

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120**

Public Meeting held July 13, 2023

Commissioners Present:

Gladys Brown Dutrieuille, Chairman
Stephen M. DeFrank, Vice Chairman
Ralph V. Yanora
Kathryn L. Zerfuss
John F. Coleman, Jr.

Petition of the Office of Consumer Advocate, the Office
of Small Business Advocate, and the Pennsylvania
Utility Law Project Requesting Initiation of a Proceeding
on Federal Funding Opportunities for Utilities Under the
Infrastructure Investment and Jobs Act

P-2022-3032929

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Petition for Clarification (Petition) filed by UGI Utilities, Inc. – Electric and Gas Divisions (UGI or Petitioner) on April 5, 2023, seeking clarification of our Order entered March 21, 2023, in the above-captioned proceeding (*March 2023 Order*). Also before the Commission is the Answer filed by the Office of Consumer Advocate (OCA), the Letter in Support of UGI’s Petition filed by the Energy Association of Pennsylvania (EAP), and the Letter in Lieu of Answer filed by the

Pennsylvania Utility Law Project (PULP) received by the Commission by the required due date of April 17, 2023. *See*, 52 Pa. Code § 5.572(e). On April 25, 2023, an Amicus Letter in Support of UGI’s Petition was also filed by the Energy Innovation Center Institute/Infrastructure Academy (EICI/IA). For the reasons set forth herein, we shall grant, in part, and deny, in part, the Petition, and clarify our *March 2023 Order*, with certain conditions, consistent with the discussion in this Opinion and Order.

Background

The federal Infrastructure Investment and Jobs Act (IIJA) was enacted on November 15, 2021, and provides for the availability of substantial federal funds for investment in utility infrastructure improvements, including electric generation and transmission, access to clean water, and improved cybersecurity.¹ Some of the programs authorized by the IIJA implicate public utilities, including:

- Grants to assist entities in carrying out efforts to harden the electricity grid, reduce risks of power lines causing wildfires, and reduce the likelihood and consequences of disruptive events, including those caused by weather or natural disaster. IIJA § 40101.
- A program to encourage innovative approaches to transmission, storage, and distribution infrastructure to improve resilience, and reliability, and to encourage new approaches to enhance regional grid resilience. IIJA § 40103.
- A Transmission Facilitation Program under which eligible transmission owners can receive loans from the Department of Energy (DOE) for new or replacement transmission lines or upgrades of existing lines. IIJA § 40106.
- An expansion of the Smart Grid Investment Matching Grant Program established by Section 1306(a) of the Energy Independence and Security Act of 2007, which allows for investment in technology to enhance grid flexibility. IIJA § 40107.

¹ Pub. L. No. 117-58, 135 Stat. 429 (2021).

- Grants and technical assistance to enable small and rural electric utilities to deploy advanced cybersecurity technologies. IIJA § 40124.
- Grants to provide assistance to small and disadvantaged community water systems to purchase point-of entry or point-of-use filters and filtration systems; or make investments necessary for providing information regarding use and maintenance of these devices, as well as options for replacing lead service lines or removing other lead sources. IIJA § 50104.
- Grants pursuant to a newly-established Midsize and Large Drinking Water System Infrastructure Resilience and Sustainability Program to enable these systems to improve resilience to natural hazards and extreme weather events as well as address cybersecurity vulnerabilities. IIJA § 50107.
- Grants for rural and Low-Income Water Assistance Pilot programs to maintain access to drinking water and wastewater treatment. IIJA § 50109.

History of Proceeding

On June 10, 2022, the OCA, the Office of Small Business Advocate (OSBA), and the PULP filed a Petition with the Commission, pursuant to 52 Pa. Code § 5.41, requesting that the Commission initiate a proceeding to require utilities to file reports and allow interested parties to file comments to the Commission related to federal programs and funding available to Pennsylvania utilities under the IIJA (Initial Petition).

As noted above, we entered our *March 2023 Order* relative to this proceeding. In that Order, we encouraged Pennsylvania's public utilities to avail themselves of the historic and singular availability of federal funding for infrastructure projects via the IIJA. Acknowledging that any individual utility may choose not to pursue this funding for any myriad of valid reasons, we ultimately granted, in part, and denied, in part, the Initial Petition.

