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November 1, 2021

Rosemary Chiavetta, Esq., Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, Pennsylvania 17120

**Re: Comments of the Energy Association of Pennsylvania to the Tentative
Implementation Order, Docket L-2020-3019417**

Dear Secretary Chiavetta:

Attached for filing, please find the Energy Association of Pennsylvania's Comments on the Tentative Implementation Order at Docket No. L-2020-3019417.

Sincerely,

A handwritten signature in blue ink that reads "Donna M.J. Clark".

Donna M.J. Clark
Vice President & General Counsel

Enclosure

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Request for Comments on Implementation of :
Potential Amendments to 52 Pa. Code § 59.34 :
Relating to Leakage Surveys of Customer- :
Owned Service Lines : Docket No. L-2020-3019417

**COMMENTS OF THE
ENERGY ASSOCIATION OF PENNSYLVANIA TO THE TENTATIVE
IMPLEMENTATION ORDER**

I. INTRODUCTION AND BACKGROUND

On August 5, 2021, the Public Utility Commission (“PUC” or “Commission”) entered a Tentative Implementation Order (“TIO”) at Docket No. L-2020-3019417 seeking public comments on the implementation of potential amendments to 52 Pa. Code § 59.34 relating to leakage surveys of customer-owned service lines (“COSL”)¹. Initially comments were due within forty (40) days of publication² of the TIO in the *Pennsylvania Bulletin*, i.e., September 30, 2021. By a Secretarial Letter dated September 24, 2021, the Commission granted a request for a thirty (30) day extension filed by the Energy Association of Pennsylvania (“EAP” or “Association”) and comments are now due on November 1, 2021.

¹ The Energy Association of Pennsylvania suggests that the instant TIO is procedurally in the nature of an Advanced Notice of Proposed Rulemaking. EAP understands that the next step may be the issuance of a Notice of Proposed Rulemaking, if modifications to existing regulations are necessary, as opposed to a generic final order adopting the changes proposed in the TIO without a formal rulemaking process. TIO at p.8. EAP contends that issuance of a generic final order as a way to modify the current existing regulations would be unlawful.

² The TIO was published in the *Pennsylvania Bulletin* on August 21, 2021.

EAP is a trade association that represents and promotes the interests of regulated electric and natural gas distribution companies operating in the Commonwealth. These comments are filed on behalf of its natural gas distribution company (“NGDC”) members³, noting that three (3) of those members have COSL connected to their distribution systems, i.e., Columbia Gas of Pennsylvania, Inc., Peoples Natural Gas Company, LLC, and Peoples Gas Company, LLC. EAP’s comments supplement and support those filed by its NGDC members.

The Commission seeks comments on proposed amendments to 52 Pa. Code § 59.34 (Leakage surveys of customer-owned service lines) as a result of a “potential conflict” voiced by the federal Pipeline and Hazardous Materials Safety Administration’s (“PHMSA”) Director of State Programs (“Director”) during an evaluation of the Commission’s 2017 pipeline safety program. During the course of that evaluation, which occurred in 2019, PHMSA’s Director detailed his concern that 52 Pa. Code § 59.34 (c) conflicts with minimum federal safety standards codified at 49 C.F.R. § 192.723(b)(2) (relating to Distribution systems: Leak repair) because the Pennsylvania regulation requires the customer to repair or renew the service line following notification by the public utility that a leakage survey has revealed a leak in the COSL. PHMSA opined that requiring the customer to repair or renew the service line owned by the customer conflicts with federal requirements that “[e]ach operator maintain, modify as appropriate, and follow the plans, procedures, and programs that it is required to establish under [Part 192],” 49 C.F.R. § 192.13(c), and that “[e]ach segment of pipeline that becomes unsafe must be replaced, repaired, or removed from service”, 49 C.F.R § 192.703(b).⁴

³ The Association’s natural gas distribution company members include: Columbia Gas of Pennsylvania, Inc.; Pike County Light & Power Company; Leatherstocking Gas Co., LLC, National Fuel Distribution Corp.; PECO Energy Company; Peoples Natural Gas Company LLC; Peoples Gas Company LLC; Philadelphia Gas Works; UGI Utilities Inc.; and Valley Energy Inc.

⁴ TIO at pp. 3 and 5 - 6.

