PENNSYLVANIA PUBLIC UTILITY COMMISSION
Harrisburg, Pennsylvania 17120

Rulemaking to Implement Act 120 of 2018, 66 Pa. C.S. § 1311	**Public Meeting of February 24, 2022** **3019521-LAW** **DOCKET NO.: L-2020-3019521**

STATEMENT OF CHAIRMAN GLADYS BROWN DUTRIEUILLE

Before the Commission for consideration and disposition is our final rulemaking order setting forth regulations to implement Act 120 of 2018 (Act 120) which amended Section 1311(b) of the Public Utility Code, 66 Pa. C.S. § 1311(b), by directing the replacement of customer-owned lead water service lines (LSL) and damaged wastewater service laterals (DWSL), while addressing the recovery of associated costs.

This Commission has long recognized the inherent and proven danger that LSLs pose to public health and the public interest and, even prior to the passage of Act 120, the Commission approved The York Water Company's replacement of this type of aged infrastructure. *See Petition of The York Water Company*, Docket No. P-2016-2577404 (Order entered March 8, 2017). However, the subsequent passage of Act 120, which provides a comprehensive framework for the replacement of LSRs for jurisdictional water utilities, clarifies the Commission's authority to put replacement costs into rates; and, therefore, will accelerate the replacement of lead service lines in the Commonwealth, if properly implemented.

After Act 120 was enacted, the U.S. Environmental Protection Agency (EPA) promulgated the Lead and Copper Rule Revisions (LCRR)[1] on January 15, 2021, with the goal of reducing lead and copper in drinking water. The Commission's regulations regarding LSL replacements (LSLR) are meant to work in conjunction with the federal LCRR which will be implemented by Pennsylvania's Department of Environmental Protection (DEP). The LCRR requires water systems with LSLs, or service lines of unknown status, to create lead LSLR plans, within the meaning of the LCRR, by 2024. Under the LCRR, water systems above the trigger level, but at or below the action level, must conduct replacements at a "goal rate," while water systems above the action level must "annually replace a minimum of three percent per year, based upon a 2-year rolling average of the number of known or potential LSLs in the inventory at the time the action level exceedance occurs." Additionally, some water systems are afforded compliance

[1] *National Primary Drinking Water Regulation: Lead and Copper Rule Revisions*, 86 FR 31939-31948 (January 15, 2021) (amending 40 CFR 141-142).

alternatives and may not be required to conduct LSLRs. Further, water systems below the lead trigger level are not required to execute any system-wide LSLR program. *See* 86 FR 4198 at 4200, 4213, 4217-4218, 4221.

In comparison, Act 120 requires no trigger or action level for LSLR replacement and Act 120 in conjunction with Section 1501 of the Public Utility Code, 66 Pa. C.S. § 1501, requires Commission jurisdictional entities to undertake LSLRs, as a matter of course, to effectuate the removal of all LSLs. Stakeholders and the IRRC have expressed concern regarding the interplay between the Commission's LSLR regulations and the EPA's LCRR, claiming that the Commission's regulations will not be consistent with the federal LCRR. In my view, the LCRR sets a minimum level of LSLR while Act 120 and Section 1501 provide for a full-scale replacement of Commission jurisdictional LSLs. Thus, under the Commission's final regulations, entities should be required to routinely engage in LSLRs with the goal of **total** LSL removal. This charge was assigned to the Commission by the General Assembly and signed into law by Governor Wolf.

The Commission, as an economic regulator, must address LSLs as an infrastructure replacement issue, while the replacement of LSLs under the LCRR is driven by Lead Action Level Exceedances of lead in the water by a public water system. However, if an entity hits the LCRR's trigger level or action level, that entity will become subject to the relevant LCRR provisions for using LSLRs as a remediation tool. See e.g., 86 FR 4198 at 4200, 4221. Given this dynamic, with Act 120 providing for the removal of all LSLs from jurisdictional public utilities by a time certain, while only the sub-category of those entities with severe lead leaching will be subject the LCRR's more immediate timelines, there will be no conflict between the Commission's final regulations and the LCRR as they seek to achieve different, but both necessary, goals.[2]

Service Line Inventory

Both the LCRR and our notice of proposed rulemaking (NOPR) provide for an inventory to ascertain where the lead service lines are located. The Commission "Service Line Inventory" would function to emphasize the inventory as a process of identifying each service line's material and, correspondingly, establish a minimum uniform structure for the organization of the data collected during the inventory process.

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[2] Federal regulation by means of minimum standards of the picking, processing, and transportation of agricultural commodities, however comprehensive *for those purposes* that regulation may be, does not of itself import displacement of state control over the distribution and retail sale of those commodities in the interests of the *consumers* of the commodities within the State. . . . Congressional regulation of one end of the stream of commerce does not, *ipso facto*, oust all state regulation at the other end. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, *145.