With respect to the granting of the Petition, we determined that:

[D]ue to the potentially substantial amount of funding available to utilities under the IIJA, we believe that it is in the public interest to require jurisdictional fixed public utilities to file simple periodic reports identifying the full amount of all public grants monies that have been received pursuant to the IIJA in the preceding calendar year, the date the funds were received, and the program(s) in which the funding is associated.

March 2023 Order at 12. Further, we directed any utility that receives IIJA funding to prepare to include testimony during the course of a rate case proceeding explaining the accounting treatment of those funds. *Id.*

Regarding its denial, we recognized that the Commission cannot act as a super board of directors for utility companies. *March 2023 Order* at 9 (citing *Met. Edison Co. v. Pa. PUC*, 437 A.2d 76, 80 (Pa. Cmwlth. 1981)). To that end, the *March 2023 Order* identified reasons why a utility may decide not to pursue funding, and reasoned that the Commission cannot penalize utilities that decide not to pursue federal funds absent a showing of abuse of discretion or arbitrary action by a utility. *Id.*² The *March 2023 Order* also acknowledged the private nature of grant applications as well as the potential impact that publicly disclosing grant application details could have on the competitive grant application process. *Id.* at 11.

² The *March 2023 Order* cited *Joint Application of Verizon Communications Inc., and MCI, Inc., MCI Metro Access Transmission Services LLC MCI WorldCom Communications, Inc., MCI WorldCom Network Services, Inc., TTI National Inc., Teleconnect Long Distance Services and System Co. d/b/a Telecom USA for approval of Agreement and Plan of Merger (Verizon MCI)*, Docket Nos. A-310580F0009; A-310752F0006; A-310364F0003; A-312025F0005; A- 310407F0003; A-310401F0006 (Initial Decision issued November 15, 2005, adopted by Opinion and Order entered January 11, 2006).

On April 5, 2023, UGI filed the instant Petition, seeking clarification of the *March 2023 Order*, regarding, in part, regulatory accounting treatment of the incremental costs incurred to seek the federal funds made available by the IIJA. As noted above, on April 17, 2023, the OCA filed an Answer to UGI's Petition, EAP filed a Letter in Support of the Petition, and PULP filed a Letter in Lieu of Answer. On April 25, 2023, EICI/IA filed an Amicus Letter in Support of the Petition.

Discussion

Legal Standards

The Public Utility Code establishes a party's right to seek relief following the issuance of our final decisions pursuant to Subsections 703(f) and (g), 66 Pa. C.S. § 703(f) and § 703(g), relating to rehearings, as well as the rescission, clarification and amendment of orders. Such requests for relief must be consistent with Section 5.572 of our Regulations, 52 Pa. Code § 5.572, relating to petitions for relief following the issuance of a final decision, which provides in pertinent part that:

Petitions for rehearing, reargument, reconsideration, clarification, rescission, amendment, supersedeas or the like must be in writing and specify, in numbered paragraphs, the findings or orders involved, and the points relied upon by petitioner, with appropriate record references and specific requests for the findings or orders desired.

Additionally, we recognize that, while a petition under Section 703(g) may raise any matter designed to convince us that we should exercise our discretion to amend or rescind a prior order, at the same time “[p]arties . . ., cannot be permitted by a second motion to review and reconsider, to raise the same questions which were specifically considered and decided against them.” *Duick v. Pennsylvania Gas and Water Company*, 56 Pa. P.U.C. 553 (Order entered December 17, 1982) (*Duick*) (quoting

Railroad Co. v. Pennsylvania Public Service Commission, 179 A. 850, 854 (Pa. Super. 1935)). Such petitions are likely to succeed only when they raise “new and novel arguments” not previously heard or considerations which appear to have been overlooked or not addressed by the Commission. *Duick* at 559.

Furthermore, we note that any issue that we do not specifically address herein has been duly considered and will be denied without further discussion. It is well settled that we are not required to consider expressly or at length each contention or argument raised by the parties. *Consolidated Rail Corp. v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); *also see, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

Petition

In its Petition, UGI seeks clarification of two matters: “(1) whether the costs incurred by utilities to prepare, apply, administer and otherwise execute on opportunities for federal programs will qualify for regulatory asset accounting treatment, along with related offsetting funding receipts; and (2) that the Commission will engage Pennsylvania utilities to the extent it seeks federal funding as an eligible entity, so utilities may plan for any related impact those additional funds may have on their operations.”³ Petition at 2.

