

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE**

IN THE MATTER OF REVISIONS TO THE)	
RULES OF PRACTICE AND PROCEDURE)	
OF THE DELAWARE PUBLIC SERVICE)	
COMMISSION (FILED JANUARY 6, 1999;)	PSC DOCKET NO. 99-9
RE-OPENED OCTOBER 9, 2012; RE-OPENED)	
JANUARY 29, 2020; RE-OPENED)	
AUGUST 31, 2022))	

**COMMENTS OF THE DELAWARE DIVISION OF THE PUBLIC ADVOCATE
ON THE PROPOSED AMENDMENTS TO THE DELAWARE PUBLIC SERVICE
COMMISSION’S RULES OF PRACTICE AND PROCEDURE**

BACKGROUND

The Delaware Public Service Commission (“Commission”) issued its first comprehensive set of rules of practice and procedure in 1999. Since then, the docket was reopened twice to make relatively minor changes.

On August 31, 2022, the Commission issued Order No. 10094 re-opening the docket to make some more substantive changes that Staff proposed for clarification and adjustment (“Proposed Rules”). The Proposed Rules were published in the October 2022 *Delaware Register of Regulations*, and the Commission scheduled a hearing on the Proposed Rules for November 2, 2022. To be considered at the November 2, 2022 hearing, written comments were due by October 14, 2022. Because the Commission was required to leave the docket open for a minimum of 15 days after the November 2, 2022 hearing pursuant to 29 *Del. C.* § 10118(a) of the Administrative Procedures Act (“APA”), written comments are due on or before November 17, 2022.

The DPA did not submit written comments on or before October 14, 2022 because the DPA agreed with the amendments to the Proposed Rules. Delmarva Power & Light Company (“Delmarva”) and Artesian Water Company, Inc. (“Artesian”) submitted written comments prior

to October 14, 2022; the remaining regulated utilities¹ did not. Both Delmarva and Artesian discussed their objections to the Proposed Rules at the November 2, 2022 hearing, and the Delaware Division of the Public Advocate (“DPA”) provided oral comments during the hearing.

These are the DPA’s post-hearing written comments.

The APA Does Not Require the Commission to Follow the Normal Procedure for Promulgating, Amending, or Repealing Regulations When the Regulations Are Rules of Practice and Procedure Used by the Agency.

We start with an initial observation that the Commission is exempted from the requirements of the APA where its rules of practice and procedure are concerned. Section 10113(b) of the APA provides:

(b) Regulations of the following types are exempted from the procedural requirements of this chapter and may be adopted informally:

- (1) Descriptions of agency organization, operations and procedures for obtaining information;
- (2) *Rules of practice and procedure used by the agency;*
- (3) Delegations of authority to subordinates;
- (4) Nonsubstantive changes in existing regulations to alter style or form or to correct technical errors;
- (5) Amendments to existing regulations to make them consistent with changes in basic law but which do not otherwise alter the substance of the regulations; and
- (6) Codifications of existing agency or judicial principles of decision derived from previous decisions and rulings.

(Emphasis added).

¹ Veolia Water Delaware, Inc.; Tidewater Utilities, Inc.; Sussex Shores Water Company, Inc.; Long Neck Water Company, Inc.; and Chesapeake Utilities Corporation. Tidewater submitted written comments on November 14, 2022, which largely raise the same concerns that Artesian and Delmarva raised. Chesapeake submitted a letter on November 14, 2022 that did not raise any substantive issues of its own but “agree[d] with the comments” submitted by the other utilities and “support[ed] the recommendations made in those comments for the reasons set forth therein.”

Because the Proposed Rules are the Commission’s “rules of practice and procedure used by the agency,” the Commission can simply adopt the regulation and file both the regulation and a copy of the order adopting the regulation with the Registrar of Regulations, “and the regulation so filed shall become the official regulation” *Id.*

Nevertheless, because the Commission has triggered the full process for adopting regulations for the Proposed Rules, the DPA will address each of the Proposed Rules.

Staff’s Proposed Amendments to the Rules Are Reasonable and Should Be Adopted.

Section 1.2 Definitions

The changes made to this section are minor. First, they add the DPA as a defined term. Second, they remove the date included in the definition of “E-filing,” because it is no longer necessary now that the Commission has electronic filing, and remove the specific reference to “Delafile” in the event the Commission changes the name of its e-filing system. Last, they add a reference to Section 1.7 to enhance the definition of what a “Filing” is.

Section 1.6 Filing of Documents

Subsection 1.6.5 is amended to provide that the Commission will provide electronic notice of all filings to the DPA. It eliminates the requirement that the Commission provide paper copies of all filings to the DPA.

Section 1.7 Filings

Subsection 1.7.1 is amended to add “reports” to the list of items that “filing” defines. Reports were added to the list because it was discovered that the Commission’s electronic filing system was not providing notice when utilities filed reports required by Commission regulations and orders. Notice of filed Reports are now required to be provided to those who sign up for electronic notification of anything filed with the Commission.

1.11 Submission of Confidential, Proprietary, and Privileged Material

Subsection 1.11.1 changes the reference to the Freedom of Information Act (“FOIA”) to the correct FOIA section.

Subsection 1.11.2 is amended to place an affirmative obligation on a party claiming that information of confidential or propriety to file a petition with the Commission to request a ruling if any party challenges that designation of information. It clarifies that the party claiming confidentiality must demonstrate that the designated information is exempt from public disclosure pursuant to *29 Del. C. § 10002(o)* of the FOIA.

