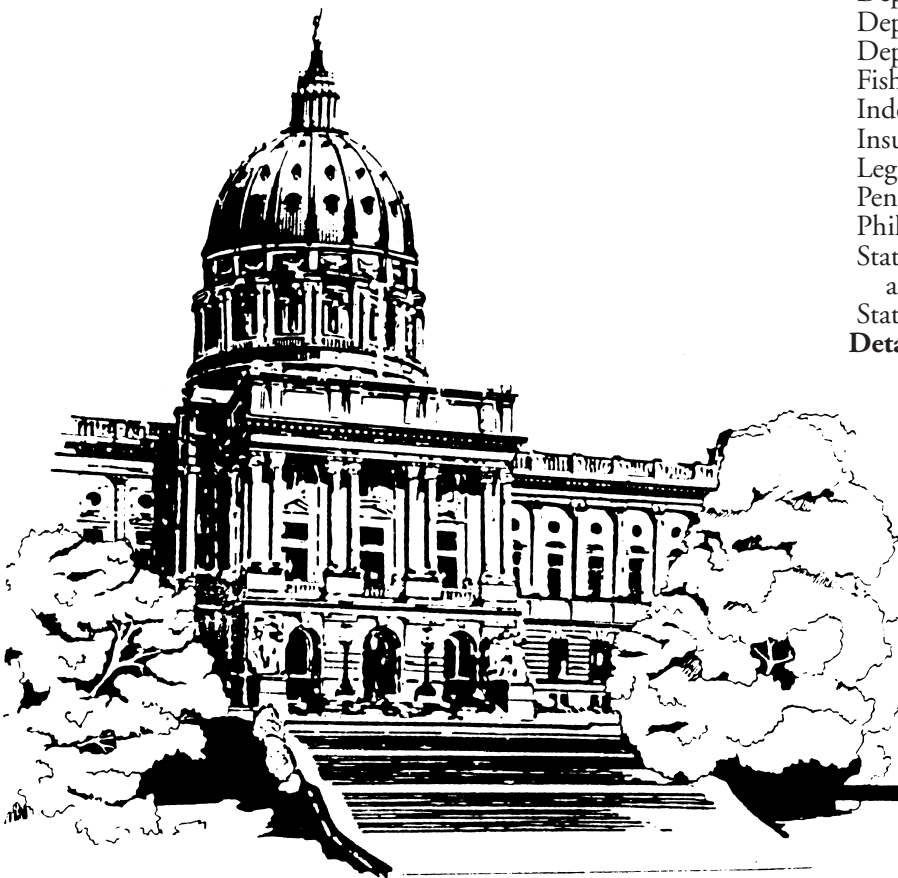


PENNSYLVANIA BULLETIN

Volume 52
Saturday, September 17, 2022 • Harrisburg, PA
Number 38
Pages 5917—6026

Agencies in this issue

The Courts
Department of Banking and Securities
Department of Community and Economic
Development
Department of Conservation and Natural
Resources
Department of Education
Department of Environmental Protection
Department of Health
Department of Transportation
Fish and Boat Commission
Independent Regulatory Review Commission
Insurance Department
Legislative Reference Bureau
Pennsylvania Public Utility Commission
Philadelphia Parking Authority
State Board of Vehicle Manufacturers, Dealers
and Salespersons
State Horse Racing Commission
Detailed list of contents appears inside.



RULES AND REGULATIONS

Title 52—PUBLIC UTILITIES

PENNSYLVANIA PUBLIC UTILITY COMMISSION

[52 PA. CODE CH. 51]

[L-2020-3017284]

Diversity Reporting of Major Jurisdictional Utilities

Public Meeting held
June 16, 2022

Commissioners Present: Gladys Brown Dutrieuille, Chairperson; John F. Coleman, Jr., Vice Chairperson; Ralph V. Yanora

Diversity Reporting of Major Jurisdictional Utilities,
52 Pa. Code Chapter 51; L-2020-3017284

Final Rulemaking Order on Reconsideration

By the Commission:

This matter comes to the Public Utility Commission (PUC) on sua sponte reconsideration. On December 17, 2020, the PUC entered a Notice of Proposed Rulemaking Order (NOPR) proposing to make diversity reporting recommendations in the Diversity Policy Statement, 52 Pa. Code §§ 69.801—69.809, an obligation to be codified in 52 Pa. Code Chapter 51 (relating to general provisions for major jurisdictional utilities providing electric, natural gas, water, wastewater, and telecommunications services). The NOPR and Annex A were submitted to the Office of Attorney General (OAG) for review as to legality and form and to the Governor's Office of the Budget for review as to fiscal impact. Thereafter, the NOPR and Annex A were submitted to the Legislative Committees, the Independent Regulatory Review Commission (IRRC), and the Legislative Reference Bureau.

The NOPR and Annex A were published in the *Pennsylvania Bulletin* on June 5, 2021, 51 Pa.B. 3134,¹ and the public comment period closed on July 20, 2021. The PUC received comments from the Coalition for Affordable Utility Service and Energy Efficiency in Pennsylvania (CAUSE-PA); Citizens' Electric Company of Lewisburg, PA, Wellsboro Electric Company, and Valley Energy, Inc. (collectively C&T Utilities); Duquesne Light Company (Duquesne Light); the Energy Association of Pennsylvania (EAP); IRRC; Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company (collectively, FirstEnergy); Pennsylvania American Water Company (PAWC); PECO Energy Company (PECO); Philadelphia Gas Works (PGW); UGI Utilities, Inc. (UGI); and Verizon Pennsylvania LLC and Verizon North LLC (collectively Verizon).

On April 14, 2022, the PUC entered a Final Rulemaking Order which addressed the comments received in response to the PUC's NOPR. In the April 14, 2022 Order, the PUC reviewed all of the comments received, and the PUC adopted some of the proposed amendments to the PUC's Diversity Reporting regulation that commentators submitted. As will be discussed in detail, *infra*, the PUC received comments on its ability to require telecommunications utilities to file diversity reports. In the April 14, 2022 Order, the PUC removed telecommunications utilities from the diversity reporting requirement and instead added a provision that encouraged telecommunications

utilities to submit diversity reports to the PUC. Upon sua sponte reconsideration of the April 14 Order, the PUC concludes that the inclusion of a provision encouraging telecommunications utilities to file diversity reports with the PUC is not appropriate for a regulation and enters this Final Rulemaking Order On Reconsideration to address this revision and to restate the final regulation in its entirety.

For the sake of clarity, the PUC reiterates its analysis of the comments received in response to the NOPR, which we now address.

Summary of the Rulemaking

This regulation builds on the PUC's existing Diversity Policy Statement. The guidelines and recommendations in the PUC's policy statement at 52 Pa. Code §§ 69.801—69.809 set forth the goal of maintaining a diverse workforce and supply chain and include recommendations for the voluntary filing of diversity information by major jurisdictional utilities.

The General Assembly has empowered the PUC to enact regulations governing public utilities. Section 501 of the Public Utility Code, 66 Pa.C.S. § 501(b), provides that:

[T]he commission shall have general administrative power and authority to supervise and regulate all public utilities doing business within this Commonwealth. The commission may make such regulations, not inconsistent with law, as may be necessary or proper in the exercise of its powers or for the performance of its duties.

Section 504 of the Public Utility Code, 66 Pa.C.S. § 504, provides in relevant pertinent part that the PUC:

[M]ay require any public utility to file periodical reports, at such times, and in such form, and of such content, as the commission may prescribe, and special reports concerning any matter whatsoever about which the commission is authorized to inquire, or to keep itself informed, or which it is required to enforce.

In the NOPR, the PUC proposed that diversity reporting be mandatory for major jurisdictional utilities providing electric, natural gas, water, wastewater, and telecommunications services. The NOPR indicated that this new obligation would be codified in 52 Pa. Code Chapter 51. This entailed promulgating within the Diversity Reporting regulation (1) as regulatory definitions some of the policy definitions that have been recently modified in Sections 69.802 and 69.802a and (2) as filing obligations the filing recommendations recently modified in Section 69.809. 52 Pa. Code §§ 69.802, 69.802a and 69.809. It also required mandating the use of a specific form, as may be modified from time to time by the PUC, for reporting workforce diversity.