PHMSA also “took issue” with 52 Pa. Code § 59.34 (b) which provides that “[i]f the leakage survey prescribed by subsection (a) requires access to the premises of a customer and the customer refuses access, or if the public utility requires a customer to inform it of the location of a service line and he fails to provide the information, the public utility may shut off gas service until access is permitted or the information is provided.” PHMSA concluded that this regulatory language “ignores the fact that under the CFR the service line between the main and the meter is the pipeline operator’s responsibility, not the customer’s, to design, construct operate, and maintain in accordance with the pipeline safety regulations, pursuant to 49 C.F.R. § 192.1, *et seq.*” TIO at p. 6. PHMSA stressed that it cannot dictate who is responsible for payment of either repairing or replacing COSL but maintains that Section 59.34(b) of Chapter 52 of the Pennsylvania Code conflicts with federal regulations which provide that it is “the operator of the pipe [which] is responsible for the design, construction, operation, and maintenance of the pipe, regardless of who owns it.” TIO at pp. 6-7.

PHMSA concludes that 52 Pa. Code § 59.34 “is confusing” and “gives the impression, albeit unintended, that the customer, and not the operator, is responsible for pipeline safety on part of the pipe between the main and the meter that is service line owned by the customer...[and] asserts that...the specific conflicts that it [PHMSA] has identified between Part 192 of the CFR and 52 Pa. Code § 59.34 of the Commission’s regulations must be resolved.” TIO at p.7.

As set forth below, EAP disagrees with PHMSA’s suggestion that there is a potential conflict between regulations found at Part 192 of the Code of Federal Regulations (“CFR”) and Pennsylvania regulations set forth at 52 Pa. Code § 59.34. EAP contends that the current Commission regulation enables NGDCs which have COSL connected to their distribution

system to comply with both federal minimum safety standards codified in Part 192 and Pennsylvania statutory law found at 66 Pa. C.S. § 1510. EAP believes that PHMSA’s analysis overlooks language contained in Section 1510 of the Pennsylvania Public Utility Code which provides, in pertinent part, that “[m]aintenance of service lines shall be the responsibility of the owner of the service line.” Further, EAP respectfully suggests that the proposed amendments detailed in the TIO to resolve this “potential conflict” identified by PHMSA in 2019 would, in fact, violate Pennsylvania law, upend longstanding NGDC practices and procedures which provide system operational safety for COSL, and create unnecessary complexity and confusion without improving system or customer safety.

EAP appreciates Commission efforts to address the concerns raised by PHMSA⁵ and the opportunity provided through this process to gather public input from a number of interested parties on its proposed solutions to the alleged conflict between federal and state regulations. EAP, however, reiterates its conclusion that no such conflict exists, obviating the need to amend Commission regulations as proposed. Based on these comments and those filed by its NGDC members, EAP urges the Commission to conclude the same and close the current docket.

⁵ It is unclear to EAP what authority, if any, PHMSA has to require the Commission to amend state regulations (and in this situation, arguably state statutory law) in the context of an evaluation of the Commission’s pipeline safety program activities. EAP is concerned that the resolution seemingly required by PHMSA raises issues concerning federal preemption; adopting federal regulations does not preempt state law on the same subject.

II. COMMENTS

A. No Conflict Exists Between Federal Regulations and Section 59.34 of the Commission’s Regulations (Leakage survey of customer-owned service lines).

Initially, EAP notes that the particular sections of Part 192 of the Code of Federal Regulations and the specific section of Chapter 59 of the Pennsylvania Code cited in the TIO as allegedly in conflict are not new and have been in place for a substantial period of time⁶. Similarly, the relevant Pennsylvania statutory section, 66 Pa. C.S. § 1510, which provides the legal basis for 52 Pa. Code § 59.34, was enacted in 1984, clarifying under state law that “[m]aintenance of service lines shall be the responsibility of the owner of the service line” and paving the way for the development of a number of related businesses which enable customers who own their service lines to address maintenance and safety concerns identified by the public utility in a timely and cost-effective manner. Such businesses include plumbers and companies that provide warranty and insurance programs to owners of COSL. EAP believes that such entities have a vested interest in this proceeding particularly here where proposed amendments could substantially impact their business models and the alleged conflict between federal and state regulation does not stem from a particularized or identified safety risk that will be resolved through amending the Commission’s current regulatory language at 52 Pa. Code § 59.34.

Examining the specific Commission regulatory sections identified by PHMSA as in conflict with federal regulation, EAP concludes that PHMSA is mistaken in its analysis. First, the Commission’s regulations require a public utility to “establish and execute a plan by which it will periodically survey each customer-owned service line for leakage. The plan shall conform with or exceed the standards established in 49 C.F.R. § 192.723 (relating to distribution systems;

⁶ E.g., 52 Pa. Code § 59.34 was last amended in 1986.

leakages and procedures) as of May 1, 1986 and subsequent amendments thereto which have been ratified by the Commission under § 59.33 (relating to safety).” 52 Pa. Code § 59.34(a). The Commission regulation requires that utility plans developed to conduct leakage surveys pursuant to 49 C.F.R. § 192.723 include COSL. There is no conflict between those two regulatory requirements; the Commission regulation clarifies any uncertainty that COSL are not covered by the more general federal regulation.