UGI avers that any utility that elects to apply for the federal funds made available by the IIJA will need to call upon additional resources to do so successfully, *i.e.*, additional staff time and expense or the hiring of outside consultants with expertise

³ UGI notes that, although it has not undertaken a comprehensive review of the funding opportunities available for the Commission under the IIJA, it is aware of instances where the Commission itself would be an eligible applicant, rather than the individual utilities. Petition at 8 (citing Section 40103(b)(1)(A)(v) of the IIJA, stating that public utility commissions are eligible entities that may apply for grant funding).

in navigating the federal grant process. In addition, UGI points out that a successful grant award may come with a matching funds requirement. UGI contends that without the creation of a regulatory asset, the matching cost requirements to participate in the program may prohibit utilities from seeking and obtaining funding that could provide long term benefits. Petition at 5-6.

UGI further posits that the Commission should place Pennsylvania utilities on “equal footing” with utilities in other states, whose public service commissions have already identified that costs associated with seeking federal funding may be treated as a regulatory asset.⁴

The OCA responds to UGI’s first request for clarification, stating that it does not disagree with UGI that the utilities’ costs associated with seeking federal funding made available by the IIJA may satisfy the exception to the rule against retroactive recovery of past expenses.⁵ OCA Answer at 3. However, the OCA directs our attention to previous decisions wherein we have allowed utilities to defer extraordinary expenses such as our 2019 decision allowing Metropolitan Edison Company to defer certain losses from extraordinary storm damage. OCA Answer at 3 (*citing Petition of Metropolitan Edison Company for Authorization to Defer, for*

⁴ Petition at 6-7 (citing *In The Matter Of The Federal Grant Opportunities For Utilities Under The Infrastructure Investment And Jobs Act*, MD PSC Order No. 90272 (dated June 29, 2022) (“[t]he Commission finds that allowing each utility to establish an IIJA-specific regulatory asset to track IIJA-related incremental expenditures and savings is appropriate.”); and *Formal Case No. 1172, In the Matter of the Consideration of Federal Funding Under the Infrastructure Investment And Jobs Act*, D.C. P.S.C. Order No. 21176 (dated July 8, 2022) (“The Potomac Electric Power Company and the Washington Gas Light Company are DIRECTED to establish a Bipartisan Infrastructure Law Regulatory Asset to track Bipartisan Infrastructure Law-related costs.”) as modified by Order No. 21542 to incorporate and apply to Inflation Reduction Act-related costs (dated October 18, 2022)).

⁵ The OCA states that it takes no position on UGI’s second request for clarification. OCA Answer at 1.

Regulatory Accounting and Reporting Purposes, Certain Losses from Extraordinary Storm Damage, Docket No. P-2018-3005957 (Order entered January 17, 2019)).

Specifically, consistent with this prior Commission precedent, the OCA submits that any approval of UGI's request for deferred accounting include the following conditions:

(1) the authorization for deferred accounting treatment carries with it no assurance of future rate recovery; (2) that the utility make a claim for the deferred expenses at the first opportunity; (3) that the authorization for deferral treatment be limited to actual operations and maintenance expenses and not include capitalized costs; and (4) that any Opinion and Order in the instant matter not limit the ability of a party in a future rate case to contest recovery of any of the costs deferred pursuant to the limited authority by the allowance to defer.

OCA Answer at 3.

Although PULP indicates that it takes no formal position on whether UGI's request for deferred accounting should be granted, it notes its support for the imposition of certain conditions, as outlined by the OCA, should the Commission grant UGI's request. PULP Letter in Support at 2. With respect to UGI's second request for clarification, PULP notes its general support of the request that the Commission engage with utilities to the extent the Commission pursues federal funding. PULP submits, however, that such engagement should not be limited to engagement with utilities – and should include engagement with consumer advocates and other potential stakeholder groups. *Id.*

The Letters in Support presented by EAP and EICI/IA simply request that the Commission offer the clarification requested by UGI in its Petition to find that the costs incurred by utilities in order to prepare, apply, administer, and otherwise execute on opportunities for federal funding may be deferred and recorded as a regulatory asset for

accounting purposes, along with related offsetting funding receipts. EAP Letter in Support at 2; EICI/IA Letter in Support at 2. Regarding UGI's second request for clarification, EAP adds that this clarification would inure to the benefit of all Pennsylvania utilities as potential projects could impact any of those overseen by the Commission. EAP Letter in Support at 2.