Discussion

The PUC has reviewed all of the comments filed in this proceeding. Based upon these comments, the PUC proceeds with the proposal in the NOPR with modifications.

After this regulation becomes effective, the PUC will rescind the diversity reporting recommendation at 52

¹ <https://www.pacodeandbulletin.gov/Display/pabull?file=/secure/pabulletin/data/vol51/51-23/890.html>

Pa. Code § 69.809 since all of these reporting recommendations will now be mandatory. The Diversity Policy Statement will thereafter consist of Sections 69.801—69.808.² 52 Pa. Code §§ 69.801—69.808.

A. The PUC's Authority to Require Diversity Reporting

The PUC first addresses comments it received from Verizon which go directly to the PUC's authority to promulgate regulations requiring diversity reporting. Verizon does not support the regulation. Verizon Comments at 4. Verizon states that the PUC is a "creature of statute" and "has only those powers which are expressly conferred upon it by the Legislature and those powers which arise by necessary implication." Id. Verizon asserts that our rulemaking is missing a citation to any specific provision in the Public Utility Code or other law that empowers the PUC to impose or enforce workforce and supplier diversity requirements. Id. It further notes that the reporting form is modeled after the federal Employer Information Report EEO-1, 29 C.F.R. § 1602.7, (EEO-1 Report) used by the Equal Employment Opportunity Commission (EEOC) but that the federal EEOC has statutory authority to require certain employers to submit (on a confidential basis) demographic workforce data, including race/ethnicity and gender, by job category. Id. Verizon argues that this federal statute does not empower the PUC to require reporting of that same information and that there is no explicit provision in the Public Utility Code conferring that authority. Id.

Verizon also argues that even if the PUC has authority to compel reporting, to mandate these new reports by "major telecommunications utilities with 50,000 or more access lines", this directly contradicts the Public Utility Code, which is the source of the PUC's authority to regulate telephone services. Id. at 5. Verizon points to 66 Pa.C.S. § 3015(e) which specifically limits the reports the PUC is authorized to require from a local exchange telecommunications company. Id. A diversity-and-inclusion report is not one of the reports that the legislature enumerated. Id. Verizon further asserts that Section 3015(f)(1) makes clear that "no report, statement, filing or other document or information, except as specified in subsection (e), shall be required" unless the PUC first makes specific written findings that the report is necessary to ensure that the company "is charging rates that are in compliance with this chapter and its effective alternative form of regulation" and that "the benefits of the report substantially outweigh the attendant expense and administrative time and effort required. . .to prepare it." 66 Pa.C.S. § 3015(f)(1)(i) and (ii). Verizon argues that the PUC has not made the required "specific written findings" and that the facts do not support finding that both of these requirements are satisfied. Id.

With respect to the definition of "major jurisdictional utility," IRRC points to a comment from Verizon that the Public Utility Code limits the reports the PUC can require from local exchange telecommunications utilities. 66 Pa.C.S. §§ 3014(f) and 3015(e) and (f). IRRC asks the PUC to explain how the reporting requirements of this rulemaking are consistent with the statutory provisions cited by Verizon in the "preamble"³ to the final-form rulemaking. Id. at 2-3.

IRRC also noted the PUC's use of fines as an available remedy to ensure compliance. IRRC wants to know what

the PUC's statutory authority is for requiring compliance with this regulation and the possible imposition of fines for non-compliance. IRRC Comments at 3. IRRC advises that the PUC cite to this authority in the final-form regulation and the preamble, and also recommends that the type of possible corrective action or enforcement and the amount of potential fines also be included in the final-form regulation. Id.

Disposition

The PUC has asserted its authority in the NOPR. The PUC stated that its authority comes from Sections 501 and 504 of the Public Utility Code. 66 Pa.C.S. §§ 501 and 504. We clarify that Section 504 authorizes the PUC to:

[R]equire any public utility to file. . .special reports concerning *any matter whatsoever. . .to keep itself informed. . .* The commission may require any public utility to file with it a copy of any report filed by such public utility with any Federal department or regulatory body.

66 Pa.C.S. § 504 (emphasis added).

It is this language by which the PUC is authorized to require major jurisdictional utilities to file diversity reports. We note that it is incumbent on the success of all businesses in today's society to have a diverse workforce. While businesses that compete in the free market are influenced by free-market forces to maintain diversity, public utilities, as natural monopolies, do not experience these free-market forces. Notwithstanding, it is incumbent on major jurisdictional utilities to have a diverse workforce as this is an essential element of success for all businesses.

The PUC is obligated to ensure that:

Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. Such service also shall be reasonably continuous and without unreasonable interruptions or delay.

66 Pa.C.S. § 1501.

Keeping apprised of major jurisdictional utilities' diversity provides the PUC with insight into how major jurisdictional utilities are able to operate effectively and ensure that they are capable of reasonably operating continuously and without unreasonable interruptions or delay. It is incumbent on the PUC to keep apprised of major jurisdictional utilities diversity efforts, since a lack of diversity could cause operating deficiencies, resulting in an inability to compete with other large employers. By providing diversity reports to the PUC, the PUC is taking a proactive approach to diversity as an essential part of maintaining a successful business. As such, the PUC disagrees with Verizon's narrow reading of the Public Utility Code, and the PUC proceeds with this rulemaking pursuant to the authority cited, supra.

With respect to Verizon's position that the Public Utility Code precludes any additional reports from local exchange telecommunications companies (LETCs), the PUC is constrained to agree. Section 3015 of the Public Utility Code carved out a limited exception for telecommunications utilities wherein the General Assembly directed the following:

² As will be addressed in detail, infra, the PUC's Diversity Policy Statement will also have 52 Pa. Code § 69.802a removed with only 52 Pa. Code § 69.802 containing definitions for the Diversity Policy Statement.

³ The Commission's notice of proposed rulemaking order and final rulemaking order on reconsideration in the rulemaking process are the "preamble," respectively, to a proposed regulation and a final regulation.

(f) Other reports.—

(1) Notwithstanding any other provision of this title to the contrary, no report, statement, filing or other document or information, except as specified in subsection (e), shall be required of any local exchange telecommunications company unless the commission, upon notice to the affected local exchange telecommunications company and an opportunity to be heard, has first made specific written findings supporting conclusions in an entered order that:

(i) The report is necessary to ensure that the local exchange telecommunications company is charging rates that are in compliance with this chapter and its effective alternative form of regulation.

(ii) The benefits of the report substantially outweigh the attendant expense and administrative time and effort required of the local exchange telecommunications company to prepare it.

66 Pa.C.S. § 3015.

The General Assembly made it clear that the PUC could not require telecommunications utilities to submit reports or statements in addition to the reports and statements already enumerated in subsection (e) of Section 3015 without establishing that the benefits substantially outweigh the attendant expenses to prepare it. On June 22, 2004, the General Assembly entered a resolution directing the Legislative Budget and Finance Committee (LB&FC) to study and report on filing and reporting requirements imposed by the PUC on LECs operating in a competitive telecommunications environment. See H.R. 786 of 2004. The LB&FC conducted a comprehensive analysis of all the filing and reporting requirements on LETCs in November of 2004. In the LB&FC's analysis, it expressly noted that:

To determine the PUC's reporting and filing requirements, we contacted both the PUC and the Pennsylvania Telephone Association, an association representing 37 incumbent local exchange carriers throughout Pennsylvania. The list of required reports includes nine reports that have been temporarily waived or suspended for at least some companies. *We did not include the Report on Diversity, which the PUC "encourages" LECs to submit but is not a required report, nor does the report address the continued need for several Verizon-only reports.*

LB&FC Filing and Reporting Requirements on LECs at 1 (emphasis added).

