day TUS review of Section 1329 applications often results in amendments to applications. In addition, Bates stamping may hinder any potential need to amend an application, if additional information is obtained after filing. Therefore, we decline to revise the Checklist to require Bates stamping.

We also reject the proposals of SWPA and York to create a modified checklist or establish a materiality threshold for small transactions. We note that the General Assembly did not choose to include such a threshold. We agree with BIE regarding the importance of providing the parties and the ALJ with as much information as possible at the outset of the proceeding in light of the six-month deadline. Providing the information required by the Checklist reduces the need for substantial discovery and related disputes and supports the development of a full and complete record, even required for smaller transactions. Moreover, as the OCA noted, the thresholds proposed by SWPA and York may not be appropriate indicators and we decline to distinguish between what is a small transaction and a large transaction at this time.

**Checklist Item 4**

In the TSIO, we proposed to revise Item 4 of the Section 1329 Application Filing Checklist as follows:

4. Provide responses to Section 1329 Application Standard Data Requests.

TSIO Appendix A at 1. The purpose of this revision was to address the responses to the Standard Data Requests.

**Comments**

Aqua indicated that it does not oppose Item 4 as revised. Aqua Comments at 5. Aqua requested that the Commission make clear that rejection or acceptance of an application does not hinge on a substantive review of the Standard Data Requests. *Id.*

The OCA noted that existing Item 4 requires an applicant to provide its schedules, studies, and workpapers in electronic working format. OCA Comments at 7. The OCA indicated that it disagrees with the Commission’s decision to revise Item 4 as set forth in the TSIO. *Id.* The OCA argued that electronic working documents are a crucial component of the existing Checklist, because the information included in the electronic working documents is necessary to understand the analyses contained in the filing. *Id.* at 7-8. The OCA further argued that the Standard Data Requests should supplement the information being provided with the filing, not replace the provision of electronic working documents. *Id.* at 4, 8.

**Reply Comments**

In response to the OCA’s comments regarding existing Item 4, PAWC noted its concern that materials filed with the Commission are placed on the Commission’s website. PAWC Reply Comments at 8. PAWC argued that the formulas and other calculations embedded in spreadsheets and other working electronic files are confidential, proprietary information. *Id.* PAWC requests that, if existing Item 4 is retained, the Commission direct the Secretary’s Bureau not to place working electronic files on the Commission’s website. *Id.*

**Conclusion**

As it pertains to Aqua’s request for clarification that rejection or acceptance of an application does not hinge on a substantive review of the Standard Data Requests, we note the following language in the TSIO:

The Commission would clarify here that the Bureau of Technical Utility Services does not review the veracity or substantive quality of information that an applicant may submit to fulfill the threshold requirements of the Application Checklist. The Bureau of Technical Utility Services is to evaluate only whether the Application Checklist is complete and responsive to the data requested. It shall not refuse to perfect an application on the basis that the Bureau is dissatisfied with the quality of the items submitted in response, or whether additional information may later be required.

TSIO at 15. We do not believe that further clarification on this point is necessary.

Upon consideration of the OCA’s comments on Item 4 of the Section 1329 Application Filing Checklist, we believe that Item 4 should be modified as follows:

4. Provide responses to Section 1329 Application Standard Data Requests, including electronic working documents (i.e., Excel spreadsheets) for all the filing’s schedules, studies, and working papers to the extent practicable.

*See* Appendix A at 1. This revision addresses responses to the Standard Data Requests and maintains the existing requirement that applicants provide electronic working documents for all the filing’s schedules, studies, and working papers, while avoiding unnecessary duplication as between the Checklist and the Standard Data Requests.

To alleviate PAWC’s concerns regarding the potential confidential nature of electronic working documents, applicants should provide any confidential or proprietary electronic working documents (i.e., Excel spreadsheets) to the Secretary’s Bureau on a *separate* disc, labeled *CONFIDENTIAL* in clear and conspicuous letters, in a separate envelope attached to the application. It is the applicant’s responsibility to identify all confidential or proprietary documents. Applicants providing confidential or proprietary electronic working documents in response to Item 4 should also follow standard procedures for the filing of documents containing confidential or proprietary information with the Commission. Applicants may refer to the instructions for submitting confidential information provided in the Section 1329 Application Filing Checklist. *See* Appendix A at 7. Further, consistent with the Commission’s regulations at 52 Pa. Code § 1.32(b)(4), filings containing confidential or proprietary information may *not* be filed electronically and the Commission will post only redacted, public versions on the electronic filing system. Likewise, the Commission will post only non-confidential and non-proprietary PDF versions of Excel files on the electronic filing system.

**Checklist Item 8**

In the TSIO, we proposed to revise Item 8 of the Section 1329 Application Filing Checklist as follows:

8. Provide a verification statement that one utility valuation expert was selected by the buyer and the other utility valuation expert was selected by the seller.

TSIO Appendix A at 1. The purpose of this revision was to verify UVE independence. In the TSIO, we noted that Item 8 was addressed to the Buyer and Seller regarding the UVE selection process and that Item 8 is distinct from Item 9, which is addressed to the respective UVEs.

**Comments**

Aqua stated that it does not oppose Item 8 as revised. Aqua Comments at 5. Aqua requested clarification that this statement may be made in the application verified by an officer or authorized employee of the Company. *Id.* Aqua noted that, in its previous Section 1329 applications, the Company has included verifications from the UVEs stating that each was selected by either the Buyer or the Seller. *Id.*

**Reply Comments**

No party filed reply comments specifically addressing Aqua’s request.

**Conclusion**

As stated in the TSIO and above, Item 8 is addressed to the Buyer and Seller regarding the UVE selection process. TSIO at 10. Accordingly, the applicant should provide a verification statement of the Buyer that one utility valuation expert was selected by the Buyer as well as a verification statement of the Seller that the other utility valuation expert was selected by the Seller. For clarification purposes, we believe it is appropriate to modify Item 8 as follows:

8. Buyer and Seller Verification Statements:

1. Provide a verification statement of the Buyer that ~~one~~ its utility valuation expert was selected by the Buyer. ~~and~~
2. Provide a verification statement of the Seller that ~~the other~~ its utility valuation expert was selected by the Seller.

*See* Appendix A at 1. These verification statements may be signed by an officer or authorized employee of the Buyer and Seller respectively.

**Checklist Item 9**

In the TSIO, we proposed to revise Item 9 of the Section 1329 Application Filing Checklist as follows:

9. Utility Valuation Expert Verification Statements:

1. Buyer Utility Valuation Expert has no affiliation with the buyer or seller.
2. Buyer Utility Valuation Expert determined fair market value in compliance with the most recent edition of the Uniform Standards of Professional Appraisal Practice as of the date of the report. employing the cost, market, and income approaches.
3. Buyer Utility Valuation Expert applied applicable jurisdictional exceptions to the submitted appraisal.
4. Seller Utility Valuation Expert has no affiliation with the buyer or seller.
5. Seller Utility Valuation Expert determined fair market value in compliance with the most recent edition of the Uniform Standards of Professional Appraisal Practice as of the date of the report employing the cost, market, and income approaches.
6. Seller Utility Valuation Expert applied applicable jurisdictional exceptions to the submitted appraisal.

TSIO Appendix A at 2. The purpose of this revision is to verify that the Buyer and Seller UVEs have no affiliation with either the Buyer or the Seller. This revision is also directed at verifying that the fair market valuation was performed in compliance with the most recent edition of the Uniform Standards of Professional Appraisals Practice (USPAP) and that the appropriate jurisdictional exceptions were applied to the submitted appraisal. Moreover, as discussed above, Item 9 is distinct from Item 8. Items 9.a through 9.f are addressed to the respective UVEs. Each UVE is expected to submit a verification supporting their independence and submitted appraisal.

**Comments**

Aqua stated that it does not oppose Item 9 as revised. Aqua Comments at 5. Aqua requested clarification that the items listed in Item 9 may be incorporated into two overall verifications from the Buyer’s and the Seller’s respective UVEs, rather than a separate verification statement for each item. *Id.*

**Reply Comments**

No party filed reply comments specifically addressing Aqua’s request.

**Conclusion**

We agree with Aqua the items listed in Item 9 may be incorporated into two overall verifications from the Buyer’s and the Seller’s respective UVEs, rather than a separate verification statement for Item 9.a through 9.f. However, we do not believe that it is necessary to modify the language of Item 9 to reflect this point. Therefore, the revisions to Item 9 set forth in the TSIO remain intact.

**Checklist Items 13 and 14**

In the TSIO, we proposed to revise Item 13 of the Section 1329 Application Filing Checklist as follows:

13. Provide seller direct testimony supporting the application including seller UVE direct testimony.

TSIO Appendix A at 2. This revision indicates that the Seller may provide testimony supporting the transaction, if it so chooses. Unless a Buyer and Seller agree otherwise, a Seller is responsible for its own testimony.

In the TSIO, we proposed to revise Item 14 of the Section 1329 Application Filing Checklist as follows:

14. Provide buyer direct testimony supporting the application, including buyer UVE direct testimony.

TSIO Appendix A at 2. This revision indicates that the Buyer is to provide testimony supporting the transaction. Unless the Buyer and Seller agree otherwise, the Buyer will be responsible for its own testimony.

Items 13 and 14 indicate that, if Buyer and Seller wish to submit individual direct testimony in support of the proposed acquisition, all direct testimony must be filed concurrent with the application. The six-month consideration period of Section 1329(d)(2) requires direct testimony to be filed concurrent with the application. In addition, the Seller and Buyer UVE will submit written direct testimony in support of their respective appraisals along with the initial filing.

**Comments**

Aqua stated that it does not oppose Item 13 as revised. Aqua Comments at 6. Aqua noted that it may choose to file the Seller’s direct testimony and the Seller’s UVE direct testimony along with its application for administrative ease. *Id.*

PAWC claimed that the Checklist would require the Seller to provide testimony supporting the transaction and that the Buyer would be submitting the testimony of the Seller in the application. PAWC Comments at 3. PAWC argued that the TSIO does not address whether the procedural and evidentiary issue of whether the Buyer may challenge the testimony of the Seller that must be included in the application. *Id.* PAWC also argued that, just because the Buyer is submitting the Seller’s testimony in its application, that testimony should not become the Buyer’s testimony such that the Buyer is denied the right to challenge the testimony. *Id.* PAWC requested that the Commission clarify that inclusion of Seller testimony with the application does not constitute sponsorship of that testimony by the Buyer. *Id.* PAWC also raised concerns regarding a hypothetical instance in which the Seller declines to intervene and there is no agreement between the Buyer and Seller for the Buyer to sponsor the Seller’s testimony. *Id.* PAWC requested that, if the Seller declines to intervene and the Buyer declines to sponsor the Seller’s testimony, the Commission *sua sponte* enter the testimony into the evidentiary record provided that it is properly authenticated through a verification or affidavit. *Id.*

**Reply Comments**

In response to PAWC’s arguments, BIE noted that it understands that filing the Seller’s testimony with the application could potentially create an issue if the Buyer wants to challenge the Seller’s testimony, being that the Buyer and Seller are two distinct parties to the litigation. BIE Reply Comments at 6. BIE argued, however, that having the Seller’s UVE testimony at the outset of the proceeding is essential to ensuring that the parties can fully evaluate the filing. *Id.* at 6-7. BIE stated that it strongly supports the requirement imposed by the TSIO that all UVE testimony be provided at the time the application is filed. *Id.* at 6.

The OCA noted that, if the Seller declines to intervene and the Buyer declines to sponsor the Seller’s testimony, one solution is to join the Seller as an indispensable party. OCA Reply Comments at 16.

**Conclusion**

As indicated in the TSIO and above, revisions to Item 13 include the following: Seller to provide testimony supporting transaction, *if any*. TSIO at 9. Contrary to PAWC’s arguments, the Seller is not *required* to provide direct testimony supporting the transaction. The Seller may choose to omit direct testimony at its own risk. A key purpose of this item is to avoid the submission of Seller direct testimony late in the six‑month timeframe, which hampers review by other parties of the Section 1329 application. If the Seller wishes to submit individual direct testimony, however, the Seller must sponsor that testimony absent an agreement with the Buyer to the contrary. As stated in the TSIO, each party must sponsor its individual testimony absent demonstrated agreement otherwise included in the application. TSIO at 10. Likewise, if a Seller chooses to individually sponsor testimony supporting an application the Buyer remains free to challenge the Seller’s testimony as it believes appropriate.[[3]](#footnote-3)

In addition, the Commission clarifies that Buyer and Seller direct testimony supporting the application is distinct from UVE direct testimony. For clarification purposes, we modify Items 13 and 14 as follows:

13. Seller Testimony:

1. Provide seller direct testimony supporting the application, if any. ~~including~~
2. Provide seller UVE direct testimony.

14. Buyer Testimony:

1. Provide buyer direct testimony supporting the application. ~~including~~
2. Provide buyer UVE direct testimony.

*See* Appendix A at 2. Both the Buyer and the Seller UVEs must provide direct testimony in a format like that discussed below. *See supra* at 88. As we directed in the TSIO, UVEs must submit written direct testimony in support of any appraisal completed pursuant to Section 1329(a)(5) and submitted in support of a request for fair market valuation for rate setting purposes.

Moreover, in the TSIO, we stated that, absent a showing of extenuating and extraordinary hardship, late-filed direct testimony will not be accepted or considered. Also, a request to submit late-filed direct testimony shall be considered a request to extend the six-month consideration period to provide for appropriate due process. These provisions of the TSIO remain intact.

Further, regarding PAWC’s concern that the Seller may decline to intervene without an agreement for the Buyer to sponsor the Seller’s testimony, we note that, in each of the approximately eight proceedings initiated under Section 1329 to date, the Seller has petitioned to intervene in the proceeding. We decline to speculate as to hypothetical circumstances. Regarding the OCA’s proposed solution, pleadings requesting the joinder of indispensable parties will be considered on a case-by-case basis.

**Checklist Item 18**

In the TSIO, we proposed to revise Item 18 of the Section 1329 Application Filing Checklist by modifying the following subsection:

18. Rates:

. . .

1. Provide a copy of the notification sent, or which will be sent, to affected customers describing the filing and the anticipated effect on rates.

TSIO Appendix A at 3-4. The purpose of this revision is to make clear that applicants are to provide notice to affected customers contemporaneously with the proposed application, not after closing, such that affected customers receive adequate notice of the proposed transaction and have the opportunity to participate in the proceeding.

As indicated earlier, given the circumstances of the issuance of the TSIO and the increasing complexity of litigation surrounding the implementation of Section 1329, we granted PAWC’s Petition for Leave to File Supplemental Comments on the TSIO as to notice and provided for reply comments thereto.

**Comments**

Aqua stated that it does not agree with Item 18 as revised. Aqua Comments at 7. Aqua claimed that it is unclear from the TSIO whether the Commission proposed notice is to be provided to existing or acquired customers, or both. *Id.* Aqua noted that it will provide the draft customer letter to the Commission that will be sent to acquired customer upon closing, as it has done with previous applications. *Id.* at 7-8. Aqua stated that it will provide any notice sent by the municipality to customers only if the municipality sent such notice. *Id.* at 8. Aqua further noted that it has provided supplemental notice through publication in newspapers of general circulation for acquired customers. *Id.*

Aqua commented that it does not agree with expanding notice to all customers. *Id.* Aqua claimed that, if notice is provided by bill insert, some customers may get 30 days’ notice, some customers may get less than 30 days’ notice, and some customers will not receive notice until weeks or months after the protest period has passed. *Id.* Aqua also claimed that direct mailing is impractical and is not required unless there is a general rate increase. *Id.* at 8-9. Aqua argued that, in Section 1329 applications, neither a general rate increase nor an increase in rates is proposed to existing or acquired customers. *Id.* at 9. Aqua further argued that newspaper notice in a paper of general circulation in the acquired customers’ service territory is adequate. *Id.*

In addition, Aqua averred that Item 18 will add confusion to the proceeding. *Id.* Aqua claimed that notice to existing customers would be highly speculative as to the effect of the acquisition on rates and that asking the Company to predict its rate design is impractical. *Id.* at 10. Aqua further claimed that direct notice will add approximately $200,000 per application that would be included in transaction and closing costs. *Id.*

The OCA suggested the use of a collaborative or working group to address issues such as how to implement notice and how to present the rate impacts and the supporting materials in the filing. OCA Comments at 1-2.