Second, EAP contends that the regulatory language found at Section 59.34(c) which details the responsibility of the public utility to require the owner of the COSL “to repair or renew the line” if the results of a leakage survey reveal a leak in the service line and authorizes the public utility to “shut off the gas service until repair or renewal has been effected” implements and is consistent with Section 1510 of the Pennsylvania Public Utility Code. PHMSA’s concerns that 52 Pa. Code § 59.34 (c) conflicts with the operator’s responsibilities under 49 C.F.R. § 192.13(c) to “maintain, modify as appropriate, and follow the plans, procedures, and programs that it is required to establish under [Part 192]” and/or the operator’s responsibilities under 49 C.F.R. § 192.703(b) to replace, repair or remove from service pipeline that has become unsafe represent an overly narrow interpretation of the Commission’s regulatory language.

The Commission’s regulation adroitly enables the public utility to comply with Pennsylvania law requiring that the owner of the service line bear responsibility for its maintenance and also with the federal requirement that a pipeline which has become unsafe must be replaced, repaired or removed from service. The regulations align the mandate of 66 Pa. C.S. § 1510 with the requirements of both 49 C.F.R. §§ 192.13(c) and 192.703(b). Federal regulations do not require the operator to either perform the work or pay for the work. And authorizing the

operator to “shut off gas service” following notification of the owner of a COSL that a leak exists in the service line and requiring the owner to take action to repair or renew that service line satisfies the federal requirement. Thus, no conflict exists between federal regulations and 52 Pa. Code § 59.34(c).

Moreover, federal regulations do address circumstances where the customer owns and maintains a portion of the service line. Federal regulations found at 49 C.F.R. § 192.16 require an operator to provide notice to the customer if that the operator does not maintain the customer’s buried piping and to provide notice that if the customer’s buried piping is not maintained, it may be subject to potential hazards of corrosion and leakage. 49 C.F.R. § 192.16(b)(1) – (2). To the extent that PHMSA has alleged a conflict with the Commission’s regulations based on an argument that “the operator is responsible for compliance with the Federal pipeline safety regulations between the main and the outlet of the meter, and not the customer”, 49 CFR § 192.16 undermines that analysis and should be considered as the Commission determines whether to pursue amendments to 52 Pa. Code § 59.34 as requested by PHMSA.

B. The Public Utility Code does not Authorize the Commission to Amend Existing Regulations as Proposed.

The TIO proposes three specific amendments to address the “potential conflicts” identified by PHMSA. While EAP maintains that the federal and state regulations can be interpreted as consistent and that no conflicts exist which would necessitate amending current Commission regulations, EAP further contends that the proposed changes are prohibited by the Pennsylvania Public Utility Code.

Initially, the Commission proposes to amend 52 Pa. Code § 59.34(b) to address PHMSA’s concern that requiring a customer to identify the location of her COSL and authorizing the public utility to “shut off gas service until...the information is provided” conflicts with the operator’s obligation under federal regulations to design, construct, operate and maintain the service line between the main and the meter. As stated above, however, this analysis overlooks 49 C.F.R. § 192.16 which addresses operator notice requirements in situations where the customer owns the service line and is required to maintain that service line. In other words, the federal regulations acknowledge that circumstances exist where the customer, not the operator, has the obligation to maintain a service line which she owns. An amendment, therefore, is not warranted. Moreover, the amendment proposed which would require the public utility to “include the location of all customer-owned service lines upstream of the meter in its records of its natural gas system”, TIO at p. 9, fails to address the situation described in the current regulatory language where the owner of the COSL does not provide the location of the service line following notification by the public utility that a leak has been identified. Requiring the public utility to obtain this information and then maintain it in utility records can only be accomplished over time as it relates to COSL; amending a regulation to mandate such a requirement on a date certain is not practical and will require considerable resources and time to achieve, and ultimately may not be fully achievable.⁷

The Commission next proposes to amend 52 Pa. Code § 59.34(c) “to require that the public utility (either directly or through qualified subcontractors) perform repairs or renewals of customer-owned service lines upstream of the meter (or wall of the property if there is no meter