It is apparent that the LB&FC was aware of the PUC's existing policy statement encouraging diversity reporting among all of the major jurisdictional utilities. However, since employee diversity was not a required report at the time, the LB&FC did not analyze the effect of this report on telecommunications utilities. Since diversity reporting was not a required filing at the time of Section 3015's enactment and there is no language permitting the addition of any report, the PUC is constrained to read Section 3015 as excluding telecommunications utilities from being required to file a diversity report. Accordingly, the PUC amends its proposed regulation to exclude telecommunications utilities from the definition of "major jurisdictional utility" as applied to diversity reporting to avoid contradicting statutory law. However, while telecommunications utilities are exempt from the diversity reporting requirement, the PUC's Diversity Policy Statement encourages them to submit diversity reports in accordance with 52 Pa. Code Chapter 51.

B. § 51.11.—General.

The PUC received comments from CAUSE-PA, C&T Utilities and IRRC generally supporting Section 51.11 but recommending amendments.

CAUSE-PA supports Section 51.11 but suggests adding the words "equity and inclusion" in the regulatory language and as part of the reporting requirements. CAUSE-PA's Comments at 5. CAUSE-PA recommends that the PUC collaborate with local and statewide organizations and community partners with Diversity Equity and Inclusion (DEI) expertise to assist in the finalization of this rulemaking and to consult on future initiatives to strengthen DEI-related language. *Id.* at 6. CAUSE-PA also encourages the PUC to establish a dedicated office of DEI to review utility reports, study relevant data and further advance DEI initiatives. *Id.*

C&T Utilities recommends deleting the first sentence that states "Diversity is an economic reality that each major jurisdictional utility is expected to recognize in its corporate strategy now and in the future." C&T Utilities' Comments at 4-5. C&T Utilities asserts that the phrase "is expected" appears to elevate diversity among the competing priorities and policies established by its management. *Id.* at 5. To eliminate any ambiguity, C&T Utilities recommends deleting this sentence from the final regulation. *Id.*

IRRC points to CAUSE-PA's comment regarding diversity including concepts of "equity and inclusion." IRRC's Comments at 2. IRRC suggests that the PUC adopt this amendment if the PUC believes this amendment would increase workforce diversity and participation by diverse groups at major jurisdictional utilities. *Id.* In its comments, IRRC also inquires as to what the PUC's statutory authority is for requiring compliance with this regulation and the possible imposition of fines for non-compliance. *Id.* IRRC recommends that the PUC cite the authority in the final-form regulation and the preamble and include the type of possible corrective action enforcement and potential fines. *Id.*

Disposition

The PUC's primary focus in this rulemaking is to require the diversity reporting by major jurisdictional utilities so that the PUC can be kept apprised of major jurisdictional utilities' progress with their respective employment diversity. The words "equity and inclusion" were not used in the PUC's Diversity Policy Statement, and adding the words "equity and inclusion" would require further revision to the definition section which would not serve the PUC's goal of ensuring consistent and accurate reporting from major jurisdictional utilities. The words "equity and inclusion" would infer that the PUC is taking an active role in management of major jurisdictional utilities' hiring process which is not the objective of this rulemaking. As there is no material benefit from adding the terms "equity and inclusion," the PUC refrains from adding these terms in the final rulemaking.

The PUC agrees with C&T Utilities' recommendation of deleting the first sentence of Section 51.11. The first sentence in Section 51.11 appears as the first sentence in the PUC's Diversity Policy Statement at 52 Pa. Code § 69.801. It is not the intention of this rulemaking to direct the hiring practices of major jurisdictional utilities. To the contrary. The PUC recognizes that major jurisdictional utilities are responsible for managing their business operations and that they are in the best position to

address the diversity in their respective workforces. To address C&T Utilities' concern, the PUC deletes the first sentence in Section 51.11 and retains this sentence in the Diversity Policy Statement at 52 Pa. Code § 69.801.

The PUC also agrees with IRRC's recommendation to cite in the preamble the PUC's authority to impose a fine against major jurisdictional utilities that fail to comply with the diversity reporting requirement. The PUC derives its authority to impose a fine of up to \$1,000 on any public utility in its jurisdiction for violations of the Public Utility Code or the PUC's regulations. 66 Pa.C.S. § 3301. Accordingly, the PUC amends Section 51.11 to include the language "failure to conform with this chapter may result in civil penalties pursuant to 66 Pa.C.S. § 3301."

The PUC notes that the last sentence in Section 51.11 generally states that major jurisdictional utilities are now required to report annually the result of their diversity efforts. The PUC has determined that it is necessary to include the phrase "in accordance with this chapter" to make it clear that annual reports, that major jurisdictional utilities submit to the PUC, adhere to all of the provisions set forth in Chapter 51.

C. § 51.12.—Definitions.

Before addressing the comments regarding the individual definitions, we first address the definition structure in Chapter 51. IRRC notes that the definitions in all three sections (Sections 51.12, 51.13, and 51.14) are applicable to this regulation and the entirety of the Policy Statement and that none of the definitions in a particular section are repeated in another section. IRRC Comments at 1. IRRC questions the need for three separate sections for definitions and suggests that there be one section for definitions. Id.

Disposition

The PUC agrees with IRRC in reducing the definitions sections from three sections to one. To accomplish this, the PUC deletes Sections 51.13 and 51.14 and amends Section 51.12 to contain three new subsections: (a), (b) and (c). Subsections (a), (b) and (c) will contain the prefacing language from Sections 51.12, 51.13 and 51.14, respectively, and their defined terms listed beneath their respective prefacing language. Accordingly, terms applicable to both major jurisdictional utility employees and vendors will be listed under 51.12(a), terms applicable only to employees will be listed under 51.12(b), and terms only applicable to vendors will be listed under 51.12(c). The remaining proposed sections will be renumbered.

1. § 51.12(a)⁴

The PUC received comments from CAUSE-PA and IRRC generally supporting the language now in Section 51.12(a) but recommending amendments. CAUSE-PA recommends adding to persons with disability and LGBTQ definitions "employee self-identification and shall be confidential and voluntary on the part of the employee." CAUSE-PA's Comments at 6-7. CAUSE-PA contends that it is important for utilities to build an inclusive and welcoming workplace, where employees feel safe to be who they are. Id. at 7. CAUSE-PA notes that disabilities are often not visible and that disclosure of a disability to an employer can expose the person to disparate treatment by the employer or their colleagues. Id. It must be clear to the employee that disclosure is completely voluntary and will remain confidential. Id. at 7-8.

IRRC also notes that the last sentences in "LGBTQ," "person with disabilities" and "operate" are substantive

and should be moved to the body of the regulation or policy statement. Id. at 2. IRRC further advises that if the Policy Statement is amended to delete Section 69.809, 52 Pa. Code § 69.809, the definition section of the final regulation should be amended to reflect the correct citation to the Policy Statement. Id.

Disposition

The PUC agrees with CAUSE-PA's recommendation that employee self-identification must be confidential and voluntary on the part of the employee. Further, the PUC adopts IRRC's recommendation that the language directing the self-identification and confidential treatment of persons with disability and LGBTQ status should be moved to the body of the regulation to be consistent with the *Style Manual*. Accordingly, the PUC amends the definition of "LGBTQ" in Section 51.12(a) by deleting "Employer reporting on LGBTQ shall be based on employee self-identification." In turn, we add subsection (d) to Section 51.13 which now incorporates CAUSE-PA's recommended language which reads "reporting of persons with disability and LGBTQ status shall be confidential and voluntary on the part of the employee." This language ensures the privacy of individuals who do not wish to be reported as a person with disability or LGBTQ status. The PUC further corrects all the citing references to all of the Diversity Policy Statement sections in Chapter 51.