Producing a report containing the information sought by the Commission in the proposed rulemaking need not be burdensome. Entities could use the inventory submitted under the LCRR as a basis for the Service Line Inventory submitted to the Commission. To the extent that an entity desired to submit their Service Line Inventory to the Commission at the same time as their LCRR inventory, it could do so. In other words, the Commission Service Line Inventory would require an entity to conduct only one coordinated inventory effort of the entity-owned and customer-owned service lines. The LCRR inventory is due to DEP no later than October 16, 2024, with annual updates to follow, while the Commission's Service Line Inventory would be due at a reasonable time thereafter. With the LCRR inventory due first, any additional requirements that DEP puts into upcoming rulemakings could be incorporated, along with Commission parameters, into one database by an entity. This approach to the timing of inventory filings would avoid any duplication of efforts and any conflicts between agency requirements.

While DEP is the "primacy agency" with respect to the LCRR, the Commission has a statutory duty to effectively implement Act 120 and regulate the safety of public utility infrastructure and assets. See 66 Pa. C.S. § 1311(b), 1501. The NOPR does not attempt to implement the LCRR in DEP's place. Rather, the NOPR requires a Service Line Inventory because the Commission's proper and effective implementation of Act 120 and regulation of public utility safety calls for a Commission-specific Service Line Inventory. This requirement parallels 52 Pa. Code § 65.4, which requires entities to keep complete maps, plans, or records of its entire distribution and other systems showing the size, character and location of each main, street valve, and each company service line together with other information that may be necessary. See 52 Pa. Code § 65.4. Recording material type and diameter is important so that entities have complete records of their water distribution systems. For example, if another material is determined to be as hazardous as lead in the future, entities will not be required to duplicate efforts to create a Service Line Inventory based on the presence of that material because they will already have complete records with which to identify it. If entities are fully compliant with 52 Pa. Code § 65.4(b), the requirement to include the service line sizes in the Service Line Inventory would serve to consolidate relevant information about service lines into one document. If entities are not fully compliant with this regulation, the requirement to include the service line sizes will provide entities with an opportunity to comply. Also, service line sizes are used to develop equivalent weights in cost-of-service studies, so additional data would result in more equitable cost allocations between customer classes (residential vs. commercial, *etc.*) and within customer classes (customer charges for customers with a 5/8" meter vs. customers with a 2" meter, where customer charges include costs associated with service lines).[3]

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[3] See 52 Pa. Code §53.53, Exhibit D, Section VIII.1.f.; Aqua Pennsylvania, Inc., Exhibit 1-A Water, Docket No. R-2018-3003068 at PDF p. 1,284-1,285 and 1,341-1,342 available at https://www.puc.pa.gov/pcdocs/1582242.pdf.

Even so, I agree that we should allow an entity to use reasonable assumptions to ascertain the material type and diameter of service lines in its Commission Service Line Inventory, provided that the entity informs the Commission of the assumptions used. For example, entities should be allowed to make generalizations regarding material type and diameter of service lines based on their knowledge with respect to nearby lines to facilitate inventories of smaller, acquired, or aged water systems.

With the enactment of Act 120's clear statutory directive to remove LSLs from Commission jurisdictional drinking water systems, this Commission is constrained to first inventory the affected systems in order to cost-effectively and efficiently carry out our statutory mandate. Act 120 differs from the EPA's LCRR in a critical way. Act 120 provides the Commission with the authority to establish processes for the cost recovery of LSLRs. The service line inventory proposed in the Commission's NOPR necessarily will differ from the EPA/DEP inventory in order to more specifically categorize facilities to efficiently set rates. Because the LCRR and Act 120 have foundational differences, reliance on the LCRR's inventory will not be sufficient to prudently effectuate Act 120.

LSLR Plan Requirements

Act 120 requires replacements as a matter of course, which is an inherently different goal than the LCRR. "This legislation would allow regulated utilities to replace this part of the line as part of its normal operations . . . The Public Utility Commission would retain the ability to determine how these costs are recovered from consumers." [4]

Rate recovery/ratemaking remains the exclusive jurisdiction of the Commission; therefore, it is within the Commission's authority to establish processes for the collection of information to facilitate and implement the recovery of LSLR costs from consumers. These processes not only include LSL inventories; but also, communications and reporting requirements that may differ based on the Commission's discretionary authority to establish processes for rate recovery. The Commission LSLR Plan and the plan required by the LCRR have some similarities, but there are distinctive differences in various aspects of the reporting requirements. An entity can and should prepare the base information required by both plans to maintain efficiencies but will need to respond to the differing aspects of Commission and EPA/DEP requirements. Ultimately, it is not uncommon for entities to be required to file plans and reports with utility commissions, state environmental agencies and federal agencies that have similar, yet distinctive, elements based on the regulating bodies' particular responsibilities.