Disposition

On review of UGI's Petition, we find that it satisfies the *Duick* standards. Accordingly, we will grant it, in part, and deny it, in part. UGI's first request for clarification does not necessarily relate to the accounting treatment for the IIJA funds themselves, but as to how the costs incurred by utilities in *pursuing* IIJA funding should be treated and accounted for until they are presented for recovery in a future rate proceeding. We will, accordingly, make explicit that costs incurred by utilities to prepare, apply, administer and otherwise execute on opportunities for federal funding made available by the IIJA will qualify for regulatory asset accounting treatment, along with related offsetting funding receipts.

We note that, while the *March 2023 Order* itself omitted direction on how utilities should account for the increased cost associated with seeking these funds, the arguments presented with UGI's requested clarification, along with the letters in support provided by PULP, EAP and EICI/IA, sufficiently rationalized the alleged necessity of the establishment of an IIJA-specific regulatory asset to track IIJA-related incremental costs.

In prior proceedings involving Commission authorization for deferral accounting, the requesting utility has been required to show that the expense item appears to be within the scope of the type of items that the Commission has allowed as an exception to the general rule against retroactive recovery of past expenses. *See, Petition*

of Pennsylvania-American Water Company for Authority to Defer for Accounting and Financial Reporting Purposes Expenses Relating to a Water Customer Class Demand Study, Docket No. P-2012-2308982 Order (Order entered August 30, 2012); and *Petition of United Water Pennsylvania, Inc. For Authorization to Defer, for Accounting Purposes, Certain Unanticipated Expenses Relating to Storm Damage*, Docket No. P-2012-2312950 (Order entered December 5, 2012).

We find that the Petitioner has satisfied its burden to show that IJJA-related incremental expenditures are within the scope of the type of items which are allowable as an exception to the general rule against retroactive recovery of past expenses.

However, petitions seeking authorization for deferral accounting are not intended to create a factual record.⁶ As such, the burden of proof will remain with the utility to establish in any subsequent proceeding that costs associated with seeking federal funding made available by the IJJA are: (1) extraordinary and substantial; (2) non-recurring; and (3) unanticipated. We are simply determining here that the IJJA-related expenses are within the scope of the type allowed to be deferred and tracked as a regulatory asset as an exception to retroactive recovery.

Therefore, we find that allowing each utility to establish an IJJA-specific regulatory asset to track IJJA-related incremental expenditures is appropriate (similar to the regulatory asset that the Commission authorized for COVID-19-related costs

⁶ See, *Petition of Pennsylvania-American Water Company for Authorization to Defer, and Record as Regulatory Assets for Future Recovery: (1) Incremental Expenses Incurred Because of the Effects of the COVID-19 Emergency; (2) Revenue Reductions Attributable to the Effects of the COVID-19 Emergency; and (3) Carrying Charges on the Amounts Deferred*, Docket No. P-2020-3022426 (Order entered September 15, 2021) at 13.

incurred).⁷ To be clear, the establishment of an IIJA-specific regulatory asset is not a finding of prudence and does not provide a predetermined certainty of cost recovery for those expenses. Further the allowance granted is not a directive that a utility must defer these costs, nor is it making a determination of the appropriate treatment for the recovery of any allowable costs in a future period. Lastly, the OCA's stipulated approval conditions are similar to those required in previous filings of this kind;⁸ as such, they are included in the second Ordering Paragraph of this Opinion and Order.

In addition, we will require that a utility shall file a notice with the Commission at this docket, Docket No. P-2022-3032929, upon establishing an IIJA-specific regulatory asset as described herein. Such notification shall be served on the Commission's Bureau of Investigation and Enforcement, the OCA, and the OSBA.

Moreover, in order to be eligible for inclusion in a utility's IIJA-specific regulatory asset, the utility must maintain detailed accounting records of the incremental

⁷ Secretarial Letter issued by the Commission on May 13, 2020, at Docket No. M-2020-3019775 titled "COVID-19 Cost Tracking and Creation of Regulatory Asset" (*May 2020 Secretarial Letter*). Subsequent to the *May 2020 Secretarial Letter*, the Commission issued the following Orders: *Public Utility Service Termination Moratorium – Modification of March 13th Emergency Order*, Docket No. M-2020-3019244 (Order entered October 13, 2020); *Public Utility Service Termination Moratorium*, Docket No. M-2020-3019244 (Order entered March 18, 2021); and *Public Utility Service Termination Moratorium; COVID-19 Cost Tracking and Creation of Regulatory Asset*, Docket Nos. M-2020-3019244 and M-2020-3019775 (Order entered July 15, 2021).