The PMAA commented that timely individualized notice should be provided to all ratepayers of the municipal or authority-owned system subject of the proposed acquisition and all of the acquiring entity’s existing ratepayers, regardless of geographic location. PMAA Comments at 3. The PMAA argued that notice published in the *Pennsylvania Bulletin* or a newspaper of general circulation is not sufficient. *Id.* The PMAA claimed, citing *McCloskey v. Pa. PUC*, 195 A.2d 1055 (Pa. Cmwlth. 2018)   
(*New Garden*), that an investor-owned utility’s water or wastewater acquisition in one part of the Commonwealth may have an effect on the rates of its existing ratepayers in another part of the Commonwealth. *Id.* The PMAA also argued that the investor-owned entity must provide current and future rates applicable to ratepayers affected by the transaction and that any proposed deferment in rate increases must be clearly stated because it may impact ratepayers at some future date. *Id.*

PAWC commented that notice to the Seller’s customers may present challenges for a Buyer to the extent that customer information is deemed confidential. PAWC Comments at 4. PAWC requested that the Commission address how the Buyer can obtain customer information, if notice to the Seller’s customers is required. *Id.*

In addition, PAWC argued that notice should not be provided until the application is accepted. *Id.* PAWC argued that a rate case-style bill insert is unworkable because it takes a 30-day billing cycle to notify all customers. *Id.* at 5. PAWC argued that the alternative of a direct mailer would be extremely costly. *Id.* PAWC claimed that bill insert or bill message would be the most cost effective, but that this approach would require the Commission to modify the litigation schedule and hearing process, unless the Buyer and Seller agree to a voluntary extension. *Id.* PAWC suggested a two-track litigation schedule and PAWC argued that the first track should include notice through the *Pennsylvania Bulletin*, newspaper notice, and direct notice to the statutory advocates, DEP, and surrounding municipalities. *Id.* PAWC argued that second track should include individual ratepayer notice via bill insert over a 30-day billing cycle and that ratepayers should be afforded an opportunity to submit comments within 14 days of the end of the billing cycle. PAWC argued that the comments should be entered into the evidentiary record with the parties responding on the record. *Id.* at 6. PAWC claimed that a paper hearing has been deemed to satisfy due process requirements. *Id.*

Further, PAWC requested that the Commission give guidance on what the notice must say. *Id.* PAWC argued that, at the time of the acquisition, the rate impact of the acquisition is unknowable and that utilities are limited in the information they can give to customers. *Id.* at 6. PAWC argued that the notice should state that (1) the Buyer has filed an application, (2) the Buyer had requested to add up to $X to rate base in its next rate case, (3) the increase may impact customers rates in the Buyer’s next rate proceeding, but the precise impact is unknown at present, (4) and customers have a right to protest or intervene and will have an opportunity to participate in a future base rate proceeding. *Id.* at 6-7.

**Reply Comments**

BIE replied that that Item 18(d) aligns with the *New Garden* decision. BIE Reply Comments at 2. BIE stated that it supports the OCA’s proposal to use a collaborative or working group to determine how to implement notice. *Id.* BIE suggested that questions raised by PAWC, including who is to receive notice, when customers should be notified, and how customers should be notified, should be addressed in a collaborative or working group in order to obtain a resolution that is suitable for all parties. *Id.* at 3.

The OCA argued, pointing to *New Garden*, that direct notice to customers is required. OCA Reply Comments at 3. The OCA indicated that it is willing to work with the Commission and stakeholders to develop a notice that provides sufficient information regarding the rate impact on customers of the Section 1329 filing and information on what a customer can do in response to the notice. *Id.* The OCA claimed that the Commonwealth Court’s decision in *New Garden* addresses the issues raised by Aqua. *Id.* at 3-4. The OCA claimed that Section 1329, by definition, involves a ratemaking rate base determination and that, in *New Garden*, the Court found that there are due process issues that need to be addressed by providing customers, existing and acquired, with notice of the filing. *Id.* at 4.

In response to PAWC’s concerns on how the Seller’s customers will receive notice, the OCA argued that it is clear that the Seller has access to its own customer information and can work with the Buyer to ensure that notice is provided to those customers. *Id.* The OCA suggested that this be addressed in the APA. *Id.* In response to PAWC’s claim that notice should not be provided until an application is accepted, the OCA proposed that notice be provided during the 30-day billing cycle leading up to the filing of an application. *Id.* at 5. The OCA argued that waiting until the application is accepted would mean that litigation would conclude before customers are able to meaningfully participate. *Id.* at 4-5. Further, the OCA indicated that it does not agree that PAWC’s proposed two-track litigation schedule, including the use of a paper hearing, meets the requirements of due process. *Id.* at 6. The OCA argued that the *New Garden* Court found that substantial property interests were at stake in Section 1329 proceedings and that direct notice and a meaningful opportunity to be heard was required. *Id.*

The PMAA argued that *New Garden* is controlling regarding notice. PMAA Comments at 2. The PMAA indicated that it disagrees with comments that seek to narrow notice or limit notice recipients, including comments suggesting that direct notice would add additional costs or confusion to Section 1329 proceedings. *Id.* The PMAA reiterated that it believes that *New Garden* mandates individualized notice to ratepayers of the municipal or authority-owned system and all of the acquiring entity’s existing ratepayers. *Id.* Additionally, the PMAA argued that the rates to be assessed against all of an investor-owned utility’s customers and potential customers as a result of an acquisition must be clear. *Id.*

PAWC argued that Section 1329 Applicants should comply with the requirements of *New Garden* to reduce the risk that a Commission decision approving a fair-market valuation would be appealed and, possibly, overturned. PAWC Reply Comments at 2. PAWC claimed that Aqua’s comments appear inconsistent with *New Garden*. *Id*. PAWC continued to suggest a two-track litigation schedule. *Id.* Additionally,PAWC noted that it does not oppose the OCA’s suggestion to use a collaborative or working group to address issues that may remain after the TSIO. *Id.* at 6. PAWC noted, however, that it opposes the use of such a mechanism to slow down or otherwise impede the use of Section 1329. *Id.* Further, PAWC noted that it opposes the PMAA’s suggestions regarding information on future rate increases. *Id.* at 14. PAWC argued that such information is speculative. *Id.*

SWPA indicated that it does not agree with PMAA’s assertion that timely individualized notice should be given to all of the acquiring utility’s existing ratepayers irrespective of geographic location. SWPA Comments at 2. SWPA stated that it agrees with Aqua and PAWC’s comments regarding notice. *Id.*

**PAWC’s Supplemental Comments**

PAWC suggested that the Commission require Section 1329 applicants to take a two-prong approach to notice. First, PAWC proposes that Acquiring Utilities provide notice of the proposed transaction in a form like that of 52 Pa. Code § 53.45. PAWC Supp. Comments at 2. PAWC proposes that this general notice include information regarding the proposed acquisition and rate base addition. The *pro forma* customer notice provided with PAWC’s Supplemental Comments also discussed ways in which to support or challenge the acquisition and how to access documents filed in support of the application and other additional information. PAWC Supp. Comments, Appendix A. PAWC proposes that affected customers would receive this general notice concurrent with the submission of a Section 1329 application. PAWC Supp. Comments at 2.

Next, PAWC proposes that Acquiring Utilities would prepare a “Statement of Reasons and Potential Bill Impact,” which would be referenced in the above customer notice. PAWC Supp. Comments at 2. PAWC opines that this approach is similar to that of Section 1308 general rate proceedings. *Id.* PAWC proposed that the Statement of Reasons and Potential Bill Impact be included in the Application Filing Checklist and reviewed by TUS. *Id.* PAWC further proposed that, if TUS finds the Statement of Reasons and Potential Bill Impact deficient, the applicant should have an opportunity to revise it. *Id.* PAWC included with its Supplemental Comments proposed language in a *pro forma* Statement of Reasons and Potential Bill Impact and a *pro forma* customer notice. *See* PAWC Supp. Comments, Attachments A-B.

PAWC claimed that its approach is consistent with *New Garden* because it is modeled on 52 Pa. Code § 53.45. PAWC Supp. Comments at 2-3. PAWC also claimed that its approach recognizes that, while the rate base valuation of an acquired system is set through a Section 1329 proceeding, actual rates recognizing that valuation will not be set until a future base rate proceeding. As such, the future rate effect of the valuation is subject to a high degree of speculation at the application stage. *Id.* at 3. PAWC opined that including a speculative rate increase percentage in the customer notice would be misleading. *Id.* PAWC suggested that, under its approach, customers who desire additional information would be directed by the customer notice to the Statement of Reasons and Potential Bill Impact, which would be readily available upon contact to the company, as in a base rate case, and would provide a more accurate explanation of the range of potential rate effects that could result from including a Section 1329 valuation in a future base rate case. *Id.*

**Reply Comments**

Aqua noted that it filed a petition for allowance of Appeal of the *New Garden* decision and argued that the Commission should revisit any customer notice requirements that may result from the TSIO should *New Garden* be overturned or modified. Aqua Supp. Comments at 3. Aqua stated that it generally agrees with PAWC’s proposal and does not propose any edits to the proposed documents. *Id.* at 3-4. Aqua raised concerns regarding the process of notice. *Id.* at 4. Aqua claimed that, under the conditional acceptances for the Exeter[[4]](#footnote-4) and Steelton[[5]](#footnote-5) applications, the Commission will fully accept an application and the six-month period will begin after the applicant files a verification for individualized notice and proof of publication for traditional newspaper notification with the Commission. *Id.* Aqua argued that the conditional acceptance in the Exeter and Steelton Applications will add substantial time outside the application process that was envisioned to be six months. *Id.*

Aqua argued that direct mailing will add substantial costs to each proposed transaction. Id. Aqua also argued that newspaper notification has generally been provided after an application is accepted. *Id.* at 5. Aqua claimed that the Commission usually directs the form of newspaper notice in a Secretarial Letter and that it did not see a form of notice provided in the Exeter or Steelton applications. *Id.* Aqua also claimed that it would not be able to provide a date certain for the deadline to file a complaint in the individualized notice or newspaper notice. *Id.* Further, Aqua claimed that, the timing of newspaper publication and obtaining affidavits will add upward of four weeks to the process.  *Id.* Similarly, Aqua averred that a bill stuffer sent out during the utility’s billing cycle will add upwards of four or more weeks, if the Commission requires that the entire billing cycle run before verification can be filed.  *Id.*

Aqua requested that the Commission consider fully accepting an application under a direct mailing approach when the Company files a verification that the direct mailing has occurred, then direct newspaper publication. *Id.* Aqua argued that it would then be able to provide a certain date for when complains should be filed. *Id.* at 5-6. Under a bill stuffer approach, Aqua requested that the Commission consider fully accepting an application when the utility files a verification that it has begun providing bill inserts under its billing cycle, then direct newspaper publication. *Id.* at 6. Lastly, with regard to the Exeter and Steelton applications, Aqua requested that the Commission clarify the phrase “area involved” in the Secretarial Letters for a utility providing notice in a newspaper of general circulation. *Id.* Aqua noted that it interpreted this phrase as being the requested service territory, not the entire service territory. *Id.*

BIE indicated that it is concerned about PAWC’s proposal because the notice deviates from the clear, concise language in 52 Pa. Code § 53.45 and it places the burden of requesting rate impact information on customers, rather than the utility as required in Section 53.45. BIE Supp. Comments at 2. BIE noted that, unlike the language in Section 53.45, PAWC’s initial notice will not provide affected customers with any information about the potential rate impact the acquisition would have on their rates. *Id.* at 3. BIE claimed that the language of PAWC’s proposed Statement of Reasons and Potential Bill Impact will confuse a typical residential customer by using technical terms. *Id.* at 3-4. BIE argued that PAWC’s proposed language, contrasted with the clear, concise language in Section 53.45 does not adhere to the Commonwealth Court’s directive. *Id.* at 4.

BIE further argued that the *New Garden* Court intended for Section 1329 application notice to mirror the notice requirements of Section 53.45, which would include a percentage of rate impact. *Id.* BIE indicated that it supports the language proposed by the OCA in its Petition to Reject or Hold in Abeyance Acceptance of Application and Petition for Stay relevant to the Exeter application.[[6]](#footnote-6) BIE at 4-5. BIE claimed that this language concisely informs customers about the potential rate impact. *Id.* at 5.

BIE further indicated that it disagrees with PAWC’s proposed two-pronged notice approach because it fails to adhere to the requirements of Section 53.45. *Id.* BIE claimed that the initial notice will simply indicate that rates will not change until the next rate case and that it is unclear what impact the acquisition will have on customer rates. *Id.* BIE further claimed that the more detailed Statement of Reasons and Potential Bill Impact will only be provided to customers upon request. *Id.* BIE argued that PAWC’s proposal improperly places the burden on the customers to seek out this information. *Id.* at 6. BIE averred that requiring the customer to seek out the actual rate impact is unacceptable because it fails to adhere to the delivery methods intended by the Commonwealth Court, which are those used in general rate cases. *Id.*

Finally, BIE noted that it supports the use of a collaborative or working group to determine how to implement customer notice. *Id.* BIE argued that, while efficiency is important, it is more important to get this issue right. *Id.* at 7. BIE argued that, in a collaborative, interested stakeholders would be able to work through the issue and reach a mutual resolution. *Id.* BIE maintained that the resolution must ensure that customers obtain the necessary information in a way that is meaningful to them. *Id.*

The OCA asserted that the two-step notice procedure proposed by PAWC does not meet the requirements of 52 Pa. Code §§ 53.45(b)(1)-(4) and the Commonwealth Court’s decision in *New Garden*. OCA Supp. Comments at 1. The OCA indicated that it is willing to work with the parties and the Commission to resolve the conflicting positions regarding the content of notices sent to customers. *Id.* The OCA also noted that it has filed several petitions in pending application proceedings under Section 1329 seeking stay of those proceedings so that issues can be resolved across-the-board. *Id.*

The OCA argued that, in *New Garden*, the Commonwealth Court held that, to meet due process requirements, individualized notice must be provided directly to all ratepayers and ratepayers must be afforded an opportunity to participate in a Section 1329 proceeding. *Id.* at 2. Citing *New Garden*, the OCA argued that notice is required because the ratemaking rate base determination is fundamental to a determination of rates and a rate increase involves a substantial property right. *Id.* The OCA noted that the Commission’s regulations contain explicit language for the notice that the utility sends to customers in a rate case, including the impact on customers’ bills. *Id.* The OCA claimed that PAWC’s proposed notice does not include any information regarding potential bill impact and does not satisfy Section 53.45 or comply with *New Garden*. *Id.* The OCA further claimed that the two-step process does not remedy this failure. *Id.* at 3.

The OCA recommended that the Commission adopt a single notice that is provided to all customers and includes information regarding the impact of the ratemaking rate base on customers’ bills. *Id.* The OCA argued that the Court in *New Garden* directed that notice be provided in accordance with Section 53.45, which requires the notice to show the impact on customers’ bills, separated by customer class, and using a typical usage level. *Id.* In the interest of moving the implementation process forward, the OCA proposed that the notice in Section 1329 proceedings show the impact on the revenue requirement depending on whether the revenue requirement increase related to the ratemaking rate base determination is allocated to existing water or wastewater customers, to acquired customers, or to both. *Id.* The OCA averred that this is the minimum rate impact information that can be included in a notice, while still advising customers that future rates could increase. *Id.* at 3-4.