2. § 51.12(b)⁵

The PUC received comments from CAUSE-PA, C&T Utilities, EAP, and IRRC generally supporting the definitions now in Section 51.12(b) but recommending amendments.

a. *Removal of definitions not used in Diversity Reporting Regulation*

C&T Utilities, EAP and IRRC recommend removing definitions that do not appear in Section 51.11 and 51.15. C&T Utilities Comments at 5 and EAP's Comments at 4. C&T Utilities specifically notes that the term Minimum Improvement Level (MIL) assumes a substantive evaluation of the "level or goal" that "indicates progress in a preferred direction," which is a matter of managerial discretion. C&T Utilities Comments at 5. EAP asserts the proposed regulations would include definitions recently modified or added to the Diversity Policy Statement but not used in the proposed regulatory language set forth in the NOPR. EAP's Comments at 3. EAP further notes that the form also is part of the Diversity Policy Statement. Id. EAP disagrees with the PUC's rationale that "because the Diversity Policy Statement would be the predicate recommendations for the contents being reported, there are definitions proposed for inclusion in the regulation that would not be otherwise used in the regulation." Id. At 4 (citing NOPR, 51 Pa.B. at 3135). EAP disagrees with this approach and contends that definitions necessary to understand the Diversity Policy Statement are already contained therein. Id. EAP requests that the following terms in Section 51.12(b) be stricken: "long-term plan," "minimum improvement level," "midterm plan," "short term plan." Id. At 4 n. 3. EAP also notes its concerns that the language as proposed blurs the line between policy and regulatory obligation which sets the stage for future confusion between the regulator and the regulated community. Id. At 3.

IRRC states that terms not used in the substantive section of the rulemaking creates a compliance obligation

⁴ Formerly Section 51.12.

⁵ Formerly Section 51.13.

that does not exist. *Id.* At 1. It notes that the inclusion of definitions in a regulation that are not used in that regulation conflicts with guidance provided in Section 2.12 of the *PA Code & Bulletin Style Manual*. IRRC suggests that the PUC follow the *PA Code & Bulletin Style Manual* and delete terms that are not used in Sections 51.11 and 51.15 of Section 51.12(a) or the annual report. *Id.* At 1-2.

Disposition

With respect to the terms “long-term plan,” “minimum improvement level,” “midterm plan,” “short term plan,” the PUC deletes these definitions from Section 51.12(b). The PUC agrees with C&T Utilities, EAP, and IRRC that since these terms are not used in the regulation for diversity reporting they should not be defined here. As such, the PUC deletes these terms from Section 51.12(b) and keeps these definitions in the Policy Statement at Section 69.802 where they are used. 52 Pa. Code § 69.802. The PUC also deletes language in the preamble of Section 51.12(b) that reads “and in the Commission’s Diversity Policy Statement at 52 Pa. Code §§ 69.801—69.808” since the terms defined in Section 51.12(b) are not used in the Diversity Policy Statement.

In turn after the regulation becomes effective, the PUC will delete, in its entirety, Section 69.802a, 52 Pa. Code § 69.802a, and combine all of the employer and vendor terms together in one definitions section in the Policy Statement since both the employer and vendor terms are apparent as to their respective applicability in the Policy Statement.

b. The Use of “Not Hispanic or Latino”

CAUSE-PA recommends removing “Not Hispanic or Latino” from each identified race in Section 51.12(b) because people who identify as Hispanic or Latino, an ethnicity, should not be prevented from also indicating the race they identify as, if they so choose. CAUSE-PA Comments at 9. CAUSE-PA posits that research suggests that separating ethnicity from race in data reporting can cause inaccuracies in reporting. *Id.* It acknowledges that these amendments would be different from the federal definitions from which the PUC modeled its proposed definitions and would cause state reporting to differ. However, CAUSE-PA generally suggests this challenge is not insurmountable and not cost prohibitive. *Id.*

IRRC notes that the term “Black or African-American” does not include “not Hispanic or Latino” in parentheses like the other racial definitions. IRRC’s Comments at 3. IRRC points to CAUSE-PA’s comment regarding the use/non-use of “Not Hispanic or Latino” and asserts that if the PUC believes CAUSE-PA’s suggestion improves the clarity of the regulation and the form, then IRRC encourages this change to be made to the final-form rulemaking. *Id.*

Disposition

The definitions being used to refer to race in the proposed rulemaking were carried over from the PUC’s updated Diversity Policy Statement from 2020. See 52 Pa. Code § 69.802. In the PUC’s update to its Diversity Policy Statement, the PUC considered comments from Aqua, Duquesne Light, EAP, PECO, and First Energy which all recommended that the PUC use the EEOC’s EEO-1 Report. See 51 Pa.B. 435-436. We further noted in amending the Diversity Policy Statement that it was part of the PUC’s goal to ensure consistent reporting of major jurisdictional utility diversity reporting to multiple governmental agencies. The definitions of terms to describe race as used in the Diversity Policy Statement are now

used in this regulation. The PUC has determined that these definitions are consistent with the EEO-1 Report and will not make any further changes to these definitions. However, with respect to IRRC’s comment regarding the omission of “Not Hispanic or Latino” after “Black or African American” this was incorrectly omitted, and the PUC adds “Not Hispanic or Latino” to the term “Black or African American” in Section 51.12(b).

*3. § 51.12(c)*⁶

C&T Utilities generally supports Section 51.12(c) but made recommendations for amendments. C&T Utilities recommends removing the definition of “exempt procurement” and “substantial objective.” C&T Utilities Comments at 5. It notes that these definitions are not used in the proposed regulations and should not be included in the definitions section. Additionally, “substantial objective” is defined as one “which demonstrates a major jurisdictional utility’s commitment to increase the share of the utility’s purchases from and contracts with” diverse vendors. C&T Utilities suggests that this seems to set a quota for assessing a utility’s performance, rather than establishing a reporting requirement. *Id.*

Disposition

The PUC has reviewed Sections 51.11 and 51.13 and determined that the terms “Control,” “Operate,” “Subcontract” and “Substantial objective” are not used in Sections 51.11 or 51.13. We are mindful of IRRC’s comment, *supra*, that Section 2.11 of the *Pennsylvania Code & Bulletin Style Manual* proscribes defining unused terms. While it was initially the PUC’s intent to eliminate the definition sections in the Policy Statement, 52 Pa. Code §§ 69.802 and 69.802a, we now recognize that a definition section in the Policy Statement is still necessary to include the terms only used in the Policy Statement. Accordingly, the PUC will add these definitions to the Diversity Policy Statement at 52 Pa. Code § 69.802 after this rulemaking is concluded. Removing the term “substantial objective” from the regulation also addresses C&T Utilities’ concern, stemming from this term and definition, over the appearance of the PUC setting a quota. Since this term is no longer defined in the regulation, this concern is no longer an issue.

With respect to the term “Exempt procurement” the PUC has made additional amendments to the language now Section 51.13, *infra*, wherein this term is now used in the regulation. Accordingly, we leave this term defined in Section 51.12(c).

D. § 51.13⁷—Diversity Reporting Requirement.

The PUC received comments from CAUSE-PA, C&T Utilities, Duquesne Light, EAP, IRRC, PECO, PGW, and UGI generally supporting the language now in Section 51.13 but recommending amendments.

1. Consistency of Terms Used

Prior to receiving public comments, the PUC received correspondence from the OAG on May 5, 2021, indicating that its approval of the PUC’s diversity reporting regulation for form and legality was contingent upon the PUC replacing the term “diverse-owned business” with “MBE/WBE.” The OAG explained that the PUC had not defined “diverse-owned business” and therefore this term should not be used in Chapter 51.

⁶ Formerly Section 51.14.

⁷ Formerly Section 51.15.

Disposition

In accordance with the OAG's required change, the PUC amends the language now in Section 51.13 by removing the term "diverse-owned business" from subsection (a)(8) and replaces this term with "MBE/WBE." Additionally, the PUC keeps the terms "MBE" and "WBE" defined in Section 51.12(c) since these terms are now used in Chapter 51.

2. Items Required for Reporting

CAUSE-PA asserts that the language now in Section 51.13(a)(2) should be amended as follows: "goods and services, including the number of trainings, number of attendees, department trained, and topics covered." CAUSE-PA's Comments at 10. It contends that this amendment allows the PUC and stakeholders to evaluate the nature and frequency of the trainings conducted. Id. CAUSE-PA also suggests that Section 51.13(a)(4) should be amended as follows: "[a] description of diversity recruiting strategies, and how those strategies are designed to reach underrepresented communities." Id. It asserts that this amendment will help the PUC determine if utilities have promoted recruitment in communities that are underrepresented or at-need. Id. At 10-11. Finally, CAUSE-PA recommends amending Section 51.13(a)(6) to require annual reporting related to "[a] description of diversity retention efforts, including identified disparities in workforce retention." Id. At 11. CAUSE-PA contends that requiring utilities to report not only on their diversity retention efforts, but also to specifically identify disparities in the utilities' ability to maintain diversity in the workforce since the last annual report, will allow the PUC to better examine trends amongst utilities to recruit and retain a diverse workforce.