⁷ NGDCs have practices and protocols in place to assist field personnel in locating a COSL when the exact location is not known. Additionally, it may be necessary to align One Call requirements for locating facilities in the context of amending 52 Pa. Code § 59.34(b) as proposed.

present)” and to add a new section 59.34(d) “to clarify that the public utility would be responsible for the design, construction, operation, and maintenance of a customer’s service line upstream of the inlet of the meter (or wall if no meter) serving the customer, and that the public utility may bill the customer” for all those costs in accordance with its tariff. Neither of these proposed amendments are lawful under 66 Pa. C.S. § 1510 which requires that “[m]aintenance of service lines shall be the responsibility of the owner of the service line.” The Commission proposed work-around to meet PHMSA’s concerns of a “potential conflict” violates statutory law by placing the responsibility for maintenance of a COSL on the public utility in contravention of the clear language in section 1510 of the Public Utility Code which places that responsibility on the owner of the service line. The Commission cannot implement regulations which are not authorized by or conflict with statutory law.

More generally, the proposed amendments raise an array of issues concerning the rights of property owners in the event the public utility becomes obligated to repair, renew or replace the COSL in lieu of the owner of that line. Questions concerning whether these amendments amount to an unconstitutional “de facto taking” of property must be considered and resolved prior to any future rulemaking proceeding. And, the language in section 1510 of the Public Utility Code (“A public utility shall not be authorized or required to acquire or assume ownership of any customer’s service line.”) is arguably violated by the adoption of a regulation that shifts indicia of ownership from the owner of the COSL to the public utility without agreement by (and possibly compensation to) that owner. EAP contends that this effort to address PHMSA’s unfounded concerns raises a number of complex legal and operational issues for the Peoples companies and Columbia without resolving or improving any specific safety concern.

C. Comments to Monetary Issues and Customer-Service Issues Identified by the Commission in its Tentative Implementation Order.

EAP provides general observations on the issues identified in the TIO as monetary issues and customer-service issues, reserving its rights to provide further detailed comments in these areas if this matter proceeds to a formal rulemaking process. EAP also references the comments of its NGDC members filed at this docket to the extent they do not conflict with these general observations.

Initially, EAP supports Commission efforts to discuss and implement a variety of cost recovery mechanisms to provide utilities with the ability to cover all costs incurred, including interest, in the event gas utilities become legally obligated to repair, replace or renew COSL. At the same time, EAP is wary of placing its members in roles akin to a lending institution and treating costs incurred by the utility to repair or replace a COSL under a proposed new regulatory paradigm as individual loans with uniform interest terms and service termination allowed for failure of the customer to meet that loan obligation. Additionally, EAP believes that it is premature to identify specific cost recovery mechanisms and maintains that the proposed amendments are neither necessary nor lawful. In the event the Commission does move forward to a NOPR in this proceeding (which may first require a statutory amendment), EAP believes it would be prudent to develop a cost recovery mechanism to include the creation of a regulatory asset to accumulate all costs, including interest, and to allow for recovery of costs via a DSIC mechanism.

Currently, those utilities which have COSL connected to their distribution systems have tariff language allowing for termination for refusal of an owner to provide access to her service line pursuant to 52 Pa. Code § 59.34(b). EAP asks that the Commission refrain from amending that regulatory language.

With respect to the development of uniform tariff language, it may be premature at this point given EAP's position that federal and state regulations are not in conflict and the proposed amendments are not warranted. Additionally, only the Peoples companies and Columbia will be impacted by any regulatory or legislative changes in this area and uniform tariff language may not be necessary.

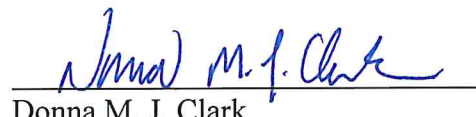
With respect to the customer-service issues raised in the TIO, EAP agrees that communication with owners of service lines in the event that the proposed amendments are enacted is important and suggests that the specific questions raised are better decided in the context of a future proceeding. EAP suggests that any required communications should be broadly disseminated via written and electronic communications in addition to stakeholder meetings and forums.

III. CONCLUSION

As set forth above, EAP maintains that the “potential conflicts” identified by PHMSA are illusory and that the current regulatory language was crafted to enable public utilities to comply with both the federal regulations and Section 1510 of the Pennsylvania Public Utility Code. EAP believes that the proposed amendments are neither necessary nor authorized under the Pennsylvania Public Utility Code and that requiring public utilities to take responsibility for the maintenance of assets owned by third parties raises a number of complex issues without a corollary improvement in operational safety that would benefit the customer owning the service line or ratepayers in general.

Respectfully submitted,


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