The OCA recommended adding this information to the proposed PAWC notice in chart form. *Id.* at 4. The OCA noted that the chart used by PAWC is an effective means to supply the information. *Id.* If a chart is not used, the OCA proposed adding one or two sentences to the notice to state the range of potential rate impact. *Id.* The OCA proposed additional specific revisions to PAWC’s proposed notice. *Id.* In particular, the OCA proposed to add similar language to what is included in rate case notices regarding the PUC’s role modified to reflect that it is an application proceeding. *Id.* at 4-5. The OCA pointed to language that the PUC may approve, modify, or deny the acquisition and may approve, modify, or deny the requested addition to rate base as an example. *Id.* at 5. In addition, the OCA proposed to add its contact information with a description of its role. *Id.* The OCA provided attachments with its proposed revisions to PAWC’s notice in both chart and sentence form as well as redline versions. *See* OCA Supp. Comments, Attachments A-B.

Further, the OCA stated that it does not recommend that the Commission adopt PAWC’s *pro forma* Statement of Reasons and Potential Bill Impact. *Id*. The OCA argued that the statements contained therein are unique to the acquiring entity and the particular acquisition. *Id*. The OCA noted that Section 1329 does not require the acquiring entity to be an existing Pennsylvania utility. *Id*.

The PMAA stated that it is willing to work with the Commission and other stakeholders to develop a notice to be used as a template, provided that such notice contains adequate information regarding the rate impact on ratepayers and the options ratepayers have in response to the notice. PMAA Supp. Comments at 2. The PMAA asserted that notice must be consistent with *New Garden* and Section 53.45. *Id.* The PMAA claimed that PAWC’s proposed *pro forma* notice fails to meet the requirements of Section 53.45. *Id.* at 3. In particular, the PMAA claimed that the notice fails to inform the investor-owned utility’s ratepayers of the impact of the proposed acquisition on their rates, advise ratepayers that they are permitted to be a witness at a public input hearing, provide ratepayers with options in response to the notice, and identify and explain the PUC’s role in the rate approval process. *Id.* The PMAA also averred that the proposed Statement of Reasons and Potential Bill Impact is a mere promotional piece for the pending acquisition. *Id.* at 3-4. The PMAA argued that PAWC is proposing one document that fails to include critical information for ratepayers, while requesting that applicants prepare another document containing information with no nexus to the requirements set forth in *New Garden* and the Commission’s regulations. *Id.* at 4.

Further, the PMAA also noted that it filed an amicus brief in support of Aqua’s petition for allowance of appeal pertaining to the *New Garden* decision. *Id.* The PMAA claimed that, because the Pennsylvania Supreme Court has not acted upon the petition for allowance of appeal, the requirements set forth in *New Garden* need to form the basis of notice to ratepayers. *Id.* at 4-5.

**Conclusion**

On October 11, 2018, approximately three weeks after the issuance of the TSIO, the Commonwealth Court issued its Order in *New Garden*. The Court determined that, since Section 1329 proceedings include a determination of rate base, which affects customer rates, individual notice must be given to all customers affected by the proposed sale as well as an opportunity for them to participate in the Section 1329 proceeding. *Id.* at 1069. The Court vacated the Commission’s Order approving the New Garden transaction, directed the Commission to provide notice to all affected customers in accordance with 52 Pa. Code § 53.45, and remanded the matter to the Commission for further proceedings in accordance with the notice requirement of *New Garden*. *Id.* Aqua, the acquiring public utility in the *New Garden* transaction, timely petitioned the Pennsylvania Supreme Court for allowance of appeal of this decision. *See McCloskey v. Pa. PUC*, 743 MAL 2018 (Nov. 8, 2018). Given the procedural posture of *New Garden*, we note that notice requirements set forth here remain subject to the Supreme Court disposition of that case.

First, we clarify that, at present, the Commission has no active Section 1329 applications pending before it. For instance, as it pertains to the Exeter and Steelton applications, the Commission issued conditional acceptance letters on December 19, 2018, and January 17, 2019, respectively. The conditions established therein are not yet satisfied. The Commission has not issued final acceptance letters and, as such, the 10‑day application consideration periods before TUS have not yet begun to run. Section 1329 conditional acceptance letters are interlocutory instruction, not final Commission action. Additionally, the Exeter and Steelton conditional acceptance letters do not endorse or approve any form of notice or notice content. The letters direct the applicants to, *inter alia*, provide individual notice to all potentially affected customers; it remains to be seen whether the notices proposed or used by the applicants will comply with *New Garden*.

The issue of appropriate notice to those affected by proposed system acquisitions subject to Section 1329 valuation has generated substantial disagreement among stakeholders. As is discussed elsewhere in this Order, the pending appeal of *New Garden* creates uncertainty regarding whether the notice considerations addressed by stakeholders in response to the TSIO are required in full or at all. However, one definitive conclusion may be drawn from *New Garden*. Namely, even after Commonwealth Court review, Section 1329 stands as a legitimate regulatory tool. In its current legal posture, *New Garden* provides instruction on how Acquiring Public Utilities, Entities, and Selling Utilities are to provide adequate procedural due process to all affected customers of an acquisition subject to Section 1329 valuation.

As a valid statutory valuation mechanism, Section 1329 is available to Acquiring Public Utilities, Entities, and Selling Utilities as a regulatory tool for the consolidation of water and wastewater systems throughout the Commonwealth. Similarly, the legal and practical consequence of *New Garden* in that context is discrete. That is, *New Garden* directs the Commission to develop a 52 Pa. Code § 53.45 compliant notice mechanism for all ratepayers such that ratepayers have the opportunity to be heard and to present evidence that may be taken into account by the Commission.[[7]](#footnote-7) The Commission will operate under the *New Garden* precedent, unless instructed otherwise by a court of competent jurisdiction.

In their supplemental comments, the OCA and PAWC provided versions of customer notice forms that each believed are compliant with 52 Pa. Code § 53.45. The critical difference between these competing versions is their respective approach to the potential future rate effect of any particular transaction. Other matters, such as the role of the PUC and actions that customers may take, are largely fungible and would likely be serviceable regardless of the version selected.

The rub of the notice falls to how one is to handle the myriad of potential rate effects under various rate case scenarios, some more likely than others, but all representing hypotheticals of what might be. The Commission notes that such a future rate case may not even be the “next” rate case filed subsequent to Commission approval of a Section 1329 valuation request. Shoehorning a variety of potential Section 1329 rate effects into the general base rate notice requirements of 52 Pa. Code § 53.45 is, as it were, easier said than done. Establishing the high and low bookends of future rate recovery of Section 1329 fair-market valuations is a speculative enterprise because those limits are inherently dependent on many factors reserved for the subsequent base rate case in which a wide variety of cost and other ratemaking inputs are reviewed and adjudicated. These include, but are not limited to, operating expenses, depreciation, state and federal income taxes, cost of debt, cost of equity, capital structure, cost of service studies, water/wastewater revenue allocations, and rate design. While these inputs are known and certain as part of a utility’s *proposed* rate increase, and therefore quantifiable for purposes of a customer notice for a base rate case, quantifying these inputs for a *future* rate case, under various assumptions or scenarios as proposed by some of the commenters, is beyond the scope of 52 Pa. Code § 53.45, which was drafted for the purpose of providing notice of a base rate increase *as proposed by the utility*.

What makes the Section 53.45 notice acceptable for a base rate case is that it contains a reasonable degree of certainty. It does not attempt to prognosticate all possible rate case outcomes or to predict the Commission’s adjudication. To do so would be folly. What that notice does project is a concrete rate increase request placed before the Commission for review.

In the Commission’s judgment, providing a notice with a complex set of potential rate increase based on a variety of assumptions and scenarios, or even a range of potential outcomes, will not provide any meaningful notice to affected customers. A notice of this sort would be more confusing than informative. For example, the Section 1329 valuation could have a highly unlikely rate effect of $0. Equally unlikely is a full allocation of all costs — acquisition and perhaps others — to a rate division consisting of only the customers of the acquired municipal system. The more likely *outcome* is indeterminate; it will be found somewhere between possible extremes.

Under these circumstances, and in order to provide meaningful notice to residential, commercial and industrial customers regarding the effect of the proposed acquisition on their bills, the Commission directs that Section 1329 applicants are to provide one notice to all customers potentially affected by the proposed transaction, including the customers of the Selling Utility, based on the results of the most recently adjudicated rate case. As is explained above, language like that found in the *Pro Forma* Notice of Proposed Acquisition and Rate Base Addition proposed by PAWC would suffice to satisfy the Application Filing Checklist. As to the potential rate effect of the proposed valuation and rate base addition, Buyers shall follow the 52 Pa. Code § 53.45 format rate case example by customer class, except that Buyers will provide a *NON-BINDING* *ESTIMATE* of the likely incremental rate effect of the proposed valuation rate base addition of a typical customer’s bill using reasonably certain data.

Using fictious numbers for illustrative purposes only, this should appear in the notice as follows:

|  |  |  |
| --- | --- | --- |
| **Rate Class** | **Average Usage** | **Estimated Monthly Increase** |
| Residential | 4,000 gal/month | $0.03 |
| Commercial | 22,000 gal/month | $0.03 |
| Industrial | 500,000 gal/month | $0.03 |

Moreover, to avoid the speculative aspects of using assumptions and scenarios of *potential* future rate cases, the manner of calculating the above incremental rate increase should mirror the *actual* results of company’s most recently adjudicated base rate proceeding whether fully litigated or settled. If a Buyer has filed the thirty-day notice of 52 Pa. Code § 53.45(a), or has filed a rate case, it should calculate the above using data as proposed in its upcoming or filed rate case.

As to potential subsidy among existing and current customers, the Buyer should assume that the costs of the acquisition will be subsidized according to traditional single-tariff pricing models the Buyer has previously employed. While even these factors are (at best) an estimate, they work to avoid speculation of what a years-distant rate filing might entail, and how that speculation *might* translate into a specific rate design or cost allocation *after* Commission action. Of course, the Buyer and Seller notices may contain different numbers depending on the terms of the acquisition in question.

As to issues of timing, Section 1329 applicants are free to employ either model addressed in 52 Pa. Code § 53.45 — the direct mailing of a written or printed notice or by the alternative method of a bill insert. As to the latter, Aqua is correct that *New Garden* will require more advance planning on the part of Buyers if they wish to avail themselves of the accelerated six-month consideration period of Section 1329.

Lastly, we reiterate that, as revised in the TSIO, Item 18(d) of the Application Filing Checklist requires applicants provide a copy of the notice sent or to be sent to affected customers describing the filing and the anticipated effect on rates. Item 18(d) is consistent with the directives above and, as such, the revisions to Item 18(d) set forth in the TSIO remain intact.

**Checklist Item 20**

In the TSIO, we proposed to revise Item 20 of the Section 1329 Application Filing Checklist by adding the following subsection:

20. Proof of Compliance - provide proof of compliance with applicable design, construction and operation standards of DEP or of the county health department, or both, including:

. . .

1. Provide documentation of all Notices of Violation issued to seller by DEP for the last 5 years, an explanation of each, including a description of any corrective or compliance measures taken.

. . .

TSIO Appendix A at 4-5. The purpose of this revision is to distinguish between Department of Environmental Protection (DEP) violations and Notices of Violation, which may not in fact be a substantiated violation of law.

**Comments**

Aqua stated that it does not oppose Item 20.f as revised. Aqua Comments at 11. Aqua requested clarification that the request will come to the selling municipality and the Buyer will provide, to the best of its ability, what information the Seller may have. *Id.* Aqua argued that the Buyer should not have to utilize its limited resources to track down information from DEP during the due diligence process that may or may not confirm prior notices of violation. *Id.*

**Reply Comments**

PAWC indicated that it agrees with Aqua. PAWC Reply Comments at 3. PAWC noted that it is concerned that an application may be rejected due to the failure to include information that is within the sole custody and control of the Seller. *Id.*

**Conclusion**

While the information required by Item 20 regarding DEP violations and Notices of Violation may be requested of the Seller from the Buyer as Aqua suggested, the applicant is expected to provide this information in response to the Checklist. The Section 1329 application process is voluntary. If a Seller does not wish to comply, it bears the risk of that decision. Moreover, as the Buyer is seeking to acquire and operate the Seller’s system, the Commission believes that it is in the Buyer’s interest to attempt to obtain information regarding DEP violations and Notices of Violation, including corrective and compliance measures, as a part of necessary due diligence. Therefore, we decline to modify the language of Item 20. The revisions to Item 20 set forth in the TSIO remain intact.

**Public Meetings and the Six-Month Consideration Period**

In the TSIO, we recognized concerns regarding procedural schedules in Section 1329 proceedings due to the relationship between the mandatory six-month deadline of Section 1329(d)(2) and the investigation, analysis, and effort demanded to provide competent representation in these proceedings. We also recognized scheduling concerns resulting from the relationship between the six-month deadline and the Public Meeting schedule to which that deadline is applied.

These types of statutory deadlines require the presiding ALJ and the parties to “back-into” a procedural schedule that accommodates the Section 1329 application filing date and the last Public Meeting within the proscribed six-month period. Problems may arise if there is only one Public Meeting in a month or if a Public Meeting is rescheduled or canceled. These issues may result in a procedural schedule as much as thirty days short of what is an already ambitious six-month consideration period. In the TSIO, the Commission proposed several options as a remedy.

First, we proposed that applicants consider the effect of a specific filing date, including consideration of the ten-day review of the Application Filing Checklist by TUS established in the FIO. For example, filing on a Wednesday, as opposed to a Friday, will assist in avoiding days wasted awaiting *Pennsylvania Bulletin* publication. Similarly, applicants should avoid submitting filings on dates where the six-month consideration period stands to run afoul of the published Public Meeting schedule. We further proposed that applicants may consider voluntarily extending the consideration period to avoid undue time pressure for the litigants or Commission staff charged with evaluating the proceeding.

Second, we proposed to permit TUS to hold acceptance of an application for up to five calendar days if doing so would avoid the problem of establishing a consideration period of 170 days or less.

Third, we proposed using planned notational voting to consider and adjudicate Section 1329 applications to permit the use of the entire six-month period that Section 1329 provides. *See* 4 Pa. Code § 1.43(c).

**Comments**

Aqua indicated that it agrees with the first proposal. Aqua Comments at 12. Aqua noted that, in its most recent application, it sought a filing date that would maximize the consideration period for all parties. *Id.* Aqua further noted that it will take into consideration *Pennsylvania Bulletin* publication dates, although it may file in the latter part of a week in order to make a Public Meeting date. *Id.* Aqua stated that it opposes the second proposal and argued that the Commission should not permit TUS to hold acceptance of applications for an additional five calendar days. *Id.* at 12-13. As to the third proposal, Aqua indicated that it does not oppose the use of notational voting.

BIE pointed out that, recently, applicants have been mindful of the Public Meeting schedule in filing applications. BIE Comments at 4. BIE stated that it supports the use of planned notational voting in situations where the consideration period falls short of a full six months. *Id.* at 5. BIE noted that planned notational voting would aid stakeholders in creating a more robust record for review. *Id.*

The OCA identified a voluntary extension of the suspension period and the scheduling of a special Public Meeting as additional options. OCA Comments at 5. The OCA argued that the scheduling of a special Public Meeting would provide a reasonable approach when there is only one Public Meeting per month. *Id.* The OCA stated that it prefers these alternative options. *Id.* at 5-6. Regarding notational voting, the OCA submitted that notational voting could be used, if it is the only way to avoid a shortened consideration period when there is not a Public Meeting that will allow a 180-day period, or a special Public Meeting cannot be held. *Id.* at 6. The OCA argued that a process to permit the parties and ALJ to know that notational voting will be used must be activated when the filing is under review, because the schedule is developed at that time. *Id.*

PAWC argued that an extension of the ten-day review period for TUS seems unnecessary because the Commission can use notational voting to meet its statutory obligations. PAWC Comments at 7. PAWC also requested that the Commission reconsider the timeline in the FIO and that parties be given additional time to prepare and litigate cases and consider utilizing the certification of the record procedure. *Id.* at 8.