Disposition

The PUC has previously encouraged major jurisdictional utilities to file diversity reports with the PUC. In 2020, the PUC updated the recommended reporting criteria on which the PUC received comments from the regulated community. See 51 Pa.B. 435. The purpose of enumerating the reporting criteria was to encourage a more uniform report of major jurisdictional utilities' diversity efforts. As previously mentioned, supra, this rulemaking is the next step where the PUC is now requiring major jurisdictional utilities to file the diversity information that we previously recommended that major jurisdictional utilities file. In order to maintain consistent records concerning major jurisdictional utilities' diversity data, the PUC makes no further changes to the reporting criteria enumerated in Section 51.13.

3. Reporting Requirements for Smaller Major Jurisdictional Utilities

C&T Utilities suggests modifying the filing requirement to track the requirements in 52 Pa. Code § 69.809(a). C&T Utilities Comments at 6. The PUC recently adopted an Amended Policy Statement setting forth the elements of the expected annual diversity filing. 51 Pa.B. 435. Those requirements are repeated in Section 51.13(a) but with slight modifications by eliminating the word "any" in requirements 1 through 7. Id. C&T Utilities recommends reinserting "any" into those provisions. Id. Without the word "any," the regulations appear to presuppose that all of those items must be part of the utility's diversity efforts. Id. That conclusion would undermine the major jurisdictional utility's managerial discretion to establish and oversee the policies for the utility. Id.

C&T Utilities also suggests adding subsection (d) to Section 51.13 in consideration of smaller utilities that

meet the definition of a major jurisdictional utility. Id. It recommends adding the following language to the proposed subsection: "For major jurisdictional utilities with 100 employees or less, the PUC shall accept reports that vary from the elements specified in subsection (a)." Id. At 8.

C&T Utilities submits that utilities with 100 employees or less are not required to submit workforce data under the EEOC requirements. Id. At 6. Additionally, they are not subject to the SEC regulations and do not file the SEC's Diversity Assessment Report. Id. At 6-7. C&T Utilities contends that unlike the larger utilities who are required to compile data for the EEOC and/or SEC, the PUC's filing requirements are unique and provide incremental obligations for C&T Utilities members. Id. At 7. While those utilities covered by the EEOC and/or SEC reporting regime may have comprehensive systems to solicit data from new and existing employees, smaller entities may not have the same robust information. C&T Utilities thus urges the PUC to be flexible in evaluating the reporting elements submitted by smaller utilities. Id.

Disposition

The PUC makes no further changes to the criteria listed in Section 51.13. The reporting requirements enumerated in Section 51.13 are simply areas of inquiry of which the PUC seeks to stay apprised. The determination not to carry over the use of the modifier "any" from the Policy Statement to the regulation requires major jurisdictional utilities to report on all of the items listed in Section 51.13(a). The PUC finds C&T Utilities concern unfounded. Aside from asserting that Section 51.13(a) infers those major jurisdictional utilities must have the diversity efforts listed therein, C&T Utilities points to no authority in the Public Utility Code, upon which the PUC could rely, to compel major jurisdictional utilities to have the listed items. If a major jurisdictional utility does not have an item listed under Section 51.13(a), the major jurisdictional utility would simply report as such to the PUC. The PUC would have no further recourse to compel the major jurisdictional utility to take further diversity efforts. As such, the PUC refrains from changing the language in Section 51.13(a).

With respect to C&T Utilities' request that the PUC create an exemption for smaller major jurisdictional utilities reporting, the PUC refrains from creating such an exemption. As previously discussed, the PUC cannot compel major jurisdictional utilities to implement diversity programs. The reporting requirement in Section 51.13 is simply requiring major jurisdictional utilities to report the items listed thereunder, and if there are items which a major jurisdictional utility does not have, then that item shall be reported as such. This regulation only compels reporting, and as such, there is no need to create an exemption for smaller major jurisdictional utilities.

4. LGBTQ Reporting

EAP notes that Section 51.13(a)(3) does not include "LGBTQ" for reporting but that the term is included on the form. EAP Comments at 7. EAP suggests that the regulatory language be amended to include "LGBTQ" designation in the list of demographic information reported. Id. IRRC points to and agrees with EAP's comment that "LGBTQ" should be added to subsection (a)(3) because it is noted on the Demographics of Utility Workforce Form. IRRC Comments at 3. PGW also requests that the PUC modify the regulatory language as the "LGBTQ" classification is not listed but all other

classifications are listed. PGW Comments at 3. It further notes that “LGBTQ” is listed on the reporting form. Id. At 3.

Disposition

The PUC agrees with EAP, IRRC and PGW regarding the reporting of LGBTQ in subsection (a)(3). The PUC initially omitted “LGBTQ” from the list in Section 51.13(a)(3) because the PUC was concerned with the voluntariness of reporting the number of LGBTQ employees. However, with the addition of subsection (d) expressly noting the voluntariness and confidentiality of major jurisdictional utilities’ employees reporting their LGBTQ status, the PUC adds “LGBTQ” to the demographics to be reported in subsection (a)(3).

5. Reporting Diversity on Default Service Procurement

Duquesne Light recommends inserting excepting language with respect to procuring default service. Duquesne Light Comments at 3. It posits that these suppliers are selected following the requirements of 52 Pa. Code § 54.186 which include, among other things, an emphasis on the “least cost to customers over time.” Also, the size of this purchase would overshadow diversity in the procurement of professional services, equipment, and materials. Duquesne Light recommends inserting excepting language in item (a)(8) so that default service procurement is excluded from the report in the summary of the percentage of dollars spent with MBEs/WBEs versus businesses that are not MBEs/WBEs. Id. By excluding default service supply, more focus can be placed on areas of procurement for which the utility has more direct control, and which can arguably have greater impact in the local community it serves. Id. At 3-4.

Disposition

The PUC agrees that default service procurement should be excluded from a major jurisdictional utility’s reporting of diversity demographics. EDCs have to follow distinct parameters when procuring default service and including default service providers as a vendor would cause inaccuracies in EDCs’ reporting of their respective diversity demographics among vendors. To address this issue, the PUC makes two amendments to Chapter 51. First, we add to the definition of “Exempt procurement” in Section 51.12(c) subsection (v) to read, “default service procurement and implementation plans pursuant to 52 Pa. Code § 54.186.” Second, we add a sentence to Section 51.13(a)(8) reading “exempt procurements are excluded from this summary.” This amendment further addresses C&T Utilities’ concern regarding the lack of use of the term “Exempt procurement” in Chapter 51 and justifies keeping this term defined within the regulation rather than the Policy Statement.

6. Time Period Being Reported, Report Date and Implementation Date

EAP recommends moving the diversity reporting deadline to March 31. EAP suggests that changing the reporting date from March 1 to March 31 of each year will better align with other reports major jurisdictional utilities file annually. EAP Comments at 7. EAP reads the NOPR as the diversity report due date as the March following a full calendar year after the effective date. Id. EAP recommends making a clear effective date for this new report. Id. Many of EAP’s members do not currently collect information from employees concerning disability or LGBTQ designation either at the time of employment or in an annual survey, and, when the information is solicited, the employee option to respond is voluntary. Id. at 7. Major jurisdictional utilities will be working to build

processes and systems and train employees to collect this information. Id. This will take time, and EAP proposes that the first report under this new regulation be due no earlier than March 31, 2023, for calendar year 2022. Id.

IRRC recognized that other commenters suggested that the regulation begin with the data collection for January 1, 2022, through December 31, 2022, and that the reporting obligation begin with the filing of a utility annual report in 2023. IRRC asks that we consider the suggestion and amend the implementation timeline as suggested by commenters or explain why it is not reasonable or appropriate to do so. Id. at 2.