⁸ See, *Petition of Metropolitan Edison Company for Authorization to Defer for Regulatory Accounting and Reporting Purposes Certain Losses from Extraordinary Storm Damage*, Docket No. P-2013-2351260 (Order entered July 16, 2013); *Petition of Metropolitan Edison Company for Authorization to Defer, for Regulatory Accounting and Reporting Purposes, Certain Losses from Extraordinary Storm Damage*, Docket No. P-2018-3005957 (Order entered January 17, 2019); *Petition of West Penn Power Company for Authorization to Defer, for Regulatory Accounting and Reporting Purposes, Certain Losses from Extraordinary Storm Damage*, Docket No. P-2019-3014988 (Order entered April 30, 2020).

extraordinary, nonrecurring expenses incurred as a result of its pursuit of federal funding made available by the IIJA.⁹ Utilities shall also track any and all funding, assistance, or benefit they receive in connection with the IIJA, regardless of form or source, that would offset expenses in pursuit of IIJA-related funding. The Commission will consider in future proceedings whether each utility's request for recovery of an IIJA-specific regulatory asset is just and reasonable pursuant to 66 Pa. C.S. §§ 1301, 1308 (as applicable). The Commission will also consider, during those proceedings, other issues, such as the appropriate period of recovery for the approved amount of the regulatory asset or exogenous event treatment, any amount of carrying costs thereon, and other related matters.

Turning to UGI's second request for clarification, we acknowledge and agree that a collaborative process, as proposed by UGI, to engage interested parties on potential funding opportunities may provide for transparency and benefit all parties involved. With the understanding that it is in the public interest to foster cooperation between the Commission, utilities, consumer advocates, and other stakeholders with regard to the exploration and utilization of IIJA program funding, the Commission will use best efforts to engage with such aforementioned parties should the Commission avail itself of such potential federal funding opportunities.

Conclusion

Based on the forgoing, we shall grant, in part, and deny, in part, UGI's Petition and clarify our *March 2023 Order* by addressing deferral accounting for IIJA-related expenses, with certain conditions; **THEREFORE,**

⁹ This Opinion and Order does not grant authorization for utilities to defer any other potential expenses in pursuit of federal funding that is not IIJA-related.

IT IS ORDERED:

1. That the Petition for Clarification filed by UGI Utilities, Inc. – Electric and Gas Division on April 5, 2023, at Docket No. P-2022-3032929, is granted, in part, and denied, in part, consistent with this Opinion and Order.

2. That jurisdictional utilities choosing to pursue federal funding for infrastructure projects under the Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021), are authorized, subject to the following conditions, to defer and record as an IIJA-specific regulatory asset for accounting purposes those costs incurred in order to prepare, apply, administer, and otherwise execute on federal funding opportunities made available by the Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021):

- a. That the authorization granted for deferred accounting treatment carries no assurance of future rate recovery;
- b. That the utility shall make a claim of the deferred expenses at the first available opportunity;
- c. That the authorization for deferred accounting treatment be limited to actual operations and maintenance costs and not include capitalized costs; and,
- d. That this Opinion and Order will in no way limit the ability of any party to a future rate case to contest recovery of any of the costs deferred pursuant to the limited authorization therein.

3. That a utility shall file a notice with the Commission at Docket No. P-2022-3032929 upon establishing an IIJA-specific regulatory asset as described in this Opinion and Order. Such notification shall be served on the Commission's Bureau of

Investigation and Enforcement, the Office of Consumer Advocate, and the Office of Small Business Advocate.

4. That a utility that establishes an IIJA-specific regulatory asset shall maintain detailed accounting records of the incremental extraordinary, nonrecurring expenses incurred as a result of its pursuit of federal funding, made available by the Infrastructure Investment and Jobs Act.

5. That a utility that establishes an IIJA-specific regulatory asset shall track any and all funding, assistance, or benefit they receive in connection with the Infrastructure Investment and Jobs Act, regardless of form or source, that would offset expenses in pursuit of IIJA-related funding.

BY THE COMMISSION,

A handwritten signature in black ink, appearing to read "Rosemary Chiavetta".

Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: July 13, 2023

ORDER ENTERED: July 13, 2023