**Reply Comments**

Aqua argued that it is fairly simple for utilities to back into a public meeting date that will allow the parties the most amount of time for processing an application. Aqua Reply Comments at 3. Aqua committed to filing in this manner, absent extraordinary circumstances, and noted that the timing issue should be alleviated for utilities that have been through the process. *Id.*

BIE argued that the benefit of TUS holding an application for an additional five calendar days outweighs Aqua and PAWC’s concerns regarding a five-day delay of the acceptance of an application. BIE Reply Comments at 4. BIE also indicated that it agrees with the OCA that, if planned notational voting is to be used, the parties should be notified so that the additional time can be included in the litigation schedule. *Id.* BIE requested that the parties be notified prior to the Prehearing Conference. *Id.*

The OCA contended that Aqua’s opposition to a five-day extension to the ten-day review period for TUS is not reasonable. OCA Reply Comments at 6. The OCA noted that the extension will benefit all parties. *Id.* at 7. In response to PAWC’s argument that a five-day extension seems unnecessary as notational voting is available, the OCA maintained that notational voting should be used as a last resort and only if other options will not work to ensure a minimum of 170 days. *Id.* The OCA agreed with PAWC that certification of the record is one option that would provide more time to prepare and litigate the case. *Id.*

PAWC stated that it agrees with Aqua’s comments. PAWC Reply Comments at 3. PAWC argued that it is legally questionable and unnecessary to allow staff to extend the six-month period. *Id.* PAWC argued that notational voting should be used to maximize the consideration period and that the Commission can provide the parties with more time without artificially extending the six-month review period. *Id.*

**Conclusion**

In consideration of the above comments and reply comments, the Commission determines to take a multi-prong approach to maximize the availability of the six-month consideration period. This approach reflects a combination of the proposals in the TSIO and allows for flexibility and case-by-case consideration of the needs of the applicant, the parties, and Commission staff.

We first direct applicants to consider the effect of a particular filing date on the length of the consideration period, including the ten-day review of the Application Filing Checklist by TUS, the timeframe for publication in the *Pennsylvania Bulletin*, and the Public Meeting schedule. Applicants should consider these factors with the goal of attaining a consideration period of 170 to 180 days. We agree with Aqua that it is feasible for applicants to back into a Public Meeting date that will maximize the use of the six-month consideration period and we expect all applicants to make a good faith effort to do so.

If an applicant nonetheless files an application such that the consideration period is less than 170 days, TUS will encourage the applicant to voluntarily extend the consideration period to between 170 and 180 days. If the applicant declines, TUS is permitted to hold acceptance of the application one to five additional calendar days to achieve a consideration period of 170 to 180 days.

Lastly, with regard to PAWC’s request that we reconsider the timeline set forth in the FIO, we note that, as provided in the FIO, the proposed model timeline is a guide for achieving a Commission final order within the six-month deadline and, in our opinion, the parties are free to propose modifications to the presiding ALJ. FIO at 35. We expect any proposed modifications to recognize the requirements of due process in a particular proceeding and be tailored to the development of a full and complete record for Commission review. *Id.*

**Public Notice of Accepted Section 1329 Applications**

In the TSIO, we recognized that, because a docket number is not assigned to an application seeking Section 1329 valuation until after TUS determines that the applicant has satisfied the Application Filing Checklist and the application is suitable to accept for filing, interested stakeholders cannot enter a notice of appearance until after the filing is accepted. At that time, e-filing and e-service are unavailable as these services require at least pending party status. As such, stakeholders have no timely way to know that they can file a notice of appearance and that tolling of the six-month consideration period has begun. We also recognized that a three or four-day delay in notice of acceptance can make a difference in the context of a six-month consideration period.

To address this situation, we directed interested stakeholders to make full use of the general aspects of the Commission’s e-filing system and provided instructions for creating a generic e-filing subscription that provides a user with an electronic email alert when the Commission accepts a Section 1329 filing.

**Comments**

Aqua indicated that it does not oppose the section of the TSIO addressing public notice of accepted Section 1329 applications. Aqua Comments at 12.

The OCA claimed that, according to the TSIO, the reason that a Secretarial Letter accepting an application cannot be sent to stakeholders, including statutory advocates, is because the docket number is not assigned until the filing is accepted and, thus, stakeholders cannot have pending party status. OCA Comments at 6. The OCA suggested that the Commission serve the statutory advocates with all Secretarial Letters that accept or reject a Section 1329 filing. *Id.* at 6. The OCA suggested that another option would be to assign a docket number at an earlier point in the process. *Id.* at 7. The OCA argued that doing so would allow stakeholders to follow a proceeding by docket number and intervene to obtain pending party status and would permit the customer notice to include the docket number. *Id.* The OCA further argued that this would be similar to the assignment of a docket number to a general rate increase filing at the time of the 30-day notice letter and the assignment of a docket number when a utility asks for a waiver of the regulation between the end of the test year and the filing of the rate increase request. *Id.*

**Reply Comments**

Aqua stated that it does not oppose the OCA’s suggestion that statutory advocates be served with copies of any acceptance or rejection letter as it will provide timely notice of the beginning of the six-month consideration period. Aqua Reply Comments at 4.

PAWC indicated that it does not object to the OCA’s suggestion that statutory advocates be served with a copy of the Secretarial Letter accepting or rejecting an application. PAWC Reply Comments at 8. PAWC argued that this approach would allow the statutory advocates to intervene in a case earlier and may alleviate the problem of TUS data requests being issued before the statutory advocates intervene, but answers not being due until after they intervene. *Id.*

**Conclusion**

In the FIO, we directed that the acquiring utility or entity should notify the Commission and the statutory advocates when they enter into a service contract with a UVE to appraise a potential acquisition. FIO at 35. Buyers have done so by filing “UVE letters” and, to date, UVE letters have appeared in the instant docket, M-2016-2543193, rather than in individual dockets.

For purposes of administrative efficiency, the Secretary’s Bureau will now assign a docket number upon receipt of the UVE letter pertaining to that acquisition. We clarify that for the purposes of Section 1329, the assignment of a docket number is a ministerial document tracking mechanism with no legal significance. The assignment of a docket number does *not* indicate that a filing has been accepted and, therefore, a docket will remain inactive until a Section 1329 application under that docket number has been formally accepted by the Commission. Filings in an inactive docket will not be considered until the time at which the docket becomes active.

In the FIO, we stated that notice of rejection of a Section 1329 filing, in the form of a Secretarial Letter, shall be provided to the statutory advocates, the entities required to be served with the application, and anyone else on the application’s certificate of service so that all parties or potential parties are aware of the acceptance or rejection of the filing. FIO at 25. We agree with the OCA that the statutory advocates should also be served with notice of acceptance of a Section 1329 filing as has been done in recent Section 1329 applications. We memorialize this requirement here.

Consistent with our directive in the TSIO, we continue to encourage interested stakeholders and potential parties should to make full use of the general aspects of the Commission’s e-filing system by creating a generic e-filing subscription that provides an electronic email alert when the Commission accepts any Section 1329 filing.

**Standard Data Requests for Applications Seeking Section 1329 Valuation**

In the TSIO, we clarified that TUS does not review the veracity or substantive qualify of information that an applicant may submit to fulfill the threshold requirements of the Application Filing Checklist. In accordance with the FIO, TUS reviews whether the applicant has included, in good faith, the information required by the Commission for the initial filing such that the six-month consideration period of Section 1329(d)(2) may begin without causing (1) the applicant to suffer a summary rejection, if the application were to remain under TUS review, and (2) due process and other procedural concerns before the OALJ. TUS is not precluded from making *subsequent* data requests, provided that the data requests are issued before the Commission receives a protest or filing in opposition to an application.

In the TSIO, we determined to incorporate Standard Data Requests into Item 4 of the Application Filing Checklist in lieu of electronic working documents and provided proposed Standard Data Requests as well as instructions. *See* TSIO, Appendix B. The Standard Data Requests are designed to make the process of investigation and analysis of the Section 1329 application more efficient by providing key information at the outset of the application proceeding. Providing the information in the Standard Data Requests is intended, along with other initiatives, to address issues created by the Section 1329(d)(2) six-month consideration period.

Further, in terms of additional discovery, we declined to establish universal discovery modifications for Section 1329 proceedings. We encourage the voluntary modification of its discovery regulations at 52 Pa. Code §§ 5.321-5.372 due to the six‑month consideration period. We also strongly encourage applicants to propose discovery rules and conditions suitable for the circumstances of each Section 1329 proceeding.

Below we first address comments and reply comments on the Standard Data Requests in their entirety, TUS data requests, and discovery modifications. We then address comments and reply comments regarding specific data requests. Portions of the Standard Data Requests that did not generate comment remain intact and will not be addressed further. A copy of the final Standard Data Requests is attached as Appendix B.

**Comments**

Aqua generally noted that certain information can be provided in the Standard Data Requests to assist in the application review process and that TUS may serve data requests on an applicant, provided that no protest or opposition filing has been made. Aqua Comments at 14. With regard to discovery modifications, Aqua noted that it will work with the parties once the application is accepted as complete to establish mutually agreeable discovery schedules and enter stipulated discovery schedule agreements so the parties will not have to wait for a prehearing order. *Id.*

BIE opined that, due to the compressed schedules of Section 1329 transactions, the standard discovery response time of 20 days is inappropriate. BIE Comments at 8. BIE further opined that it has frequently filed motions to expedite discovery before a prehearing conference is held. *Id.* BIE suggested that a discovery conference take place soon after acceptance of an application so that modification can be established. *Id.* at 9. In this regard, BIE recognized the willingness of utilities in Section 1329 proceedings to voluntarily agree to discovery modifications. *Id.* BIE also encouraged OALJ to impose modifications if the parties do not propose them on their own. *Id.*

CWA suggested a number of additions to the Standard Data Requests. CWA Comments at 3-6. CWA argued, *inter alia*, that the Commission should request information used to determine the asset inventory of the system and information regarding assets that may represent contributed plant. *Id.* at 3. CWA also argued that the Commission should require the Buyer and Seller to provide a bill comparison for a typical residential customer at the rates of the Seller upon acquisition and at the approved standard tariff pricing rates of the Buyer as well as require the Buyer to provide a pro forma income statement for the acquired system as a stand-alone entity at the rates of the Seller upon acquisition and reflecting the anticipated expenses of the Buyer. *Id.* at 4-5. Additionally, CWA requested that, for water and wastewater systems in the Delaware River Basin, the Commission require the Buyer and Seller to provide copies of the current dockets authorizing water diversions or wastewater discharge. *Id.* at 5. For systems operating under a DEP Consent Order, CWA requested that the Commission required the Buyer and the Seller to provide copies of the Orders and explain the compliance status. *Id.* For wastewater systems, CWA requested that the Buyer and the Seller inform the Commission if DEP has issued any determinations of overload of conveyance or treatment capacity. *Id.* Further, CWA suggested that the Seller describe the process used to identify and select the Buyer. *Id.* CWA also suggested that corporate resolutions of the stockholders or referendum of the public bodies authorizing the transaction be provided to the Commission. *Id.* at 5-6.

The OCA also proposed additions to the Standard Data Requests. OCA Comments at 8. The OCA argued that its additional data requests are reasonable to assist intervening parties in understanding the appraisals in the context of valuations that the Buyer and Seller may have made independently of the Section 1329 requirements. *Id.* The OCA’s proposed additional data requests include the following:

1. Provide a copy of any valuation studies BUYER used in its evaluation of the Seller’s system that have not already been provided.

2. Provide a copy of any valuation studies SELLER used, in preparation for sending or receiving the request for proposals, if application, regarding the proposed sale of the system.

OCA Attachment A.

PAWC stated generally that the Commission should reconsider the Standard Data Requests. PAWC Comments at 10. PAWC averred generally that some of the Standard Data Requests are unduly burdensome and seek documentation that is not relevant. *Id.* In addition, PAWC claimed that the TSIO does not address the situation in which TUS issues data requests and the Commission receives a protest or opposition to the application before the responses are due. *Id.* at 9. PAWC argued that TUS data requests should be deemed withdrawn when the application is assigned to the OALJ. *Id.* PAWC argued that answering the TUS data requests serves no practical purpose and increases the costs to ratepayers with no corresponding benefit. *Id.* at 10. Moreover, with regard to discovery modifications, PAWC noted that it agrees with the Commission refusal to establish modified discovery rules for all Section 1329 proceedings. *Id.* at 11. PAWC argued that a five-day response time is not warranted in future proceedings. *Id.* PAWC also argued that the Commission should establish a presumption that a seven-day discovery response period is reasonable absent good cause shown. *Id.*

With regard to TUS’s data requests, SWPA noted that, in a prior proceeding, TUS took the position that SWPA was required to answer two sets of data requests, despite reassignment of the applications from TUS to OALJ. SWPA Comments at 2. SWPA further noted that many of the data requests were duplicative of discovery requests that SWPA would later receive from the public advocates. *Id.* SWPA requested that the Commission clarify that, once a protest is filed, the applicant no longer has an obligation to answer the TUS data requests. *Id.*

**Reply Comments**

Aqua argued that, with regard to the OCA’s proposed additions to the Standard Data Requests, the fair market valuations submitted with the Section 1329 application in determination of the fair market value are the only relevant valuations. Aqua Reply Comments at 4. Aqua further argued that any other valuations that are not completed in accordance with the USPAP and the jurisdictional exceptions do not provide comparable information relevant to the determination of fair market value. *Id.*

In response to PAWC and SWPA’s arguments regarding TUS’s data requests, BIE argued that, to ensure that the parties are aware of the data requests, TUS could serve the data requests on BIE, the OCA, and OSBA. BIE Reply Comments at 8. BIE noted that, if the applicant is no longer required to answer the TUS data requests after reassignment to the OALJ, the parties would have to re-serve the applicant with the same or similar questions within the short litigation window. *Id.* BIE requested that the Commission direct applicants to answer TUS’s data requests so that the same questions would not have to be regenerated as discovery. *Id.* With regard to discovery modifications, BIE stated that it opposes PAWC’s proposal to establish a presumption that a seven-day response period is reasonable for discovery absent good cause shown. *Id.* at 7. BIE argued that the requirement of good cause would place an unnecessary burden on the parties. *Id.* BIE also noted that, in the TSIO, the Commission did not impose universal discovery rule modifications for Section 1329 proceedings because each application is independent and can warrant different modifications. *Id.*

In response to PAWC’s claims that the Standard Data Requests are burdensome and seek information not pertinent to the application, the OCA argued that the information sought is pertinent and the Standard Data Requests will remove the pressure of answering the same questions during an expedited ligation period. OCA Reply Comments at 8. In response to PAWC and SWPA’s arguments regarding TUS’s data requests, the OCA noted that answering TUS’s data requests could avoid requiring the parties to ask similar questions and restarting the time for responses in an abbreviated litigation timeframe. *Id.* With regard to discovery modifications, the OCA argued that, if any discovery response period presumption is created, it should be five days as it has been in many Section 1329 proceedings. *Id.* The OCA noted that the parties have used reasonable discovery modifications in Section 1329 proceedings to date. *Id.*

PAWC indicated that it disagrees with CWA’s suggestion that applicants be required to submit numerous documents in addition to those already identified in the Standard Data Requests. PAWC Reply Comments at 18. For instance, PAWC stated it disagrees with CWA’s suggestion to establish a record of the steps taken by the Seller lending to the negotiation of the agreement. *Id.* PAWC argued that the Commission is not authorized to second-guess the decision of municipal officials selling the system. *Id.* PAWC also argued that many of the documents suggested by CWA would not be useful to the Commission. *Id.* For example, PAWC stated it sees no value in requiring documents from the Delaware River Basin Commission. *Id.*

PAWC also objected to the OCA’s proposed additional data requests. *Id.* at 8. PAWC argued that the Commission is not a super board of directors and does not have authority to second-guess municipal officials. *Id.* at 9. PAWC also argued that the negotiated purchase price should not be compared to how high the Buyer or how low the Seller was willing to go in negotiations. *Id.* Further, PAWC noted that, if the transaction does not proceed to closing, the parties may renegotiate, and it would be unfair for one party to have the proprietary business information of the other and there is a risk that a competitor would have this propriety information to use in the rebid process. *Id.* As it pertains to discovery modifications, PAWC opposed BIE’s suggestion that a discovery conference be held soon after the acceptance of an application. *Id.* at 12.

