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April 19, 2024

**VIA ELECTRONIC FILING**

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street  
Harrisburg, PA 17120

**Re: Joint Motion of Vice Chair Barrow and Commissioner Zerfuss on  
Diversity Reporting of Major Jurisdictional Utilities, Docket No. L-  
2020-3017284**

Dear Secretary Chiavetta:

Enclosed for filing please find the responsive comments of the Energy Association of Pennsylvania to the Joint Motion of Vice Chair Barrow and Commissioner Zerfuss entered at the April 4, 2024 Public Utility Commission Public Meeting. Please do not hesitate to contact me with any questions.

Sincerely,

A handwritten signature in black ink that reads 'Nicole W. Luciano'. The signature is written in a cursive, flowing style.

Nicole W. Luciano  
Director of Policy

*Via email*

CC: David Screven, Chief Counsel  
Paul Diskin, Director, Bureau of Technical Utility Services

Enclosure

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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Diversity Reporting of	:	Docket No.: L-2020-3017284
Major Jurisdictional Utilities	:	

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**COMMENTS OF THE ENERGY ASSOCIATION OF PENNSYLVANIA IN RESPONSE  
TO THE JOINT MOTION OF VICE CHAIR KIMBERLY BARROW AND  
COMMISSIONER KATHRYN L. ZERFUSS**

**I. INTRODUCTION**

The Energy Association of Pennsylvania (“EAP” or “Association”) submits these comments on behalf of its electric distribution company and natural gas distribution company members<sup>1</sup> in response to the Joint Motion of Vice Chair Kimberly Barrow and Commissioner Kathryn L. Zerfuss regarding Diversity Reporting of Major Jurisdictional Utilities adopted at Pennsylvania Public Utility Commission’s (“PUC” or “Commission”) Public Meeting of April 4, 2024.

**II. BACKGROUND**

On December 3, 2020 the Commission finalized amendment of a Policy Statement on Diversity at Major Jurisdictional Utility Companies, (“Diversity Policy Statement”) 52 Pa. Code §§ 69.801-69.809, updating the original 1995 policy statement to align demographic terms with those used in reporting to federal agencies and with the current composition of the Commonwealth’s diverse citizenship. The Diversity Policy Statement outlined goals for annual

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<sup>1</sup> For purposes of these comments, participating EAP members include: Citizens’ Electric Company; Columbia Gas of Pennsylvania, Inc.; Duquesne Light Company; FirstEnergy Pennsylvania; Leatherstocking Gas Company, LLC; National Fuel Gas Distribution Corp.; Peoples Natural Gas Company LLC; Philadelphia Gas Works; Pike County Light & Power Company; PPL Electric Utilities; UGI Utilities Inc.; Valley Energy Inc.; and Wellsboro Electric Company.

reporting to record diversity among utility employees and vendors while encouraging continued expansion and implementation of utility programs to promote diversity. In February 2020, the Commission approved a motion introduced by the Chairman which directed the Law Bureau to begin a rulemaking proceeding by December 31, 2020 to codify the reporting requirement encouraged in the Diversity Policy Statement and create a new regulatory reporting obligation. Such rulemaking process was initiated, comments were filed and reviewed, and a final order was entered on April 14, 2022. The diversity reporting regulations at Chapter 51 were then enacted with publication of this Final Order in the *Pennsylvania Bulletin* at 52 Pa.B. 5934 on September 17, 2022.

On April 4, 2024 at the Commission's Public Meeting, a Joint Motion of Vice Chair Kimberly Barrow and Commissioner Kathryn L. Zerfuss ("Joint Motion") was adopted by a 4-1 vote with Commissioner Coleman dissenting, directing PUC Bureau of Technical Utility Service staff, in coordination with the PUC's Law Bureau, to "compile the information filed at this docket and issue reports regarding our utilities' filings that will be published annually on the Commission's website." The Joint Motion further indicates that:

"The annual reports should contain statistics, including whether any trends have been identified in the information the utilities have provided, and shall retain the confidential nature of the information reported so that no specific company is identified. We emphasize that any sensitive information filed, such as LGBTQ specifics, person with disabilities data, and company policies related to procurement and trainings will not be disclosed."