PGW also requests delaying the implementation and enforcement of the mandatory reporting information in the NOPR until the March 2023 report (for 2022) data. PGW Comments at 4. This will allow additional time for utilities, to implement the necessary confidential data collection and storage processes to provide the PUC with the requested information. Id.

PAWC notes that the rulemaking does not specify the time period that is to be represented in each annual diversity report. PAWC Comments at 3. PAWC has submitted past diversity reports for the calendar year (January 1 to December 31) immediately preceding the March 1 filing date. Id. PAWC requests that the PUC specify the time period for major jurisdictional utility reports as January 1 to December 31 of the calendar year preceding the March 1 filing date. Id. at 3-4.

UGI also asks the PUC to clarify the term “for the prior year” that it expects major jurisdictional utilities to include in their report. UGI Comments at 7. Specifically, it seeks clarification as to whether the reporting year will be done on a calendar year or a fiscal year basis. Id. UGI further seeks clarification as to what date is to be used to capture/complete the Demographics of Utility Workforce Form data. Id. UGI points to Affirmative Action plans reports it files as of December 31 for employers with calendar year plans and the EEO-1 Report, as examples of reports requiring employment data from a workforce snapshot period, which is any pay period from October through December. Id.

PECO suggests moving the diversity reporting deadline to March 31. It opines that preparing diversity reports requires a concerted effort across its departments and its other diversity reports in other jurisdictions are due on March 31 as opposed to March 1. PECO Comments at 1.

Disposition

The PUC adopts PAWC and UGI’s recommendation and expressly states the time period required for the diversity report. As such, the language “starting January 1 and ending December 31” is added to the end of the first sentence of the language now in Section 51.13(a). Further, we agree that the reporting date for the annual diversity report, should be in line with other jurisdictional reporting dates, and so we adopt PECO’s recommendation, to move the annual diversity report date to March 31.

Further, the PUC acknowledges that major jurisdictional utilities that do not already track persons with disabilities and LGBTQ status will need time to implement the proper procedures to accomplish this. As such, the PUC clarifies that the effective date for major jurisdictional utilities to commence submitting their respective annual diversity reports is March 31, 2023, beginning with the year 2022.

7. *Demographics of Utility Workforce Reporting Treatment*

Several commenters recommend the PUC should treat the demographic information each major jurisdictional utility submits to the PUC as confidential.

EAP requests that the PUC consider including clarifying language in the final regulations that would explicitly permit utilities to report metrics such as disability or LGBTQ employee composition by indicating that such information is not collected by the utility at this time. EAP Comments at 5. Such clarifying language would allow those utilities with disability or LGBTQ data reporting processes in place to provide such information immediately, while at the same time, clarifying the reporting obligations for those utilities which must develop such reporting processes. *Id.* Ultimately, such a caveat would allow for the data that is reported in this space to be more accurate and precise. *Id.*

IRRC raises concerns with how the PUC will handle the demographic information. It asks the PUC if the public will have access to the information. IRRC recommends that the PUC explain how the information will be treated in the Preamble to the final-form regulation. IRRC Comment at 2.

Duquesne Light and PAWC individually note that the NOPR does not detail how the information included in the annual diversity reports will be treated after filing. Duquesne Light Comments at 2 and PAWC Comments at 2. Given the proprietary and valuable nature of the information to be included in the annual diversity report, PAWC believes that all information included in each annual diversity report should be treated as confidential and be subject to a standing protective order to prevent public disclosure of individual companies' reports. PAWC Comments at 2. While it may be appropriate for the PUC to make aggregate statistics public, PAWC submits that the information contained in annual diversity reports should be subject to the confidentiality protections established in 52 Pa. Code § 5.365. *Id.* at 2. PAWC believes that the internal strategic information and vendor relationships, that are required to be contained in annual diversity reports, qualify as confidential information under Section 5.365. *Id.* at 3. PAWC further requests that major jurisdictional utilities be exempt from filing a petition for protective order when submitting annual diversity reports. *Id.* at 3.

Duquesne Light also notes that federal reporting by employers via the EEO-1 Report is not regularly made public. Duquesne Light Comments at 2. Additionally, Duquesne Light contends that confidential reporting encourages openness. Duquesne Light further explains that as utilities build their internal diversity and inclusion programs, they will need time to communicate data and benchmark internally with their workforce, prior to making it available to the general public. *Id.*

UGI comments that the PUC strikes the appropriate balance with regard to reporting LGBTQ employees between privacy and disclosure as "the form would include the number of LGBTQ employees that a major jurisdictional utility employs with the caveat that only employees who agree to be counted in LGBTQ diversity report may be included in the report." UGI Comments at 5.

Disposition

As previously noted, the reporting of persons with disability and LGBTQ could raise privacy concerns. Expressly recognizing this information and the data reported as confidential, provides protection from public

disclosure, namely the Right-to-Know Law, 65 P.S. §§ 67.101—67.3104. Furthermore, we recognize that this information will contain proprietary information regarding individual major jurisdictional utilities' diversity initiatives which may provide a competitive advantage to individual major jurisdictional utilities. As such, the PUC has a duty to protect such competitive information from public disclosure. Accordingly, the PUC amends Section 51.13 by amending subsection (b) to read "[t]his information and form shall be filed confidentially in conformance with 52 Pa. Code § 1.32, at a major jurisdictional utility's A-docket."

Further, we add subsection (e) that will read "the information and form filed shall be confidential." The Commission will treat the information and form as exempt from public disclosure under sections 67.707(b) (relating to treatment of requests for trade secrets and confidential proprietary information) and 67.708(b)(5) (disability status), (b)(6) (personal identification information), (b)(11) (trade secrets or confidential proprietary information), and (b)(28) (eligibility to receive social services) of the Right-to-Know Law (65 P.S. §§ 67.707(b), 67.708(b)(5), (6), (11), and (28)) regarding exceptions for public records. In addition, pursuant to the right to privacy under the Pennsylvania Constitution, as espoused by the *Pennsylvania Supreme Court in Pennsylvania State Education Association v. Office of Open Records*, 148 A.3d 142 (Pa. 2016), the PUC shall assert that the personal information relating to employees as submitted by a major jurisdictional utility to the PUC is exempt from disclosure.

E. Utility Workforce Form

The PUC received comments from CAUSE-PA, Duquesne Light, EAP, PAWC and UGI regarding the Demographics of Utility Workforce Form. PAWC expressed general support for the Demographics of Utility Workforce Form in its current state. PAWC's Comments at 3. CAUSE-PA, Duquesne Light, EAP and UGI recommended amendments which we address.

1. Gender

CAUSE-PA recommends including the following two additional selections for Gender: "Nonbinary" and "Prefer to Self-Describe." CAUSE-PA's comments at 11-12. CAUSE-PA notes that other Commonwealth agencies have moved towards more inclusive reporting and gender identity such as PennDOT adding a nonbinary option for driver licenses. PennDOT now offers an "X" instead of "M" or "F." *Id.* at 12.

Duquesne Light is supportive of the PUC's efforts to be inclusive of all gender and sexual identities through the expansion of its definition of LGBTQ in the 2020 updates to the Policy Statement. With respect to the Demographic Composition of Workforce Form, it recommends including a third option for major jurisdictional utility employees who do not self-identify as either male or female. *Id.* Duquesne Light suggests in the alternative that the PUC could add a footnote to explicitly state that the two gender columns may not be inclusive of all employees under each job category. *Id.* at 3.

Disposition

In order to ensure accurate reporting, the PUC keeps gender limited to male and female. The term "LGBTQ" encompasses individuals who are transgender and/or individuals who identify their gender as non-binary. As the term "LGBTQ" already accounts for these individuals, the addition of a third option for gender could cause inaccurate results.

2. *LGBTQ Reported in Aggregate*

EAP notes that the PUC-requested reporting is based on the EEO-1 Report, which requires disclosure on workforce demographics by job category. The EEO-1 Report, however, does not include LGBTQ as a reportable category. *Id.* at 5-6 n.4. EAP recommends that the PUC consider requiring that the information for LGBTQ be reported in the aggregate because reporting LGBTQ information by job category could undermine privacy in the event the category size is small. *Id.* at 6 n.4.