SWPA stated that it does not support CWA’s suggestion that referendums of the public bodies authorizing the transaction be provided to the Commission. SWPA Reply Comments. SWPA argued that an authority’s board members and the municipal administration are best suited to decide whether or not to sell and that a municipality should not be compelled to conduct a referendum. *Id.* SWPA also stated that it does not agree with the OCA’s proposed additional data requests. *Id.* SWPA argued that the UVE appraisals should suffice in establishing the fair market value and submission of the Buyer’s and Seller’s independent and confidential evaluation studies should not be required. *Id.* SWPA also argued that the Buyer’s evaluation provides strategic information that should not be accessible to its competition. *Id.*

**Conclusion**

As it pertains to the Standard Data Requests in their entirety, we decline to adopt CWA’s proposed additional data requests. While CWA identified information that may be pertinent in some Section 1329 proceedings, we believe that CWA’s proposed data requests would be more appropriately addressed on a case-by-case basis. As stated in the TSIO, the Standard Data Requests are based largely on data requests routinely propounded in Section 1329 proceedings. The Standard Data Request are designed to make the investigation and analysis process more efficient for all stakeholders. Requiring a surplus of information that may only be pertinent to some, but not all, Section 1329 proceedings as part of the Standard Data Request does not likely support an efficient review process.

We also decline to adopt the OCA’s proposed additional data requests. We agree with Aqua and PAWC that the fair market valuations submitted with the Section 1329 application are the relevant valuations. Pursuant to Section 1329, two UVEs shall perform appraisals for the purpose of establishing fair market value and each UVE shall determine fair market value in accordance with the USPAP. 66 Pa. C.S. §§ 1329(a)(2)-(3). Valuations that the Buyer and Seller made independently of the Section 1329 requirements are not pertinent to the Commission’s inquiry in Section 1329 proceedings and may not have been conducted in compliance with the USPAP. Although not included in the Standard Data Request, the OCA (and other parties) remain free to request such data in Section 1329 application proceedings as appropriate.

As to the TUS data requests, we agree with BIE that applicants should answer TUS data requests even after the matter is assigned to OALJ. We set forth the Standard Data Requests to make the process of investigating and analyzing Section 1329 applications more efficient in light of the six-month consideration period. We find that requiring applicants to answer TUS data requests will likewise make this process more efficient. Requiring applicants to answer TUS data requests will avoid the need for parties to serve the same or similar interrogatories in discovery after the parties agree to discovery protocols.

Answering TUS’s data requests will also streamline the process for applicants, who would otherwise begin preparing answers to TUS data requests, abandon those answers upon assignment to OALJ, and soon after being asked the same or similar questions by the parties. We also agree with BIE that, for complete transparency, TUS should serve its data requests on BIE, OCA, and OSBA to ensure that the parties are aware of the data requests to avoid duplication. If applicants respond to TUS data requests, they are free to object to duplicate inquires pursuant to our discovery regulations.

Regarding the role of TUS in requests for Section 1329 valuation, we clarify that Section 1329 provides for consideration of a fair market rate base valuation of certain acquired municipal utilities and a short clock for decisions on those valuations. Section 1329 does not repeal Chapter 11 of the Public Utility Code and Commission obligations under that Chapter. Applications subject to Section 1329 valuation require the Commission to exercise its public interest examination of all acquisition and transfer of control applications submitted for its approval. Point being that while the TUS role in establishing whether an acquisition application qualifies for accelerated Section 1329 consideration is limited, its authority to consider and examine these applications pursuant to Chapter 11 remains undiminished.

Lastly, we decline to establish universal discovery rule modifications applicable to all Section 1329 proceedings. However, we strongly encourage applicants to propose discovery rule modifications appropriate for Section 1329 proceedings. As Aqua suggested, parties should work to establish mutually agreeable discovery schedules once an application is accepted and enter a stipulated discovery schedule agreement to avoid waiting until the issuance of a prehearing order after a prehearing conference. We encourage the use of this approach. If applicants or parties do not propose discovery rule modifications, we encourage the OALJ to impose appropriate modifications to aid in the efficient disposition of the application.

**Standard Data Request No. 1**

In the TSIO, we proposed that Standard Data Request No. 1 seek to obtain the following information:

1. Estimate the potential range of monthly cost impact on existing and acquired customers following the Buyer’s next base rate case, utilizing (a) a scenario in which the acquired system’s cost of service is fully allocated to the acquired customers and (b) a scenario in which any anticipated cost of service revenue deficiency associated with the acquired system is shared equally by acquired customers and existing customers. In the case of a wastewater acquisition, assume no combined water and wastewater revenue requirement.

TSIO Appendix B at 3.

**Comments**

Aqua stated that it does not oppose Standard Data Request No. 1 under the condition that the Commission is very clear that the estimates in the application are only estimates. Aqua Comments at 14. Aqua claimed that this question has the potential to turn each Section 1329 proceeding into a full base rate inquiry. *Id.* Aqua further claimed that it cannot be held to these estimates in the next base rate case. *Id.* Aqua requested that the Commission clearly state that the answers to No. 1 are simply to provide transparency and data points to the parties on what rates could be. *Id.*

**Reply Comments**

The OCA noted that No. 1 specifically asks for an estimate of the monthly cost impact on existing and acquired customers. OCA Reply Comments at 9. The OCA also noted that the concern raised regarding a full base rate case is unfounded. *Id.* The OCA argued that the Buyer can calculate a revenue requirement associated with the acquired plant, operation and maintenance expenses, and return, which does not constitute a full‑blown rate case. *Id.* The OCA further argued that this information along with estimates of the rate impact are important in Section 1329 cases because Section 1329 required a ratemaking rate base determination. *Id*. Additionally, the OCA noted that estimates need to be free of assumptions that could skew the real impact and that the assumption stated in No. 1 (no combined water or wastewater revenue requirement) be followed. *Id.* The OCA argued that allowing the Buyer to assume that any of the costs can be spread to existing customers would minimize the impact of the ratemaking rate base. *Id.*

The PMAA stated it generally disagrees with comments opposing a requirement that the acquiring utility provide an estimate of the annual revenue of the municipal system under the acquiring utility’s ownership. PMAA Reply Comments at 3.

**Conclusion**

Regarding Aqua’s concerns, it is clear that Standard Data Request No. 1 concerns estimates. Standard Data Request No. 1 requires an *estimate* of the potential range of monthly cost impact on existing and acquired customers following the Buyer’s next base rate case under the scenarios stated therein. This is not intended to turn the Section 1329 proceeding into a full base rate inquiry. Moreover, while we understand that this potential range may change from the time the Buyer files a Section 1329 application to the time of the Buyer’s next base rate case, we expect the Buyer to provide good faith estimates in response to Standard Data Request No. 1. These estimates are requested for transparency purposes and are intended to provide data points as to what rates may result from the transaction. We recognized that, between the time of the Section 1329 transaction and the utility’s next base rate case, there may be a host of cost factors that may increase or decrease the overall cost of service.

Also, we conclude that in the case of wastewater acquisitions, requiring an assumption that acquisition costs, or some portion of those costs, will not be shared among water and wastewater customers is not realistic. It is now common practice under 66 Pa. C.S. § 1311 for Class A water companies to employ the shared revenue requirement rate mechanism. We therefore revise Standard Data Request No. 1 to read as follows:

1. Estimate the potential ~~range of~~ monthly incremental cost impact on existing and acquired customers following the actual results of the Buyer’s most recently adjudicated ~~next~~ base rate proceeding, whether litigated or settled, ~~case, utilizing (a) a scenario in which the acquired system’s cost of service is fully~~ allocat~~ed~~ing ~~to~~ the fair market value of the acquired system according to the Buyer’s previously approved single-tariff pricing model. ~~customers and (b) a scenario in which any anticipated cost of service revenue deficiency associated with the acquired system is shared equally by acquired customers and existing customers.~~

1. In the case of a wastewater acquisition, a Buyer that employs a combined revenue requirement pursuant to 66 Pa. C.S. § 1311 will provide information assum~~e~~ing ~~no~~ a combined water and wastewater revenue requirement consistent with its most recent adjudicated base rate proceeding.
2. If a Buyer has filed the thirty-day notice of 52 Pa. Code § 53.45(a), or has filed a rate case, it should calculate the above using data as proposed in its upcoming or filed rate case.

*See* Appendix B at 3. Providing this information, in conjunction with the information requested in Standard Data Request No. 7 below, will provide a more realistic range of possible rate effects of the proposed acquisition and will also inform our review of any rate stabilization plan required pursuant to Section 1329 (d)(1)(v).

**Standard Data Request No. 4**

In the TSIO, we proposed that Standard Data Request No. 4 seek to obtain the following information:

4. Provide an estimate of the annual revenue requirement of the municipal system under the Buyer’s ownership. Provide the assumptions for the annual revenue requirement, including expected rate of return, expected depreciation expense, O&M expenses, etc.

TSIO Appendix B at 3.

**Comments**

Aqua stated that it opposes Standard Data Request No. 4 because it asks for a cost of service study provided up front with the application. Aqua Comments at 15. Aqua noted that, in previous applications, it agreed to provide cost of service information in the Company’s next rate case. *Id.* Aqua further noted that the rate estimates in Standard Data Request No. 1 and revenue requirement estimates are linked; estimates as to the annual revenue requirement are only estimates. *Id.* Aqua claimed that the estimated revenue requirement is subject to change and may be affected by factors not known at the time of the filing. *Id.* Moreover, Aqua argued that a Section 1329 proceeding is not a base rate case and that the Company cannot be held to these estimates in the next base rate case. *Id.* Aqua requested that the Commission clearly state that the answers to Standard Data Request No. 4 are simply to provide transparency and data points to the parties on what rates could be. *Id.*

**Reply Comments**

The OCA noted that Aqua’s interpretation is not supported. OCA Reply Comments at 10. The OCA argued that asking the Buyer to provide an estimate of the annual revenue requirement and the assumptions used in calculation that revenue requirement is not the same as a cost of service study. *Id.* The OCA also argued that calculating the revenue requirement for the Buyer to serve the municipal system is something that is based on information the Buyer already has. *Id.*

As noted above, the PMAA stated generally that it disagrees with comments opposing a requirement that the acquiring utility provide an estimate of the annual revenue of the municipal system under the acquiring utility’s ownership. PMAA Reply Comments at 3. The PMAA argued that a “cost of service study,” which includes an estimate of the annual revenue requirement of the municipal system under the acquiring utility’s ownership, provides relevant information. *Id.*

PAWC stated that it agrees with Aqua that No. 4 is unnecessary because of other information that an applicant must provide. PAWC Reply Comments at 4. PAWC noted that the cost to develop all the information required by the Standard Data Requests is borne by ratepayers. *Id.* PAWC argued that the benefits from No. 4 are minimal and that the Commission can consider the rate impact of the acquisition without this information. PAWC also argued that every Order approving a Section 1329 application has included a requirement that the Buyer submit a cost of service study in its next base rate case. *Id.*

**Conclusion**

Standard Data Request No. 4 requests only estimates; an *estimate* of the annual revenue requirement of the municipal system under the Buyer’s ownership. A cost of service study is a requirement under 52 Pa. Code § 53.53, regarding rate cases in excess of $1 million. We do not require Section 1329 applicants to prepare and file a cost of service study with each application. Moreover, while we understand that the estimate may change from the time the Buyer files a Section 1329 application to the time of the Buyer’s next base rate case, we expect the Buyer to provide a good faith estimate in response to No. 4. This estimate is requested for transparency purposes and is intended to point to what rates may result from the transaction.

**Standard Data Request No. 7**

In the TSIO, we proposed that Standard Data Request No. 7 seek to obtain the following information:

7. In the next rate case, does buyer anticipate includ[ing] the acquired system in a combined revenue requirement?

TSIO Appendix B at 3.

**Comments**

Aqua indicated that it opposes Standard Data Request No. 7. Aqua Comments at 16. Aqua argued that No. 7 requires forward-looking statements in the application concerning whether the Company would propose to operate the acquired system as a stand-alone system or include it with a combined revenue requirement. *Id.* Aqua further argued that requiring this determination at the time of filing is speculative because the development of the Company’s future rate design will not occur at that time. *Id.*

PAWC argued that answers to data requests regarding future events will be speculative. PAWC Comments at 10. With regard to No. 7, PAWC noted that the Buyer’s next base rate case may be years away. *Id.* PAWC argued that No. 7 is premature at the time an application is filed.

**Reply Comments**

In response, the OCA argued that the question asks what the Buyer anticipates and does not lock in any particular response. OCA Reply Comments at 10. The OCA noted that it is important to understand what the Buyer anticipates, especially if the rate impact of the transaction is reasonable only if the buyer used the combined revenue requirement option. *Id.*

**Conclusion**

Contrary toAqua’s argument, Standard Data Request No. 7 does not require a determination as to whether a Buyer will include the acquired system in a combined revenue requirement in its next rate case. This data request asks only what the Buyer *anticipates* in the next base rate case. We note that a Buyer will not be penalized for answering that it has made no prediction regarding whether the acquired system will be included in a combined revenue requirement. However, where the Buyer anticipates that the acquired system will be included in a combined revenue requirement in the Buyer’s next rate case, we expect the Buyer to answer accordingly. In addition, as discussed above, this information will inform our review of filing materials required pursuant to Section 1329(d)(1).

**Standard Data Request No. 9**

In the TSIO, we proposed that Standard Data Request No. 9 seek to obtain the following information:

9. Are there any leases, easements, and access to public rights-of-way that Buyer will need in order to provide service which will not be conveyed at closing? If yes, identify when the conveyance will take place and whether there will be additional costs involved.

TSIO Appendix B at 3.

**Comments**

Aqua indicated that it opposes Standard Data Request No. 9 to the extent that the Buyer may not have received a completed title report from its title agent by the application date. Aqua Comments at 16. Aqua proposed to remove No. 9 from the list and that this question be issued in discovery by the parties. *Id.*

**Reply Comments**

The OCA argued that, if the Buyer has not received all of the information at the time of filing, the Buyer can list the information it has and indicate that it awaits additional information. OCA Reply Comments at 10-11. The OCA noted that the information requested in No. 9 is important because it is helpful to know what rights of way the Buyer needs to be able to provide service. *Id.* at 11.

PAWC stated that it agrees with Aqua that No. 9 should be removed from the Standard Data Requests and address at a later date during discovery. PAWC Reply Comments at 4. PAWC noted that the concern is that an application will be rejected for failing to provide information that is unavailable at the time the application is filed. *Id.*

**Conclusion**

As a threshold matter, the Commission wishes to know whether Buyers will have adequate control or access to facilities needed to provide safe, adequate, and reasonably reliable service in the acquired territory. This is an essential consideration related to the Commission’s public safety mandate under the Public Utility Code. If a buyer has not yet received a completed title report from its title agent by the filing date, the Buyer should indicate the same in response to Standard Data Request No. 9 and provide the information when it becomes available to the Buyer. The goal of the Standard Data Requests is to make the investigation an analysis of Section 1329 proceedings more efficient not only for parties, but also for the Commission itself. When the information requested in No. 9 is available at the time of filing, it should be provided at the outset of the proceeding. When this information is not available at the time of filing, the applicant must indicate as much.

**Standard Data Request No. 10**

In the TSIO, we proposed that Standard Data Request No. 10 seek to obtain the following information:

10. Provide a breakdown of the estimated transaction and closing costs. Provide invoices to support any transaction and closing costs that have already been incurred.

TSIO Appendix B at 4.

**Comments**

Aqua requested clarification that the breakdown referred to in Standard Data Request No. 10 will be provided in general categories, i.e., legal expense incurred and projected, UVE fees incurred and projected, and projected settlement costs to close the transaction. Aqua Comments at 17. Aqua also reiterated that final costs may vary from what is stated in the Standard Data Requests at the time of filing. *Id.*

PAWC noted that a claim for transaction and closing costs incurred during the acquisition may be included in the Buyer’s next rate case, but the amount of the transaction and closing costs are determined in the subsequent rate proceeding, rather than the application proceeding. PAWC Comments at 10. PAWC argued that the request for documentation of the transaction and closing costs in No. 10 is premature.