In keeping with the theme that Commission LSLRs cannot be implemented simply by requiring adherence to the LCRR, it is important that the "communications, education,

[4] H. Leg. Journal No. 33 at 1028, 202d Cong., Sess. of 2018 (Pa. 2018).

and outreach" provisions of the NOPR be maintained. As stated earlier, while both statutes involve LSLs, the scale of replacement to be achieved under the EPA LCRR and Act 120 are different. This Commission, as a creature of the Legislature, is charged with implementing Act 120.[5] We are able to do so without stymieing the LCRR.[6] The LCRR delineates different communication, outreach, and education activities an entity must undertake based on: (1) the type of service line in use; (2) if a trigger level is reached or an exceedance occurs; and (3) the size and type of entity providing service. See 86 FR 4198 at 4294-4296.

Meanwhile, Act 120, as an infrastructure replacement bill, serves a purpose unique from the LCRR by requiring entities to explain how their efforts are being prioritized and consider feedback from third parties that could benefit the entity and its customers. For example, the Pittsburgh Water and Sewer Authority (PWSA) has a Community Lead Response Advisory Group that provides PWSA feedback on its LSLR activities. Because this is a ratepayer funded initiative, the Commission should require entities to attempt to reduce costs by coordinating LSLR Program efforts with the efforts of other organizations where prudent and feasible. An entity may be able to lower its costs by coordinating LSLR activities with other projects, such as street paving. As such, any communications, education, and outreach efforts that further such efficiency should be implemented.

With regard to communications, outreach, and education, any requirements should apply only to situations where customers and property owners, if the customer is not the property owner, have LSLs or service lines with an undetermined material type. This will resolve concerns regarding notifying all-bill paying customers, rather than targeting those that will be impacted.

Additionally, the term "sensitive populations" as proposed in Section 65.56(c)(1)(i) should be clarified as requested in PWSA's comments and the Coalition for Affordable Utility Service and Energy (CAUSE-PA) and Green & Healthy Homes Initiative's (GHHI) comments. A more widely understood definition, "subpopulations at greater risk," which is a term referenced in the Safe Drinking Water Act at 42 U.S.C.S. § 300j-

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[5] Administrative agencies are creatures of the legislature and have only those powers which have been conferred by statute. An administrative agency cannot by mere contrary usage acquire a power not conferred by its organic statutes. It is settled that jurisdiction of a court cannot be extended or conferred by agreement; it must follow, a fortiori, that an administrative agency cannot acquire jurisdiction by agreement. Nor is it for the agency to seek to create or assure its own jurisdiction by insisting that applicants subscribe to the agency's view of what public policy requires. *Western Pennsylvania Water Co. v. Pa. PUC*, 370 A.2d 337, 339–340 (Pa. 1977) (citations omitted).

[6] Absent clear congressional intent to the contrary, federal preemption of state law is not favored, especially in areas of law traditionally occupied by the states. *Marsh v. Rosenbloom*, 499 F.3d 165, *177.

18(a) should be utilized. Thus, LSLR efforts should be prioritized to target the subpopulations at greater risk of adverse health effects from exposure to contaminants in drinking water identified in the Safe Drinking Water Act, including infants, children, pregnant women, the elderly, individuals with a history of serious illness, or other subpopulations that can be identified and characterized as likely to experience elevated health risks. Due to the burden on entities, I would decline to adopt CAUSE-PA and GHHI's suggestions regarding reporting equity metrics.

Regarding Section 65.56(c)(1)(v), entities replacing the customer-owned LSL should have the ability to provide as-built drawings or similar depictions indicating the location of the customer-owned portion of the LSLR to the customer or property owner, if the customer is not the property owner. I note that because the Commission would not require entities to disclose information regarding their infrastructure, I see no security risk with this proposal. In order to provide property owners with adequate information to avoid damaging the lines, entities should be required to provide other documents associated with the LSLR and appurtenances, including product manuals, specification sheets, or manufacturer brochures. Such clear communication safeguards ratepayer investment in these replacements.

Finally, as it pertains to Section 65.56(c)(3), I agree with the OCA that the online map entities will put forth to determine whether records reflect that a property has a LSL does not need to be secure as it simply reflects the property status. As the OCA indicated, this tool will be critical for the public in terms of LSL information and education. Additionally, I note that the LCRR requires a "publicly accessible" inventory of LSLs. Therefore, entities will already be undertaking efforts to create publicly available LSL inventories.

In conclusion, I believe that in order for the Commission to carry out its duty to facilitate the removal of all lead service lines from water utilities under the Commission's jurisdiction while managing the related cost recovery, it is crucial that the Commission first establish its own specific rules regarding lead service line inventories and customer communications. If the Commission simply adopts the DEP's forthcoming inventory and communication plan pursuant to the federal LCRR, we will have met a lesser standard than that established in Act 120 of 2018.

February 24, 2022
DATE

GLADYS BROWN DUTRIEUILLE
CHAIRMAN