EAP also raises concerns that the guidelines in the Diversity Policy Statement remain discretionary and believes the proposed form necessary to comply with the reporting requirement should be included in the regulation. *Id.* at 6. EAP contends that the form must be codified in some way to maintain clear expectations and avoid any changes that are not vetted through the public regulatory process. *Id.* at 6.

Disposition

As has been previously addressed, *supra*, the diversity data being filed pursuant to Section 51.13 will be confidential and not subject to public disclosure. As this information will be treated as confidential, there is no need to aggregate the diversity data regarding LGBTQ status. Further, we have expressly noted in the regulation and on the Demographics of Utility Workforce Form that the reporting of LGBTQ status is purely voluntary on the part of the employee identifying as such. With these safeguards in place for both persons with disability and persons identifying as LGBTQ, the PUC keeps LGBTQ as a distinct category for each job title on the Demographics of Utility Workforce Form.

With respect to EAP's concern of codifying the Demographics of Utility Workforce form, we reiterate that it is the regulation, not a form, that specifies the information to be reported. The form does not control what is to be reported. The PUC has expressly noted in Section 51.13(a)(3) that all of the diversity demographic data is to be reported by entry on the Demographics of Utility Workforce form which will be provided by the PUC. The PUC makes the Demographics of Utility Workforce Form, as presently designed and as may be changed from time to time, available with the other forms the PUC makes available to public utilities.

3. *Job Categories*

UGI notes that the EEO-1 Report includes separate job categories for "Sales Workers," "Craft Workers," "Operatives," "Laborers and Helpers," and "Service Workers" to report the number of diverse employees filling these roles. UGI's Comments at 6. UGI notes that the PUC's Demographics of Utility Workforce form does not have these categories and asks if these employee positions should be put in the "All Others" category. *Id.* UGI specifically asks if "Sales Workers" should be included in "Professional" category or in the "All Others" category. *Id.* UGI also asks for clarification of whether the PUC expects major jurisdictional utilities to report on activities related to the diversity programs mentioned in the revised policy statement, 52 Pa. Code §§ 69.803—69.808. *Id.* at 6-7.

Disposition

The PUC amends the Demographics of Utility Workforce Form to include "Sales Workers," "Craft Workers,"

"Operatives," "Laborers and Helpers," and "Service Workers." In turn, we delete "All Others" so that the Demographics of Utility Workforce Form is more closely aligned with the EEO-1 Report. To be clear, the Diversity Policy Statement does not impose any duty on major jurisdictional utilities. Regardless of whether a major jurisdictional utility has implemented programs to develop diversity, this regulation directs all major jurisdictional utilities to report all of the items listed in Section 51.13(a). The only information major jurisdictional utilities are compelled to file is listed in Section 51.13(a). The PUC is not directing the filing of any other information not listed in Section 51.13(a).

Conclusion

Accordingly, pursuant to 66 Pa.C.S. §§ 501 and 504 and pursuant to our sua sponte reconsideration of our April 14, 2022 Order at this docket, we adopt as final the revisions to 52 Pa. Code §§ 51.11—51.13 as set forth in Annex A, attached hereto.⁸ We note that any issue, comment, or reply comment requesting a further change to this Rulemaking or objecting to a possible change, but which we may not have specifically delineated herein, shall be deemed to have been duly considered and denied at this time without further discussion. The PUC is not required to consider expressly or at length each contention or argument raised by the parties. *Consolidated Rail Corp. v. Pa. Pub. Util. Comm'n.*, 625 A.2d 741 (Pa. Cmwlth. 1993); see also, generally, *U. of PA v. Pa. Pub. Util. Comm'n.*, 485 A.2d 1217 (Pa. Cmwlth. 1984); *Therefore*,

It Is Ordered That:

1. The Public Utility Commission hereby adopts the revised final regulations as set forth in Annex A to this Final Rulemaking Order On Reconsideration.

2. The Secretary shall serve a copy of this Final Rulemaking Order On Reconsideration and Annex A on all major jurisdictional utilities and all other parties to this proceeding.

3. A copy of this Final Rulemaking Order On Reconsideration and Annex A shall be posted on the Public Utility Commission's website.

4. The Law Bureau shall submit this Final Rulemaking Order On Reconsideration and Annex A for review by the Legislative Standing Committees and for review and approval by the Independent Regulatory Review Commission.

5. Thereafter the Law Bureau shall submit this Final Rulemaking Order On Reconsideration and Annex A to the Office of Attorney General for review as to form and legality and to the Governor's Budget Office for review of fiscal impact.

6. Thereafter the Law Bureau shall submit this Final Rulemaking Order On Reconsideration and Annex A to the Legislative Reference Bureau for publication in the *Pennsylvania Bulletin*.

7. The final regulations embodied in Annex A shall become effective upon publication of the Final Rulemaking Order On Reconsideration and Annex A in the *Pennsylvania Bulletin*.

⁸ The Annex appended to the April 14, 2022 Order at this docket is hereby rescinded and replaced by the Annex A appended hereto.

8. The contact persons for this Final Rulemaking On Reconsideration are Joseph P. Cardinale, Jr. Assistant Counsel, jcardinale@pa.gov, and Rhonda L. Daviston, Assistant Counsel, rdaviston@pa.gov.

ROSEMARY CHIAVETTA,
Secretary

ORDER ADOPTED: June 16, 2022

ORDER ENTERED: June 16, 2022

(Editor's Note: See 52 Pa.B. 4479 (August 6, 2022) for IRRC's approval order.)

Fiscal Note: Fiscal Note 57-332 remains valid for the final adoption of the subject regulations.

Appendix A
Demographic Composition of Workforce
 Form to be used by
 Major Jurisdictional Utilities
Providing Electric, Natural Gas, Water, Wastewater, and Telecommunications Services

<i>Demographics of Utility Workforce</i>		<i>52 Pa. Code §§ 51.11—51.13</i>									
<i>Total Number of Employees:</i> _____		<i>Utility Name:</i> _____		<i>Year Reported:</i> _____							
<i>A-Docket Number:</i> _____		<i>Race and Ethnicity</i>									
<i>Job Categories</i>	<i>Gender</i>		<i>Not Hispanic or Latino</i>						<i>Person with Disabilities (Only employees who agreed to be reported)</i>	<i>LGBTQ (Only employees who agreed to be reported)</i>	<i>Veteran</i>
	<i>Male</i>	<i>Female</i>	<i>Hispanic or Latino</i>	<i>White</i>	<i>Black or African-American</i>	<i>Asian</i>	<i>Native American or Alaska Native</i>	<i>Native Hawaiian or Pacific Islander</i>			
Executive/Senior Level Officials & Managers											
First/Mid-Level Officials & Managers											
Professionals											
Technicians											
Sales Workers											
Administrative Support Workers											
Craft Workers											
Operatives											
Laborers and Helpers											
Service Workers											
Totals											

Annex A
TITLE 52. PUBLIC UTILITIES
PART I. PUBLIC UTILITY COMMISSION
Subpart C. FIXED SERVICE UTILITIES
CHAPTER 51. GENERAL PROVISIONS
DIVERSITY

§ 51.11. General.

The Commission’s Diversity Policy Statement at 52 Pa. Code §§ 69.801—69.809 (relating to diversity at major jurisdictional utility companies—statement of policy) provides recommendations for addressing diversity issues. While the means by which a major jurisdictional utility addresses diversity in its workforce and vendor supply chains should be utility-specific, the results of such efforts shall be reported in accordance with this chapter annually by each major jurisdictional utility. Failure to conform with this chapter may result in civil penalties under 66 Pa.C.S. § 3301 (relating to civil penalties for violations).

§ 51.12. Definitions.

(a) The following words and terms, when used in §§ 51.11 and 51.13 (relating to general; and diversity reporting requirement) and in the Commission’s Diversity Policy Statement at 52 Pa. Code §§ 69.801—69.809 (relating to diversity at major jurisdictional utility companies—statement of policy), in the context of major jurisdictional utility employees and vendors have the following meanings:

Diversity—The attainment of organizational objectives by maximizing the contributions of individuals from every segment of the population including minorities, women, persons with disabilities, LGBTQ and veterans.