**Reply Comments**

Citing Section 1329(d)(1)(iv), the OCA argued that an applicant is required to include the transaction and closing costs incurred by the acquiring public utility that will be included in its rate base. OCA Reply Comments at 11. The OCA argued that No. 10 simply asks for a breakdown of the costs that are required to be included with the application and invoices for any costs that have already been incurred. *Id.* The OCA claimed that No. 10 is reasonable and consistent with statutory requirements. *Id.*

**Conclusion**

Section 1329 provides that, as an attachment to its application, the Buyer shall include an estimate of the transaction and closing costs incurred by the Buyer that will be included in its rate base. 66 Pa. C.S. § 1329(d)(iv). As to format, we believe that it is acceptable for the breakdown of transaction and closing costs referred to in Standard Data Request No. 10 to be provided in general categories. We recognize that the final transaction and closing costs may vary from the time of filing to the time of closing and note that the applicant should advise the Commission and the parties of any changes to its prior estimates. In addition, the language of Section 1329(d)(1)(iv) is mandatory, not permissive. As such, these estimated costs and expenses must be identified and disclosed as part of the Section 1329 application.

**Standard Data Request No. 11**

In the TSIO, we proposed that Standard Data Request No. 11 seek to obtain the following information:

11. Please describe general expense savings and efficiencies under Buyer’s ownership. State the basis for all assumptions used in developing these costs and provide all supporting documentation for the assumptions, if available.

TSIO Appendix B at 4.

**Comments**

Aqua indicated that it opposes Standard Data Request No. 11. Aqua Comments at 17. Aqua argued that No. 11 requests speculative information and that many efficiencies are realized through operation of the system. *Id.*

**Reply Comments**

The OCA argued that, if the Buyer projects any expense savings or efficiencies as part of the acquisition, the Buyer should be able to identify, describe, and support these efficiencies. OCA Reply Comments at 11. The OCA argued that No. 11 would require the Buyer to support its position and provide more than general statements that there are efficiencies as part of the transaction. *Id.*

The PMAA stated that it supports the TSIO to the extent that it required certain information regarding the transaction, including a description of general expense savings and efficiencies under the acquiring utility’s ownership, with which the Commission and customers of the acquiring utility can evaluate and analyze the costs and benefits of the transaction. PMAA Reply Comments at 3.

**Conclusion**

As it pertains to Aqua’s concerns regarding Standard Data Request No. 11, we direct that applicants describe the *known and anticipated* general expense savings and efficiencies under the Buyer’s ownership of the acquired system. Therefore, we modify the language of Standard Data Request No. 11 as follows:

11. Please describe known and anticipated general expense savings and efficiencies under Buyer’s ownership. State the basis for all assumptions used in developing these costs and provide all supporting documentation for the assumptions, if available.

*See* Appendix B at 4. Where there are no known general expense savings and efficiencies, the applicant should state that and describe anticipated general expense savings and efficiencies, if any. For both known and anticipated general expense savings and efficiencies, the applicant should provide the basis for all assumptions used in developing the costs and supporting documentation for the assumptions, if available.

**Standard Data Requests No. 13, 14 and 15**

In the TSIO, we proposed that Standard Data Requests No. 13, 14, and 15 seek to obtain the following information:

13. Please provide a copy of all proposals received by the Seller and any accompanying exhibits with respect to the proposed sale of the system.

14. Please provide a copy of any proposals or exhibits made by Buyer for the purchase of Seller that have not already been provided.

15. Has Buyer made any previous offer to purchase the Seller wastewater system? If yes, provide a copy of the offer and relevant communications.

TSIO Appendix B at 4.

**Comments**

Aqua stated that it opposes Standard Data Requests No. 13, 14, and 15. Aqua Comment at 17-18. With regard to No. 13, Aqua argued that the proposals received by the Seller may not be public information, protected by confidentiality, and could create competitive disadvantage between competing utilities. *Id.* Aqua further argued that these documents are in the possession of the Seller and may not be available to the buyer at the time of filing. *Id.* With regard to No. 14, Aqua noted that it has agreed to provide its request for proposal and that the request for proposal is the document that was considered by the Seller for the sale of the system. *Id.* Aqua argued that No. 14 as written is overly broad and could encompass a number of documents that are highly confidential, protected by attorney client privilege, or competitive in nature. *Id.* at 18. Similarly, Aqua argued that No. 15 as written is overly broad. *Id.* Aqua proposed that No. 15 be limited to the offer of the Buyer and the response of the Seller to that offer. *Id.*

**Reply Comments**

The OCA noted that No. 13 is directed to the Seller. OCA Reply Comments at 12. The OCA argued that, as a party to the Asset Purchase Agreement (APA), the Seller should be a party to the proceeding and that the Seller has been a party in each of the Section 1329 proceedings to date. *Id.* The OCA further argued that the Seller would be in the possession of the documents requested in No. 13 and could provide the documents pursuant to a confidentiality agreement. *Id.* The OCA argued that No. 14 could be clarified to address Aqua’s concerns by restricting the question to proposal or exhibits that were provided by the Buyer to the Seller. OCA Reply Comments at 12. With regard to No. 15, the OCA argued that that the question could be clarified to show that it is requesting communications between the Buyer and Seller and is not seeking any internal communications. *Id.*

PAWC stated generally that it questions the relevance of Standard Data Requests No. 13-15 to the issue before the Commission. PAWC Reply Comments at 5. PAWC argued that the Legislation has not given the Commission the authority to act as a super board of directors with regard to the business decisions of a utility’s management or authority to second-guess the judgment of municipal officials when selecting among several offers to purchase its assets. *Id.* PAWC argued that this information should not be requested in a data request applicable to all applications. *Id.*

**Conclusion**

We agree with Aqua and PAWC that Standard Data Request No. 13 should be eliminated. As Aqua noted, the proposals received by the Seller may be confidential between the bidders and the Seller and the bidders are not involved in the particular Section 1329 proceeding. This data request may result in unnecessary confidentiality concerns at this juncture of a Section 1329 proceeding. Therefore, we remove No. 13 from the Standard Data Requests. [[8]](#footnote-8) Moreover, the statute provides that the just, reasonable, and lawful amount of rate base shall be based on the lower of the purchase price or the fair market value.

We also agree with Aqua that the more pertinent document is the Buyer’s proposal for the purchase of the Seller’s system, which is the document that was considered by the Seller for the sale of the system. Accordingly, we modify Standard Data Request No. 14 (now, No. 13) to request only this information. This data request is revised as follows:

13. Please provide a copy of ~~any~~ the proposal~~s~~ ~~or~~ and exhibits ~~made by~~ of the Buyer for the purchase of Seller’s system ~~that have not already been provided~~.

*See* Appendix B at 4. This information along with the Seller’s proposal requested in Standard Data Request No. 12 is relevant to fully understand the nature of the transaction between the Buyer and Seller.

Moreover, we agree with Aqua that Standard Data Request No. 15 (now, No. 14) should be modified to clarify that we are requesting only the offer of the Buyer and the response of the Seller and we agree with the OCA that No. 15 is not requesting internal communications. The more relevant documents are the offer of the Buyer and the Seller’s response to that offer. Therefore, we revise this data request as follows:

14. ~~Has Buyer made any previous offer to purchase the Seller wastewater system? If yes, p~~Provide a copy of the Buyer’s offer to purchase the Seller’s system and ~~relevant communications~~ the Seller’s response to that offer.

*See* Appendix B at 4. Like Standard Data Requests No. 12 and 14, this information is pertinent to the development of a comprehensive understanding of the transaction for which the applicant is seeking approval under Section 1329.

Lastly, regarding concerns that the information requested in Nos. 14-15 may be confidential or proprietary, we reiterate that, when submitting confidential information, applicants should follow standard procedures for the filing of documents containing confidential information with the Commission. Applicants should also refer to the instructions for submitting confidential information provided in the Section 1329 Application Filing Checklist. *See* Appendix A at 7. Further, consistent with the Commission’s regulations at 52 Pa. Code § 1.32(b)(4), filings containing confidential information may not be filed electronically and the Commission will post only redacted, public versions on the electronic filing system.

**Standard Data Request No. 16**

In the TSIO, we proposed that Standard Data Request No. 16 seek to obtain the following information:

16. For each UVE in this case, please provide the following:

1. A list of valuations of utility property performed by the UVE;
2. A list of appraisals of utility property performed by the UVE;
3. A list of all dockets in which the UVE submitted testimony to a public utility commission related to the appraisal of utility property; and
4. An electronic copy of any testimony in which the UVE testified on fair value acquisitions.

TSIO Appendix B at 4.

**Comments**

Aqua stated that it opposes Standard Data Request Nos. 16.a-d. Aqua Comments at 18. Aqua argued that valuations and appraisals of utility property are private engagements and that public disclosure may not be acceptable. Id. Aqua claimed that, for Section 1329 applications before the Commission, a listing of docket numbers should be sufficient. *Id.* Aqua further argued that for valuations/appraisals not before the Commission, the Company can provide docket numbers of the relevant proceedings. *Id.* Aqua also requested clarification that, if testimony is provided orally in a proceeding, the Company and the UVE may not have access to the relevant transcript. *Id.*

PAWC argued that, with regard to No. 16.d, requesting an electronic copy of any testimony in which the UVE testified on fair value acquisitions, seems unnecessary. PAWC Comments at 11. PAWC argued that it does not see why TUS needs this information. *Id.* PAWC also argued that listing all dockets in which a UVE submitted testimony to a public utility commission related to the appraisal of utility property is adequate. *Id.* Further, PAWC argued that the cost of No. 16.d outweighs the benefits.

**Reply Comments**

In response to Aqua’s comments, the OCA suggested that, if the appraisals are private and not part of the public proceeding, the information could be redacted, and a description could be given. OCA Reply Comments at 13. The OCA argued that the docket numbers would not be sufficient because testimony is not posted on the Commission’s website. *Id.* In addition, the OCA noted that electronic links for other jurisdictions where the UVE testified would be acceptable. *Id.* The OCA also noted that the UVE has this information readily available and providing it would not be burdensome. *Id.* In response to PAWC’s comments, the OCA argued that the information sought by the Standard Data Requests is not only for TUS. *Id.* The OCA noted that the cost for the UVE to provide the information is minimal given that the UVEs keep this information as a normal part of business and that No. 13 allows electronic submission of this information. *Id.*

**Conclusion**

We agree with the OCA that the cost to provide the information requested in Standard Data Request No. 16.a-d is minimal given that UVEs retain this information in the course of business, typically in a curriculum vitae. If the information requested in 16.a-c is already provided with the application, such as in a curriculum vitae attached to the UVE’s testimony, the applicant may simply point to the location of that information. To address PAWC’s concerns regarding No. 16.d, we believe that limiting copies of testimony to those from only the past two years is reasonable and appropriate. In addition, we agree with the OCA that electronic links in lieu of electronic copies of testimony are acceptable. We revise No. 16.d (now, No. 15.d) as follows:

15. For each UVE in this case, please provide the following, if not already provided:

. . .

1. An electronic copy of or electronic link to ~~any~~ testimony in which the UVE testified on public utility fair value acquisitions in the past two years.

*See* Appendix B at 4. Further, with regard to Aqua’s concerns regarding this data request, we note that, if the testimony was provided orally and the applicant and the UVE do not have access to the testimony, the applicant should note the same.

**Standard Data Requests No. 26 and 27**

In the TSIO, we proposed that Standard Data Requests No. 26 and 27 seek to obtain the following information:

26. Are there any outstanding compliance issues that the Seller’s system has pending with the PA Department of Environmental Protection. If yes, provide the following information:

1. Identify the compliance issue(s);
2. Provide an estimated date of compliance;
3. Explain Buyer’s plan for remediation;
4. Provide Buyer’s estimated costs for remediation; and,
5. Indicate whether the cost of remediation was factored into either or both fair market valuation appraisals offered in this proceeding.

27. Are there any outstanding compliance issues that the Seller’s system has pending with the US Environmental Protection Agency. If yes, provide the following information:

1. Identify the compliance issue(s);
2. Provide an estimated date of compliance;
3. Explain Buyer’s plan for remediation;
4. Provide Buyer’s estimated costs for remediation; and
5. Indicate whether the cost of remediation was factored into either or both fair market valuation appraisals offered in this proceeding.

TSIO Appendix B at 5-6.

**Comments**

Aqua stated that it does not oppose Standard Data Requests No. 26 and 27 concerning a general description of the potential environmental compliance issues of the system and a general outline of any plans that the Company may have for fixing the compliance issues. Aqua Comments at 19-20. Aqua stated that it opposes providing estimated dates of compliance, plans for remediation, estimated costs of remediation, and if those costs were factor in the appraisals. *Id.* at 20. Aqua claimed that it will not have incurred the expense at the time of filing to have an engineer develop an engineering study on the compliance issues and provide options and alternatives to remediating the compliance issues along with the associated costs. *Id.* Aqua suggested that compliance be generally discussed as the specifics will not be known at the time of filing. *Id.* at 20, 21.

**Reply Comments**

With regard to No. 26, the OCA argued that No. 26.a and 26.b may be addressed in the APA’s appendices. OCA Reply Comments at 14. In addition, the OCA argued that it seems likely that the Buyer would have made some estimate of plans for remediation and costs so that it understood what exposure it would have related to compliance issues. *Id.* The OCA argued that this does not required an engineering study. *Id.* The OCA also argued that whether the UVEs factored the cost of remediation into their appraisals should be readily known based on the appraisals. *Id.* The OCA further noted that Aqua’s opposition to No. 27 is unfounded for the same reasons. *Id.*

**Conclusion**

Initially, we correct numbering of the Standard Data Requests No. 26 and No. 27 in the TSIO, which are now properly labeled as No. 20 and 21. *See* Appendix B at 5.   
However, we refer to these as No. 26 and 27 above to avoid confusion as parties referred to the same in comments and reply comments. Below we refer to these data requests as Standard Data Requests No. 20 and 21 to align with Appendix B.

As with other data requests discussed above, we note that Standard Data Requests No. 20.b-e and 21.b-e are intended to request only estimates (at minimum). Accordingly, we make the following revisions to No. 20 and 21:

20. Are there any outstanding compliance issues that the Seller’s system has pending with the PA Department of Environmental Protection. If yes, provide the following information:

. . .

1. Explain Buyer’s anticipated or actual plan for remediation;

. . .

1. Indicate whether the cost of remediation was or is anticipated to be factored into either or both fair market valuation appraisals offered in this proceeding.

21. Are there any outstanding compliance issues that the Seller’s system has pending with the US Environmental Protection Agency. If yes, provide the following information:

. . .

1. Explain Buyer’s anticipated or actual plan for remediation;

. . .

1. Indicate whether the cost of remediation was or is anticipated to be factored into either or both fair market valuation appraisals offered in this proceeding.

*See* Appendix B at 5-6. We ask that Section 1329 applicants make a good faith effort to provide this information to the extent that it exists at the time of filing.

**The Uniform Standards of Professional Appraisal Practice**

In the TSIO, the Commission discussed the potential for substantial variances in the fair market valuation of the same properties due to inconsistent assumptions or flaws in appraisal methodology. To the extent that we can establish appropriate guidelines and consistent assumptions for UVE appraisals, it can be expected that variances in the fair market value appraisals for the same property can be reduced, and concomitantly, the Commission and stakeholders can have more confidence in the reasonableness of the negotiated purchase price.

The Commission invited stakeholders to discuss the range of values in Section 1329 proceedings to date and comment on whether the Commission should use that data as a “check” on the reasonableness of the negotiated purchase price. For instance, if an acquiring public utility’s average rate base per customer were approximately $3,500, what multiple of that amount represents a reasonable acquisition price, given that a Section 1329 fair market value implicitly endorses that some acquisition subsidy will occur?