The Joint Motion allowed interested parties to provide responsive comments by April 19, 2024. In the absence of responsive comments, the Joint Motion indicated that the matter would be adopted without further Commission action.

### III. COMMENTS

#### A. OVERVIEW

As an important initial matter, EAP and its member companies continue to support the Commission's efforts related to enhancing and supporting diversity and inclusion efforts with respect to the jurisdictional utilities.<sup>2</sup> The comments contained herein should not be misconstrued as walking back EAP and its member companies' support of this critically important goal.

Nevertheless, EAP has serious concerns with respect to the Joint Motion on both legal and procedural grounds. To the extent the Commission desires to modify its diversity reporting regulations, EAP would welcome the Commission's issuance of a Notice of Proposed Rulemaking on same to accomplish its stated goals. EAP notes that the Commission held a highly-productive, collaborative process among the Commission, public utilities, and other stakeholders in shaping the current diversity reporting regulations.

By way of additional background, and with respect to the first concern expressed above, EAP contends that the Joint Motion conflicts with the Commission's existing and approved diversity reporting regulations insofar as the data which the Joint Motion suggests will be published confidentially, in fact, will be reported in a manner which will easily identify each utility.<sup>3</sup> This contradicts the Commission's existing diversity reporting regulations, which provide, in pertinent part, as follows:

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<sup>2</sup> See, EAP Comments to *Proposed Policy Statement and Order Re: Amended Policy Statement on Diversity at Major Jurisdictional Utilities*, Docket No. M-2020-3018089, dated September 1, 2020; EAP Comments to *Notice of Proposed Rule Making for Diversity Reporting of Major Jurisdictional Utilities*, Docket No. L-202-3017284, dated July 20, 2021; EAP Letter in Support of *Diversity Policy Statement Revision of 52 Pa. Code §§ 69.801 –69.809 Proposed Diversity Policy Statement*, Docket No. M-2023-3038267, dated November 14, 2023.

<sup>3</sup> See discussion *infra*, pp. 8-9. Anonymization as contemplated in the Joint Motion is not possible given the scale of operation (e.g., employee count, spend on contracting, etc.) that can easily be gleaned by the public via already publicly-available utility data.

The information and form filed [in each jurisdictional utility’s annual report describing its diversity program activity for the prior year] **shall be confidential**.<sup>4</sup>

Additionally, EAP has concerns that the publishing of this data, in any capacity, exceeds the statutory authority of the Commission. There is no statutory provision which authorizes the Commission to publish this information, even in an aggregate or anonymized form. The finalized diversity reporting regulations do not contemplate any such publication, nor was any such publication contemplated in the prior rulemaking processes.

The current Joint Motion procedure utilized by the Commission to accomplish such publication of this data has the potential to erode the collaborative approach which the Commission has typically employed. The Commission need look no further than the NOPRs which led to the current form of the diversity policy statement and diversity reporting regulations to see how the input of all stakeholders led to a more “purposeful” (in the Commission’s words) regulatory scheme.

Here, the Commission has asked stakeholders to file comment on a Joint Motion within two weeks of its issuance, otherwise the content of the Joint Motion will be adopted without further Commission action.<sup>5</sup> In doing so, the Commission is requiring the regulated community to “speak out” prior to the issuance of a concrete regulatory proposal and without the benefit of an Opinion and Order (which the Joint Motion has indicated is forthcoming). These concerns further heighten the legal concerns expressed above.

Ultimately, what the Commission is attempting to do via the Joint Motion is a matter that requires amending the Commission’s regulations. EAP is concerned that this process is a retreat

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<sup>4</sup> 52 Pa. Code 51.13(e) (emphasis added).