LGBTQ—Lesbian, gay, bisexual, transgender, queer and questioning—This term also includes gender non-conforming individuals.

Major jurisdictional utility—An electric, natural gas, water or wastewater utility whose net plant in service is valued at \$10 million or more.

Person with disabilities—A person who has a disability as defined in the Americans With Disabilities Act (ADA) (42 U.S.C.A. § 12102—12213).

Veteran—A person who meets any veteran category defined in 41 CFR 61-300.2 (relating to what definitions apply to this part?)

(b) The following words and terms, when used in §§ 51.11 and 51.13 in the context of major jurisdictional utility employees have the following meanings:

Black or African American (not Hispanic or Latino)—A person having origins in any of the black racial groups of Africa.

Asian (not Hispanic or Latino)—A person having origins in any of the original peoples of the Far East, southeast Asia, or the Indian subcontinent, including, for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand and Vietnam.

Hispanic or Latino—A person of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin regardless of race.

Native American or Alaska Native (not Hispanic or Latino)—A person having origins in any of the original

peoples of North and South America (including Central America) and who maintain tribal affiliation or community attachment.

Native Hawaiian or Pacific Islander (not Hispanic or Latino)—A person having origins in any of the peoples of Hawaii, Guam, Samoa or other Pacific Islands.

Two or more races (not Hispanic or Latino)—A person who identifies with more than one of the five races identified in this section.

White (not Hispanic or Latino)—A person having origins in any of the original peoples of Europe, the Middle East or North Africa.

(c) The following words and terms, when used in §§ 51.11 and 51.13 and in the Commission’s Diversity Policy Statement at 52 Pa. Code §§ 69.801—69.809, in the context of a vendor with whom a major jurisdictional utility does business, have the following meanings, unless the context clearly indicates otherwise:

Exempt procurement—A product or service which may be removed from the dollar base used to establish minimum improvement levels, because of the demonstrated unavailability of a minority/women/people with disabilities/LGBTQ/veteran-owned business currently capable of supplying a product or service. the term may also include one or more of the following situations:

(i) The vendor is the original equipment manufacturer.

(ii) The vendor is the only known source of the product or service.

(iii) A plant emergency situation dictates use of a specific vendor.

(iv) The purchase is from an affiliate, corporate parent, or a subsidiary.

(v) Default service procurement and implementation plans under 52 Pa. Code § 54.186 (relating to default service procurement and implementation plans).

MBE—Minority-owned business enterprise—A business enterprise that is at least 51% owned by a minority individual or group or individuals; or a publicly-owned business that has at least 51% of its stock owned by one or more minority individuals, and whose management and daily business operations are controlled by these individuals.

Minority—Black American, Hispanic American, Native American, Asian-Pacific American or any other socially disadvantaged individual as defined in 13 CFR 124.103 (relating to who is socially disadvantaged?).

WBE—Women-owned business enterprise—A business enterprise that is at least 51% owned by a woman or women; or a publicly owned business that has at least 51% of its stock owned by one or more women, and whose management and daily business operations are controlled by one or more women.

§ 51.13. Diversity reporting requirement.

(a) Each major jurisdictional utility shall file with the Secretary of the Commission by March 31 of each year, an annual report describing its diversity program activity for the prior year starting January 1 and ending December 31. The annual report shall contain the following elements:

(1) A copy of corporate policy committed to improving diversity in the workplace and in the procurement process.

(2) A description of training implemented on diversity initiatives in employment and in the contract of goods and services.

(3) The demographic composition of the major jurisdictional utility's workforce, reporting the number of employees by gender, race and ethnicity, LGBTQ, persons with disabilities and veterans, on a form, Demographics of Utility Workforce, to be provided by the Commission.

(4) A description of diversity recruiting strategies.

(5) A description of diversity promotion efforts.

(6) A description of diversity retention efforts.

(7) A brief description of involvement with organizations promoting diversity.

(8) A brief summary of MBEs/WBEs that the major jurisdictional utility contracts with for goods and services. Includes percentage of dollars spent with MBEs/WBEs versus businesses that are not MBEs/WBEs. Exempt procurements are excluded from this summary.

(b) This information and form shall be filed confidentially in conformance with the filing specifications at § 1.32 (relating to filing specifications), at a major jurisdictional utility's A-docket.

(c) The Commission will use all available remedies to ensure reporting compliance including fines.

(d) Reporting of persons with disability and LGBTQ status shall be confidential and voluntary on the part of the employee.

(e) The information and form filed shall be confidential.

[Pa.B. Doc. No. 22-1417. Filed for public inspection September 16, 2022, 9:00 a.m.]

Title 58—RECREATION

FISH AND BOAT COMMISSION

[58 PA. CODE CH. 61]

Fishing; Seasons, Sizes and Creel Limits

The Fish and Boat Commission (Commission) amends Chapter 61 (relating to seasons, sizes and creel limits). The Commission is publishing this final-form rulemaking under the authority of 30 Pa.C.S. (relating to Fish and Boat Code) (code). The amendment updates the Commission's regulations concerning American shad fishing in the Delaware River, West Branch Delaware River and River Estuary.

A. *Effective Date*

This final-form rulemaking shall take effect on January 1, 2023.

B. *Contact Person*

For further information on this final-form rulemaking, contact Wayne Melnick, Esq., P.O. Box 67000, Harrisburg, PA 17106-7000, (717) 705-7810. This final-form rulemaking is available on the Commission's website at www.fishandboat.com.

C. *Statutory Authority*

The amendment to § 61.2 (relating to Delaware River, West Branch Delaware River and River Estuary) is published under the statutory authority of section 2102(b) of the code (relating to rules and regulations).

D. *Purpose and Background*

The specific purpose and background of the amendment is described in more detail under the summary of changes.

E. *Summary of Changes*

American shad are an anadromous species. Adults inhabit the marine waters of the Atlantic Ocean, annually returning to natal freshwater systems during spring for spawning. Young-of-the-year utilize freshwater systems as nurseries, before out-migrating during fall. American shad fulfill a foundational ecological role as forage for many piscivores within oceanic, coastal and connected inland waters, in addition to supporting well-established recreational and commercial fishing opportunities throughout their range along the Atlantic Coast.

Multiple Federal, state and tribal jurisdictions jointly manage American shad fisheries along the Atlantic Coast, including the Atlantic States Marine Fisheries Commission (ASMFC) and specifically within the Delaware River basin, the Delaware River Basin Fish and Wildlife Management Cooperative (Co-op). The Commission is a member of both entities. ASMFC's Amendment 3 to the Interstate Fishery Management Plan for shad and river herring requires Delaware River Basin states jointly submit a Sustainable Fisheries Management Plan for continuance of American shad fisheries for all connected waters within the Delaware River Basin.

In 2020, the ASMFC stock assessment workgroup developed the most current consensus population assessment for the Atlantic Coast. Findings specific to the Delaware River Basin indicated the Delaware River American shad population is experiencing unsustainable mortality. Given the ASMFC stock assessment workgroup findings, Co-op members, including this Commonwealth, have agreed to reduce American shad harvest by approximately 33% for both the recreational and commercial fisheries.

This Commonwealth does not have a commercial fishery for American shad; however, a popular recreational fishery exists in the Delaware River Basin. Given the agreed upon 33% reduction in American shad harvest by Co-op member states, it is recommended that the Commission amend the daily creel of American shad from three to two fish per day on waters managed under § 61.2. New York, New Jersey and Delaware are seeking similar reductions to the recreational daily creel limits within their respective jurisdictional waters in the Delaware River Basin.

F. *Paperwork*

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

G. *Fiscal Impact*

This final-form rulemaking will have no adverse fiscal impact on the Commonwealth or its political subdivisions.

H. *Public Comments*

A notice of proposed rulemaking was published at 52 Pa.B. 3320 (June 11, 2022). The Commission received one public comment supporting the proposal.

Findings

The Commission finds that:

(1) Public notice of intention to adopt the amendments adopted by this order has been given under sections 201 and 202 of the act of July 31, 1968 (P.L. 769, No. 240) (45 P.S. §§ 1201 and 1202), referred to as the Commonwealth