In addition, the Commission recognized that the Appraisal Standard Board updates the Uniform Standards of Professional Appraisal Practice (USPAP) every two years. The Commission interpreted the language of Section 1329(a)(3) to mandate that UVEs verify the use of the current edition effective when the UVE developed the submitted appraisal. The TSIO concluded that appraisals based on outdated or expired versions of the USPAP cannot support valuations under Section 1329 and will not be accepted as competent evidence.

**Comments**

With regard to the use of a range of values, Aqua proposed that ratemaking rate base requests exceeding $15,000 net plant per customer should be more thoroughly reviewed by the Commission for whether such a transaction would be in the public interest. Aqua Comments at 21-22. For ratemaking rate base requests between $7,500 and $15,000 net plant per customer, Aqua proposed that the Commission require documentation of the stand-alone rate impact of such request on the acquired customers. *Id.* at 22. Aqua further proposed that a ratemaking rate base request that is $7,500 and below should garner less scrutiny from the Commission and provide an additional data point that such a transaction is likely to be in the public interest. *Id.* Aqua also indicated that it agrees that the most recent version of the USPAP should be used. *Id.*

BIE strongly discouraged the use of a range of values from previous Section 1329 proceedings as a check on the reasonableness of a negotiated purchase price. BIE Comments at 6. BIE claimed that using a range of values is arbitrary due to the differing circumstances of individual system value. *Id.* BIE argued that each system to be acquired should be assessed on the specific facts and circumstances related to the system, such as size, customer count, and compliance with environmental standards, which have an effect on the average rate base cost per customer. *Id.* In addition,BIE argued that there have not been enough Section 1329 proceedings to create such a range of values. *Id.* BIE claimed that using a range of values could arbitrarily inflate purchase prices, thereby harming ratepayers who pay for the return of and on the rate base. *Id.*

HRG commented that it has reservations regarding the Commission drawing conclusions based on previously complete valuation proceedings. HRG Comments at 1. HRG argued that the number of completed Section 1329 proceedings may be a relatively small data set from which to draw any fair and reasonable conclusions. *Id.* at 1-2. HRG noted that, after a few more years of completed proceedings, some type of statistical deviation/model could be produced with a larger data set. *Id.* at 2. HRG also argued that location has an impact on price such that two identical systems – one in an urban area and one in a rural area – could have different valuations because of original cost. *Id.* In addition, HRG claimed that it is noticing a possible trend for transactions with a plant and transactions that are strictly collection and conveyance/distribution systems, but that fair and reasonable conclusions cannot be drawn without a larger data set. *Id.* Moreover, HRG argued that the number of customers may not be the best means for checking the reasonableness of a negotiated purchase price.

The OCA stated that it is concerned that the use of a standard net plant per customer amount or metric is not reasonable outside of each application. OCA Comments at 8. The OCA argued that the facts of each case must be considered and the cost per customer amount must be put into context. *Id.* The OCA argued that such considerations cannot be applied generally to all 1329 acquisitions. *Id.* at 9. The OCA also claimed that future costs may vary depending on whether the buyer needs to invest money in the acquired system and whether there are provisions in the APA that could prevent future costs from being allocated to the acquired customers. *Id.* Lastly, the OCA stated that it agrees that the most recent version of the USPAP should be used. *Id.*

**Reply Comments**

Aqua reiterated its proposals for ratemaking rate base requests exceeding $15,000, between $7,500 and $15,000, and at or below $7,500. Aqua Reply Comments at 5.

BIE argued that Aqua’s proposal fails to consider that each system to be acquired has differing circumstances, characteristics, and challenges, including size, customer count, compliance with environmental standards, and location, which would impact the net plant per customer. BIE Reply Comments at 6. BIE argued that solely because a system’s net plant per customer is valued under $15,000 does not mean the transaction is more likely to be in the public interest and should receive less scrutiny. *Id.* BIE argued that no conclusive determinations should be made simply because of the net plant per customer. *Id.* Further, BIE maintained that each acquisition should be analyzed based on its own individual facts and circumstances. *Id.*

The OCA reiterated that it does not support generic criteria for deciding what kind of review an application should receive. OCA Reply Comments at 15. The OCA argued that the cost per customer is only one piece of a very large puzzle. *Id.* The OCA noted that, if a system is dilapidated and requires rehabilitation, $7,500 or even $4,000 per customer could be excessive. *Id.* The OCA claimed that there is a similar problem with comparing the average cost per acquired customer to the existing cost per customer. *Id.* The OCA argued that the cost per customer simply does not address the validity of the appraisals, the reasonableness of the purchase price of the acquired system, or the standards for approval of such applications.

PAWC stated that it agrees with BIE’s opposition to the use of a range of values. PAWC Reply Comments at 11. PAWC claimed that Section 1329 is clear that the average of two UVE valuations is to be used as a check on the negotiated purchase price and that other data points should not be used for that purpose. *Id.* PAWC argued that every transaction is different, and that it is inappropriate to use the range of values from prior Section 1329 proceedings as a check on the reasonableness of the negotiated purchase price. *Id.*  Further, PAWC stated that it agrees that UVEs should be required to use the version of the USPAP in effect at the time they perform their evaluation. *Id.* at 13.

**Conclusion**

First, we note that Section 1329 does not contain valuation guardrails. We also agree with BIE and HRG that, to date, there have not been not enough proceedings under Section 1329 to establish a reliable range of values and that the present number of proceedings is a relatively small data set from which to draw conclusions. Therefore, we decline to use a range of values as a check on the reasonableness of a negotiated purchase price at this time. We decline to adopt Aqua’s proposals for these reasons. Nonetheless, the Commission is not opposed to revisiting this issue in the future when a larger set of data points are available for water and wastewater system acquisitions in a variety of sizes, locations, and circumstances.

Additionally, the parties generally agree that UVEs should use the most recent version of the USPAP. As provided in the TSIO and above, we interpret Section 1329(a)(3) to mandate that UVEs verify the use of the USPAP edition effective when the UVE developed the submitted appraisal. Our interpretation of this Section remains intact. Appraisals based on outdated or expired versions of the USPAP cannot support valuations under Section 1329 and will not be accepted as competent evidence.

**Jurisdictional Exceptions**

In the TSIO, we proposed to establish several jurisdictional exceptions that UVEs will apply when developing the cost, income, and market valuation approaches pursuant to the USPAP as required of Section 1329 appraisals. Consistent with the USPAP’s Jurisdictional Exception Rule, we proposed these jurisdictional exceptions in order to establish appropriate guidelines and consistent assumptions for Section 1329 appraisals by UVEs, comply with Commission precedent, and reduce variances in the fair market value appraisals for the same property. In conjunction with the TSIO, we provided Additional Guidelines for Utility Valuation Experts (Additional Guidelines), including jurisdictional exceptions under the cost, income, and market approaches.

Below we first address comments and reply comments on the Additional Guidelines in their entirety. We then address comments and reply comments regarding the jurisdictional exceptions for the cost, income, or market approaches specifically. Portions of the Additional Guidelines that did not generate comment remain intact and will not be addressed further herein. A copy of the final Additional Guidelines, including jurisdictional exceptions, is attached hereto as Appendix C.

**Comments**

Regarding the Additional Guidelines, Aqua requested clarification that the fee referenced in No. 3.c is limited to 2.5% is for each UVE and totals 5% consistent with Section 1329(b)(3). Aqua Comments at 23. In addition, Aqua argued that, with regard to other minor jurisdictional exceptions in Pennsylvania, if a minor jurisdictional exception is missed by a UVE, it should not invalidate the UVE’s report. *Id.* at 26.

BIE stated that it supports the Additional Guidelines for Utility Valuation Experts and the jurisdictional exceptions. BIE Comments at 5. BIE noted that the list is not exhaustive and that the list is comprised only of exclusions that interested parties have experienced in Section 1329 applications to date. *Id.* BIE argued that the list should be considered a living document in which stakeholders can add or amend exclusions that may arise in future applications. *Id.*

PAWC indicated concern about the procedure by which the Commission might create future jurisdictional exceptions. PAWC Comments at 11. PAWC claimed that, since jurisdictional exceptions have state-wide application, they should not be adopted in a specific case involving a limited number of parties. *Id.* PAWC argued that they should be adopted through a proceeding, such as a supplemental implementation order or a policy statement proceeding, in which all interested parties are provided notice and an opportunity to be heard. *Id.*

**Reply Comments**

BIE indicated that it disagrees with PAWC’s suggestion that the jurisdictional exceptions only be adopted through a proceeding such a supplemental implementation order or policy statement and not through specific cases. BIE Reply Comments at 5. BIE argued that the list should have the ability to be modified so that, when an application sheds light upon a new issue, it can potentially be added to this list. *Id.* BIE argued that adopting PAWC’s position may severely limit the parties to Section 1329 proceedings in their ability to review filings and make recommendations. *Id.*

PAWC requested that the Commission clarify that an order should only be considered a jurisdictional exception where it is an order of general applicability in a proceeding in which all interested parties have been afforded due process on the jurisdictional exception in question. PAWC Reply Comments at 10. PAWC argued that the approval of a settlement agreement between one utility and the statutory advocates should not establish a jurisdictional exception that is binding on all utilities. *Id.*

**Conclusion**

As it pertains to the Additional Guidelines generally, No. 3.c states that UVEs, along with Seller and Buyer, must establish that *a* UVE fee is limited to 2.5% of fair market value. Appendix C at 1. Further, Section 1329(b)(3) provides that “Fees eligible for inclusion may be of an amount not exceeding 5% of the fair market value of the selling utility or a fee approved by the commission. 66 Pa. C.S. § 1329(b)(3). The total fee for both UVEs is 5%. We agree with Aqua that the fee referenced here means 2.5% for each UVE. Further clarification is unnecessary.

Regarding Aqua’s concern that a UVE may inadvertently overlook a minor jurisdictional exception, we expect UVEs to make a good faith effort to adhere to all jurisdictional exceptions but understand that an unintentional omission is possible. If a UVE overlooks a minor jurisdictional exception, we expect the UVE to promptly notify the parties and correct the error. Patterns of omission that significantly impact the accuracy of an appraisal should be evaluated on a case-by-case basis.

In terms of jurisdictional exceptions that may not be included in the Additional Guidelines, we agree with BIE that the list is not exhaustive. As stated in the TSIO, there are other minor jurisdictional exceptions, such as recovery of public fire hydrant costs in utility rates pursuant to 66 Pa. C.S. § 1328, that are not explicitly included in the list. UVEs should be cognizant of the peculiar facets of Pennsylvania law and adjust appraisals accordingly. A Section 1329 appraisal is compliant with the USPAP, when it resolves a conflict between the USPAP and Pennsylvania law by giving preference to Pennsylvania law. The list in the Additional Guidelines is intended to serve as a guide to highlight some of the major jurisdictional exceptions in Pennsylvania that have arisen in Section 1329 proceedings to date; it is not comprehensive. The application of additional jurisdictional exceptions may be necessary in a particular appraisal depending on the circumstances of that transaction. However, in future cases, a settlement agreement between one utility and the statutory advocates in a particular case will not automatically bind other utilities to the jurisdictional exceptions contained therein. To the extent that a stakeholder believes that the Commission should modify its jurisdictional guidelines, it is free to petition for modification at any time.

**Cost, Income, and Market Approaches**

The cost approach measures value by determining the amount of money required to replace or reproduce future service capability of the system; this approach develops the total cost less accrued depreciation. In the TSIO, we provided:

1. Cost approach may measure value by:

1. determining investment required to replace or reproduce future service capability
2. developing total cost less accrued depreciation for Selling Utility assets
3. determining the original cost of the system

2. Cost approach materials shall:

1. explain choice of reproduction cost vs. replacement cost
2. not adjust the cost of land by the ENR index
3. exclude overhead costs, future capital improvements, and going concern value
4. use consistent rate of inflation for all classes of assets, unless reasonably justified

TSIO Appendix C at 2.

The income approach is based on the principle that capitalizing or discounting the future income stream to a present value can indicate the value of a business. Two methods can be used: capitalization of earning or cash flow or the discounted cash flow (DCF) method. In the TSIO, we provided:

1. Income approach may measure value by:

1. Capitalization of earnings or cash flow
2. Discounted cash flow (DCF) method

2. Income approach materials shall exclude:

1. Going concern value
2. Future capital improvements
3. Erosion of cash flow
4. Rate base/rate of return estimates

TSIO Appendix C at 2.

The market approach is based on the principle that the value of the system to be acquired can be estimated by comparison to the market value of companies in the same or similar line of business (market multiples method), or comparison to the purchases or sales of businesses in the same or similar line of business (selected transactions method). In the TSIO we provided:

1. Market approach shall use the current customer count of the Selling Utility

2. Market approach shall exclude:

1. Future capital improvements
2. Any type of adjustment or adder in the nature of “going concern” or goodwill

TSIO Appendix C at 2.

**Comments**

For the cost approach, Aqua requested clarification that, in No. 1.b, the total cost less depreciation is not the only value to establish the cost approach. Aqua Comments at 24. Aqua also requested clarification that, in No. 1.c, the original cost is not the only value to establish the cost approach. *Id.* For the income approach,Aqua stated that it opposes No. 2.b. *Id.* at 25. Aqua argued that future capital improvements are used in the development of the DCF method and that capital improvements are considered and subtracted out in the development of the Debt Free Net Cash Flows. *Id.* Aqua argued that excluding future capital improvement from consideration in developing the DCF method will artificially increase the overall income approach value. *Id.*

For the cost approach, CWA argued that this approach should identify the original cost of land when first dedicated to utility service. CWA Comments at 3. CWA argued that, because the value of land is not depreciable, the current value of land should not be included in the valuation of the acquired system, nor should the value of the land be factored by the ENR index or any other index. *Id.* CWA also argued that the UVEs should explain what depreciation rates were used to estimate accrued deprecation and explain if those rates differ from the Commission authorized rates for the Buyer. *Id.*

The OCA proposed modifications and additions to the jurisdictional exceptions

for the cost, market, and income approach. First, for all approaches, the OCA proposed the following addition:

1. The going concern, overhead, and provision for erosion of cash flow or return add ons shall not be used or included in appraisals.

OCA Comments, Attachment B at 2. Next, for the cost approach, the OCA proposed the following addition:

If the reproduction cost methodology is used, valuation of the collection mains will not be treated differently or as special circumstance unless reasonably justified.

OCA Comments, Attachment B at 1.For the income approach, the OCA proposed the following modifications and additions:

2. Income approach materials shall exclude:

. . .

1. Erosion of cash flow or erosion on return
2. Rate base/rate of return methodology

3. Calculations done under the Income Approach will clearly describe the basis for discount rate(s) in the report rather than only in the exhibits. The following information should be provided about the discount rate(s) used:

1. The capital structure used in the analysis with an explanation as to why the capital structure was selected. If Company’s actual capital structure was not used, explain why.
2. The cost of equity used in the analysis, and the basis for the cost of equity.
3. The cost of debt used in the analysis. If the Company’s actual cost of debt was not used, explain why not.

4. If a capitalization rate is used, the calculation of the capitalization rate and the basis for the growth rate will be disclosed and fully explained.

OCA Comments, Attachment B at 2. Lastly, for the market approach, the OCA proposed the following additions:

3. Speculative growth adjustments will not be used, consistent with *New Garden* (Order pp. 52-53). U.S. Census Data and relevant and applicable regional planning commission reports may be used as a basis to determine growth in a subject area. OCA reserved the right to challenge the specific use of the data in each case.

4. The proxy group used for calculating market value should not be limited to only companies which engage in Pennsylvania fair market value acquisitions. Aqua agrees that it will provide the terms of this agreement to any UVE prior to engaging the UVE.