<sup>5</sup> Requiring comment within a two-week timeframe to a Joint Motion on a novel docket as a part of a Public Meeting’s Carry-in Agenda is atypical.

from the collaborative process which the Commission, public utilities, and other relevant stakeholders have engaged in to craft standards that benefit all Pennsylvanians.

The PUC noted in its Final Rulemaking Order that:

“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...[s]ince 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.” Final Rulemaking Order at 7.

A stated goal of the Final Rulemaking Order was to make utility diversity reporting “more purposeful”<sup>6</sup> given that the previously discretionary filing under the Commission’s Diversity Policy Statement resulted in various degrees of information that was either too much, not enough, or unnecessary. Respectfully, EAP submits that the public dissemination of this information as proposed in the Joint Motion would not help to achieve that goal. In fact, such dissemination would likely decrease the relevancy by removing its context and opening these sensitive metrics to undue scrutiny, misuse, or misinterpretation that could harm utilities and their efforts.

### **1) Comments to a Joint Motion Ahead of the Opinion and Order**

The comments contained herein are to a Joint Motion without the benefit of seeing the specific proposal and/or language being contemplated that is typically outlined in an Opinion and Order. Such Opinion and Order, directed to be prepared by the Joint Motion’s Ordering Paragraph 4, has not yet been released for public viewing. It is not contemplated by the Joint Motion that such Opinion and Order will be made available prior to the April 19 comment deadline. The opportunity for comment is further impeded by the short deadline set for PUC staff to compile the first anticipated report, on May 31, 2024 per moving paragraph 1 of the Joint Motion.

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<sup>6</sup> Diversity Reporting NOPR at p.3.

EAP believes stakeholders – particularly the regulated community – are at an express disadvantage in this process by commenting on a proposal without full context or specifics contemplated by the Commission on its suggested anonymization, aggregation, and publication of otherwise confidential utility data.

**2) Confidentiality Cannot Be Reasonably Maintained as Proposed for Public Dissemination of this Information.**

The Joint Motion directs PUC staff, by May 31, 2024, to “issue an annual report regarding the diversity efforts of the utilities subject to 52 Pa. Code §§ 51.11-51.13, for the annual reports filed in 2023 and 2024, respectively.” It further directs this annual report to be ongoing, with staff issuing updates by May 31 of each year. It is not clear from the Joint Motion which of the eight outlined metrics in the Joint Motion would be included in the direction to report on utility “diversity efforts.”<sup>7</sup> Paragraph 1.

EAP believes this is a contradiction to the existing regulations’ express protections of confidentiality at § 53.13(b), (d), and (e) which were put in place to maintain confidentiality of the information contained in these reporting forms. Section 53.13 (e) states “The information and form filed shall be confidential.” It was not contemplated by the Commission or stakeholders at any point in the previous rulemaking process that this information would be made public, even in an anonymized or aggregated form.

In the Commission’s Final Rulemaking Order, the PUC noted that the IRRC explicitly raised the issue of how this type of demographic information (i.e., the number of employees by

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<sup>7</sup> The Commission’s Press Release on the Joint Motion instead outlines six (6) metrics that are implied to be included in this future annual report: corporate policies for improving diversity in the workplace and procurement process; training on diversity initiatives in employment and in the contract of goods and services; demographic data regarding diverse employment in various job classifications; a description of diversity recruiting, promotion, and retention efforts, involvement with organizations promoting diversity; and a summary of diverse-owned businesses the company contracts with for goods and services, including the percentage of dollars spent with diverse-owned businesses versus non-diverse businesses. <https://www.puc.pa.gov/press-release/2024/puc-will-compile-and-publish-online-report-of-annual-diversity-data-submitted-by-major-utilities-in-pa-04-04-2024>

gender, race and ethnicity, LGBTQ, persons with disabilities and veteran status) will be handled and if the public will have access to this information. In its disposition, the Commission stated:

*“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.” Final Order at p 27.*

EAP does not believe company confidentiality could be maintained should reports as described in the Joint Motion be made public. It will be very easy to determine the EDC or NGDC, based on size or number of employees reported, if filings are anonymized by ‘Company A’, ‘Company B’, etc. As Commissioner Coleman outlined in his Statement to the Joint Motion, the ability of the public to match individual companies with their data would further degrade the confidential nature of these filings. This would be particularly impactful for those companies with a small number of employees, or for those companies who have both electric and gas service.

For example, a small utility company may have less than 10 employees. If one employee self-reports a visible disability status, it will be evident which company and which employee is

being referenced in a publicly-available report.<sup>8</sup> In the case of the companies themselves, a joint electric and gas utility company would be immediately identifiable if it were listed under both the NGDC and EDC aggregate lists or if its data were compromised by an arbitrary “splitting” of employees or diversity recruiting / promotion strategies between the two entities.

This issue would be further evident to the extent such reports are attempting to illustrate “trends” of diverse workforces. For example, if a small company or segment of a company’s workforce reports only one demographically diverse employee and then such employee leaves the utility, it will appear as though their efforts are not successful or diversity overall is trending downward. This would also apply to situations where certain segments of a utility’s workforce may, in one year, be hired and managed in-house and the next year is outsourced or otherwise downsized. With the appropriate context between the individual utility and the PUC, these issues can be explained and accounted for in the PUC’s confidential review and assessment of these filings. If anonymized and made public, such context will be missing and likely create a misrepresentation or misuse of the data.

### **3) Other Concerns**

While the Joint Motion indicates that the Commission does not “expect our utilities to achieve a certain diversity ratio or quota, nor will lack of diversity be cause for further Commission action,” publication of this data as suggested will not prevent third parties from taking the Commission’s data as published and using it in Commission proceedings.

To be clear, EAP is supportive of the Commission’s efforts via required diversity reporting to collect information describing company initiatives – for the *Commission*’s review and use. It is

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<sup>8</sup> The context that all demographic data is self-reported may also be lost in the publication of this data. Anonymity is guaranteed, but not all employees wish to discuss their demographic statuses with their employer. A lack of reported information could be construed by the public to mean that a particular workforce is not diverse.

not clear from the Joint Motion what, if anything, is to be gained by sharing this confidential information publicly other than a vague goal of “transparency” that is inconsistent with the assurances of confidentiality that the Commission gave in adopting the reporting regulations. Moreover, the public can access general information regarding utility diversity initiatives, such as utility websites where broader company-specific context may be provided.<sup>9</sup>

Utilities have been compiling and submitting data for the last two years under the assumption (and express direction of the regulations at 52 Pa. Code §51.13 (b), (d) and (e)) that these materials would be kept confidential. To the extent the Commission wishes to publicize these previously confidential reports, regulatory change should precede such publication.

#### **IV. CONCLUSION**

EAP reiterates its support for the Commission’s efforts to date to advance diversity, equity, and inclusion measures at the jurisdictional utilities. It remains a shared goal of both the Commission and the regulated community to continue to foster these values within and across the utility workforce.

Nevertheless, given the legal and procedural issues outlined herein, EAP recommends the Commission initiate a formal rulemaking process should it continue to believe publication of this sensitive data remains a necessary public goal. Such a process will allow the regulated community and other stakeholders to flesh out these concerns in a meaningful way.

Without benefit of an opinion and order containing specifics related to the proposal contained in the Joint Motion, EAP asks that the Commission reconsider any publication of confidential diversity reporting metrics. EAP submits that anonymization as contemplated by the

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<sup>9</sup> For example, PPL electric utilities includes descriptions of various diversity efforts on a dedicated company website: <https://www.pplweb.com/sustainability/social-responsibility/diversity-equity-inclusion/> This information is appropriately broad and descriptive enough to give the public a sense of the company’s “diversity efforts” as contemplated by the Joint Motion.

Joint Motion cannot be achieved and that such publication would be in violation of the confidentiality protections afforded this data by the regulations at 52 Pa. Code §51.13(e).

Respectfully submitted,



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