5. Net book financials multiplier shall not be used.

6. Comparable sales used to establish the valuation should not be limited to those that the UVE previously appraised.

7. Comparable sales used to establish the valuation should use the current customers.

8. Comparable sales used to establish the valuation should not include the value of future capital improvement projects.

*Id.* The OCA claimed that its proposed jurisdictional exceptions are based on cases that have been filed to date under Section 1329. OCA Comments at 9. The OCA argued that its proposed jurisdictional exceptions are reasonable and should be adopted.  *Id.*

For the cost approach, HRG argued that overhead costs should be permitted in   
No. 2.c. HRG Comments at 2. HRG noted that overhead costs include engineering, review fees, legal fees, permitting, surveying, financing, and construction administration and inspection. *Id.* HRG argued that overhead costs are required to replace the same facilities prior to the actual construction cost of the sanitary sewers. *Id.* HRG claimed that, depending on size, an overhead percentage in the range of 30% to 35% covers the soft cost of the project. *Id.* HRG claimed that the total project cost includes the cost to physically construct the asset along with overhead costs, which are integral to the project and necessary for what is physically constructed to properly function, meet regulatory requirement, and have the legal ability to be installed. *Id.* HRG argued that soft costs are fundamental in reproducing the system and it would be improper not to include these costs. *Id.* HRG argued that the Commission should consider allowing 25% to 30% of overhead costs, which is a conservative estimate, to be included in the cost approach. *Id.*

**Reply Comments**

Aqua stated that it generally does not oppose the OCA’s modifications and additions as the language largely tracks prior settlement agreements on file with the Commission. Aqua Reply Comments at 5-6.

For the cost approach, the OCA argued that overhead costs should not be added to the known original cost. OCA Reply Comments at 15. The OCA argued that, if there were a situation where overhead costs were warranted, the UVE should demonstrate that overhead costs are definitively not already part of the original cost and provide an actual breakdown of overhead costs incurred. *Id.* at 15-16. The OCA claimed that simply using a percentage of the cost of the mains is speculative and not sufficient. *Id.*

PAWC stated that it agrees with HRG that, for the cost approach, the phrasing of No. 2.c should be “exclude overhead cost add-on.” PAWC Reply Comments at 17. PAWC claims that the phrase “overhead cost add-on” is consistent with the language used in Section 1329 settlements involving PAWC and Aqua. *Id.* PAWC argued that, generally, overhead costs are capitalized and included in the overall costs of a construction project and, when the construction project is placed in service, the overhead costs are then allocated to the major asset components of the project. *Id.* PAWC argued that, as a result, overhead costs should be included in the original cost of assets. *Id.*

Additionally, PAWC stated that it objects to the OCA’s proposed No. 3 and 4 for the market approach and proposed No. 3 and 4 for the income approach. PAWC Reply Comments at 10. PAWC argued that, if included at all, these items are more appropriately included in the Additional Guidelines. *Id.* PAWC claimed that proposed No. 3 and 4 for the market approach seem to be taken verbatim from a settlement agreement and should be edited before becoming applicable on a state-wide basis. *Id.* PAWC also claimed that proposed No. 4 for the income approach does not appear necessary to resolve a conflict between the USPAP and Pennsylvania law. *Id.*

**Conclusion**

First, as to Aqua’s concern regarding the cost approach, we note that No. 1 makes clear that the total cost less deprecation referenced in No. 1.b is only one measure of value. Likewise, the original cost referenced in No. 1.c is only one measure of value. As for CWA’s concerns regarding this approach, we note that No. 2.b states that cost approach materials shall *not* adjust the cost of land by the ENR index.

Next, we generally accept the OCA’s proposed modifications and additions to the jurisdictional exceptions, including those applicable to all approaches as well as those applicable to the cost, income, and market approaches individually. We note that these modifications and additions are based largely on adjustments accepted by the Commission in prior Section 1329 proceedings. For instance, speculative growth adjustments should not be used. We also note that, for this reason, Aqua does not oppose these modifications and additions. Additionally, we agree with PAWC’s recommendation to revise proposed No. 3 and No. 4 under the market and income approaches by eliminating references to specific utilities or parties as the jurisdictional exceptions are intended to be applicable to all Section 1329 proceedings. The list of revised jurisdictional exceptions is follows:

**Jurisdictional Exceptions**

As a general matter, going concern, overhead, and erosion of cash flow or return add-ons shall not be included in appraisals under the cost, income, or market approaches.

**Cost Approach**

. . .

2. Cost approach materials shall:

1. explain choice of reproduction cost vs. replacement cost

i. If the reproduction cost methodology is used, valuation of the collection mains will not be treated differently or as special circumstance, unless reasonably justified.

. . .

**Income Approach**

. . .

2. Income approach materials shall exclude:

. . .

1. erosion of cash flow or erosion on return
2. rate base/rate of return ~~estimates~~ methodology

3. Calculations done under the income approach will clearly describe the basis for discount rate(s) in the report rather than only in the exhibits. The following information should be provided about the discount rate(s) used:

1. the capital structure used in the analysis with an explanation as to why the capital structure was selected

i. If Company’s actual capital structure was not used, explain why.

1. the cost of equity used in the analysis, and the basis for the cost of equity
2. the cost of debt used in the analysis

i. If the Company’s actual cost of debt was not used, explain why not.

4. If a capitalization rate is used, the calculation of the capitalization rate and the basis for the growth rate will be disclosed and fully explained.

**Market Approach**

. . .

2. Market approach shall exclude:

. . .

1. Any type of adjustment or adder in the nature of ~~“going concern” or~~ goodwill.

3. Speculative growth adjustments will not be used.  
U.S. Census Data and relevant and applicable regional planning commission reports may be used as a basis to determine growth in a subject area.

4. The proxy group used for calculating market value should not be limited to only companies which engage in Pennsylvania fair market value acquisitions.

5. Net book financials multiplier shall not be used.

6. Comparable sales used to establish the valuation should not be limited to those that the UVE previously appraised.

7. Comparable sales used to establish the valuation should use the current customers.

8. Comparable sales used to establish the valuation should not include the value of future capital improvement projects.

*See* Appendix C at 2-3.

Lastly, we reiterate that, while the Additional Guidelines include many jurisdictional exceptions that have arisen in Section 1329 proceedings thus far, the list is not comprehensive, and the application of additional jurisdictional exceptions may be necessary in a particular Section 1329 valuation based on the circumstances of the transaction at issue.

**UVE Direct Testimony**

In the TSIO, we concluded that, as experts testifying to the valuation of rate base assets, UVEs must submit written direct testimony in support of any appraisal completed pursuant to Section 1329(a)(5) and submitted in support of a request for fair market valuation for rate setting purposes. We directed that UVE direct testimony be filed as part of the application as set forth in the Application Filing Checklist. To assist Buyers, Sellers, and UVEs, we included with the TSIO a direct testimony template and examples of the types of substantive issues that UVEs should address in direct testimony. *See* TSIO Appendix D. We directed that UVEs submit written direct testimony substantially in the form of Appendix D, and at minimum, addressing the topics contained therein. We asked stakeholders to provide comments on how the template may be improved to make Section 1329 applications more efficient for applicants, litigants, and the Commission.

**Comments**

Aqua stated that it does not oppose providing direct testimony of the UVEs with the application. Aqua Comments at 26. Aqua argued that the sample UVE direct testimony included with the TSIO is a guide for UVEs and that testimony provided by the UVEs that does not exactly mirror the question and answer in that sample should not be considered deficient in determining whether an application is complete. *Id.*

BIE noted that, previously, the Seller’s UVE direct testimony was not introduced at the outset of the case and was submitted on the same date as rebuttal testimony. BIE Comments at 7. BIE argued that all testimony supporting the application should be introduced with the application to give all parties a fair opportunity for thorough investigation. *Id.* BIE also argued that it is important that UVE testimony cover the substantive issues within Appendix D to streamline the process and reduce the need for discovery. *Id.* BIE claimed that, if UVE testimony adheres to Appendix D as a baseline, parties will be able to quickly determine whether applicants meet minimum compliance with Section 1329. *Id.* at 7-8. Further, BIE noted that Appendix D asks the UVE to identify how they determined a value under the cost, income, and market approach and to provide an explanation for the weighting given to each approach. *Id.* at 8. BIE argued that the weighting methodology used by the UVE can have a significant impact on the resulting acquisition price and should be supported thoroughly by the UVE. *Id.*

The OCA indicated that it strongly supports the Commission’s requirement that UVE testimony must be provided with the application and in the same format required of expert witnesses. OCA Comments at 10. The OCA noted its support for the suggestion in the model UVE testimony that the UVE state whether the UVE has any affiliation with either the Seller or the Buyer. *Id.* The OCA argued that the Commission’s directives regarding UVE testimony permit all stakeholders to better understand the basis of the UVEs recommendations and analyses and, as a result, will help to reduce discovery and streamline the issues raised in testimony. *Id.* The OCA proposed minor wording changes to the direct testimony template. *See* OCA Comments, Attachment C.

PAWC made arguments similar to those raised with regard to Items 13 and 14. *See* PAWC Comments at 3. PAWC commented that a UVE is independent of the entity hiring it and that a Buyer or Seller cannot dictate to its UVE what the fair market valuation will conclude or what the UVE will say in its testimony. PAWC Comments at 7. PAWC argued that the TSIO should make clear that a Buyer or Seller may challenge the testimony and report of its own UVE and the other party’s UVE, if so desired. *Id.*

**Reply Comments**

Aqua indicated that it does not oppose the changes suggested by the OCA. Aqua Reply Comments at 6. Aqua reiterated that the sample UVE direct testimony included with the TSIO is a guide for UVEs. *Id.*

In response to PAWC’s arguments, BIE noted that it understands that filing the Seller’s testimony with the application could potentially create an issue if the Buyer wants to challenge the Seller’s testimony, as the Buyer and Seller are two distinct parties to the litigation. BIE Reply Comments at 6. BIE reiterated that it strongly supports the requirement that all UVE testimony be provided at the time an application is filed. *Id.*

In response to PAWC’s arguments, the OCA noted that, if the Seller declines to intervene and the Buyer declines to sponsor the Seller’s testimony, one solution is to join the Seller as an indispensable party. OCA Reply Comments at 16.

PAWC stated that it has no objections to the OCA’s proposed changes. PAWC Reply Comments at 10. PAWC requested that the Commission clarify that the suggested language in the template is only a suggestion. *Id.* at 11. PAWC argued that UVEs may modify the template as necessary and appropriate in any particular case. *Id.*

**Conclusion**

Regarding Aqua’s concern that UVE testimony that does not mirror the template will be considered deficient in determining whether an application is complete, we reiterate that TUS does not review the veracity or substantive quality of information that an applicant may submit to fulfill the threshold requirements of the Application Filing Checklist. TSIO at 15. A non-material variation from the template alone shall not be grounds for a determination that a filing is insufficient.

As for concerns regarding UVE variance from the template, we note that the template is intended to serve as a starting point for UVEs to develop suitable testimony. As stated in the TSIO and above, UVEs registered pursuant to 66 Pa. C.S. § 1329(a)(1) shall submit written direct testimony substantially in the form of Appendix D, and at a minimum, addressing the topics contained in Appendix D. The template may be used by UVEs to establish minimum compliance. While the template provides a baseline for UVE direct testimony, UVEs may and are expected to expand upon the template as necessary to properly address the nuances of a particular transaction.

With regard to the OCA’s proposed minor wording changes to the template, we note that the proposed changes are unopposed, and we adopt several of these changes. A copy of the final UVE direct testimony template is attached hereto as Appendix D.

**Issues Not Identified in the TSIO for Review and Modification**

As noted above, in the TSIO, we sought comments and recommendations regarding the Commission’s proposals to improve the processes, evidence, and guidelines for Section 1329 applications. We noted that only certain areas of the FIO were subject to review and modification and that we would address only those areas.

In comments, supplemental comments, and reply comments, some parties discussed issues not identified in the TSIO as areas of the FIO subject to review and modification. At this time, we decline to revise the FIO as to these issues, which include, *inter alia*, the use of a single application for water and wastewater acquisitions, the establishment of a 30-day review period for appeals of staff determinations to reject incomplete applications, the scope and standard of the Commission’s review and analysis, and the burden of proof for applicants. We note that the majority of these issues have been addressed in prior proceedings and Commission orders involving Section 1329. Moreover, the TSIO is clear that we will revise only the areas of the FIO identified therein.

**Conclusion**

While Section 1329 of the Pennsylvania Public Utility Code has proven useful as a tool to ensure that the price paid for public business assets by private interests reflects market rates, it is not without its challenges. The Commission seeks to improve existing procedures and guidelines to create more certainty in the process, improve the quality of valuations, ensure that the adjudication process is both fair and efficient, and, ultimately, reduce litigation regarding the Commission’s final determinations. This Final Supplemental Implementation Order sets forth the procedures and guidelines necessary to achieve those goals; **THEREFORE,**

**IT IS ORDERED:**

1. That the Commission hereby adopts the procedures and guidelines set forth herein.

2. That the Commission hereby adopts the Section 1329 Application Filing Checklist attached as Appendix A and as set forth herein.

3. That the Commission hereby adopts the Section 1329 Application Standard Data Requests attached as Appendix B and as set forth herein.

4. That in addition to others as may be appropriate, the Commission hereby adopts the Additional Guidelines for Utility Valuation Experts, including the jurisdictional exceptions to the Uniform Standards of Professional Appraisal Practice, attached as Appendix C and as set forth herein.

5. That the Commission concludes that Utility Valuation Experts registered pursuant to 66 Pa. C.S. § 1329(a)(1) shall submit written direct testimony substantially in the form of Appendix D, and at minimum, addressing the topics contained in Appendix D to accompany all applications for fair market valuation pursuant to Section 1329.

6. That a copy of this Final Supplemental Implementation Order shall be published in the *Pennsylvania Bulletin* and posted on the Commission’s website at [www.puc.pa.](http://www.puc.pa.)gov.

7. That a copy of this Final Supplemental Implementation Order and the Appendices shall be served on all jurisdictional water and wastewater companies, the National Association of Water Companies – Pennsylvania Chapter, the Pennsylvania State Association of Township Supervisors, the Pennsylvania State Association of Boroughs, the Pennsylvania Municipal Authorities Association, the Pennsylvania Rural

Water Association, the Commission’s Bureau of Investigation and Enforcement, the Office of Consumer Advocate, and the Office of Small Business Advocate.

8. That this docket shall be marked closed.

**** **BY THE COMMISSION**

Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: February 28, 2019

ORDER ENTERED: February 28, 2019

1. SWPA indicated generally that it agrees with the Comments of Aqua, PAWC, and York. [↑](#footnote-ref-1)
2. Buyer refers to either an “Acquiring Public Utility” or “Entity” under Section 1329(g), while Seller refers to a “Selling Utility” under Section 1329(g). [↑](#footnote-ref-2)
3. The Buyer and Seller may agree that the Buyer will sponsor the Seller’s testimony supporting the application. [↑](#footnote-ref-3)
4. Application of Pennsylvania-American Water Company Pursuant to Sections 507, 1102 and 1329 of the Public Utility Code for Approval of its Acquisition of the Wastewater Assets of Exeter Township, Docket No. A-2018-3004933 (Exeter application). [↑](#footnote-ref-4)
5. Application of Pennsylvania-American Water Company Pursuant to Sections 507, 1102 and 1329 of the Public Utility Code for Approval of its Acquisition of the Water Assets of Steelton Borough Authority, Docket No. A-2019-3006880 (Steelton application). [↑](#footnote-ref-5)
6. The OCA Petition to which BIE refers is the Exeter application, *supra*. On February 8, 2019, the Commission issued a Secretarial Letter informing the OCA that, because it had not yet formally accepted the Exeter application, that docket was inactive and that it would entertain filings in the docket when the Commission formally accepted the application pursuant to Section 1329. Because it has not formally accepted the Exeter application, the Commission has not as yet taken final action related to it. [↑](#footnote-ref-6)
7. We note that in *New Garden* the language of Senior Judge Pellegrini literally directs *the Commission* “to provide notice to all ratepayers in accordance with 52 Pa. Code § 53.45.” Of course, providing such actual notice under regulation Section 53.45 is the responsibility of the public utility filing for relief. [↑](#footnote-ref-7)
8. The removal of No. 13 affects the numbering of subsequent Standard Data Requests. [↑](#footnote-ref-8)