Subsections 1.11.5 and 1.11.6 shorten the reference to the DPA to the defined term.

Subsection 2.0 Hearings

Subsection 2.1.2 changes the specific reference to Supreme Court Form O to more general Supreme Court forms. This will prevent the Commission’s rules from requiring amendment if the title of the form is changed.

Subsection 2.2.1 shortens the reference to the DPA to the defined term.

Subsection 2.3.3 changes the reference to Delafile to “E-filing,” and clarifies that the Commission Secretary shall direct the respondent to file an answer to a formal complaint within 20 calendar days of service.

Subsection 2.4.1 also clarifies that an answer to a formal complaint is due within 20 days of service.

Section 2.6 addresses changes to the Commission’s discovery rules. First, **Subsection 2.6.2** establishes rolling discovery as the default method of discovery in Commission proceedings. Staff and the DPA proposed the change to rolling discovery to enable faster follow-up on responses. Under the current system, the Hearing Examiner establishes a deadline for submission

of discovery, a deadline for responses to that discovery, a deadline for follow-up discovery, and a deadline for responses to follow-up discovery. On occasions where responses were incomplete or worse, not responsive, the prior practice often left issues unresolved (as you have read on more than one occasion in DPA's testimony). Additionally, rolling discovery is the practice in many other jurisdictions.

Artesian opposes this change, claiming that it could become "unwieldy," and foreshadowing that a party might file discovery every single day during the discovery period. It then suggests limiting discovery via a procedural schedule or allowing a discovery order that limits frequency and number of requests. Tidewater also opposes this change, claiming that "rolling discovery could create an unmanageable situation."

As mentioned previously, the procedural schedule system is what we have had before, and it has failed on more than one occasion to allow Staff and the DPA to ferret out important information. Moreover, we have used rolling discovery in the last three Delmarva rate cases, and it has worked well. It has neither been "unwieldy" nor has it created "an unmanageable situation." Staff and the DPA have been able to conduct timely follow-up discovery and ultimately receive responses that the previous practice would not have provided. Moreover, the DPA notes that Delmarva, the one utility that has experience with this process in Delaware (and in other jurisdictions), does not object to making rolling discovery the normal practice. Finally, should Artesian or Tidewater find that rolling discovery is too difficult for it (which we doubt will happen, based on our experience in the Delmarva rate cases), Subsection 2.6.4 provides that the Commission or Hearing Examiner may "vary discovery provisions, in the interest of justice"

When deciding this issue, the Commission should bear in mind that the utility has the burden of proof in most instances, and the utility holds all the records and data upon which

intervenors must rely to build their case. Rolling discovery allows for more robust investigations and fuller vetting of concerns which will lead to sound decisions, based upon solid evidence, by the Commission. Thus, the DPA respectfully requests the Commission to adopt rolling discovery as the default discovery system in the Proposed Rules.

Subsection 2.6.3 adds a provision that discovery must be provided in Word format. Delmarva proposes adding a sentence that responses need not be provided in Word format. Delmarva explains that its proposed addition clarifies that the party issuing the data requests or interrogatories is the party obligated to provide them in Word format. The party responding to interrogatories or data requests may provide its response as a PDF, a Word version, an Excel document, or other format. The DPA does not object to this addition.

Subsection 2.6.6 is changed to provide that discovery responses in expedited cases shall be due within 15 calendar days from receipt of the discovery. This change is proposed for expedited cases because the specifically identified situations severely circumscribe the time in which the Commission must make a decision. For example, in section 215 cases, the Commission must make a decision within 30 days of the application. That time can only be extended in one narrowly-prescribed situation; otherwise, the applicant must agree to extend the time limit. Under the current 21-day response time, if Staff or the DPA want to submit discovery regarding a particular application, they would have to submit that discovery essentially on the day the application is filed in order to get responses within the 30-day period – and that is even assuming the Commission has the entire 30-day period to consider the application given the dates on which it will meet. As the DPA noted during the November 2 hearing, there are seven months in which the Commission only meets one time. Thus, as a practical matter, discovery may be unavailable.

Similarly, the Commission must make a decision on CPCN applications within 60 days of the application (30 days plus another 30 days for good cause) or the application is deemed approved. Unless the applicant voluntarily agrees to waive the time limits, discovery may be unavailable.

Another example is distribution planning. The distribution planning regulations specify a date that the utilities must submit a proposed ISR or LRDP and a date by which the utilities must file their final ISR or LRDP. The time for discovery is between those two dates. It's only a few months.

The current 21-day period for discovery responses could deprive non-utility parties the right to issue any discovery in these cases. Even at 15 days, it's unlikely they will have the opportunity for follow-up discovery.

Rate cases are supposed to be decided within seven months. *26 Del. C. § 306(a)(1)*. While that deadline is honored more in the breach than the observance, this change could accelerate the processing of the rate case, which the DPA would think the utilities would appreciate.

Artesian, Delmarva, and Tidewater oppose this change, contending that they need the entire 21-day period (although Tidewater would accept 20 days). Delmarva claims that it needs 21 calendar days to find the correct respondent, compile the responsive documents, identify confidential material, and prepare and serve the response. Delmarva further notes that these are "complex matters that often involve voluminous discovery on a large variety of topics." Artesian and Tidewater also assert that reducing the response time will place a "significant burden" on utilities, with Tidewater raising the specter of increased rate case costs should it need to retain outside consultants to comply with discovery obligations. But it is the utilities that determine when they are going to file rate cases, and they should be prepared for their personnel to have to devote

time to them. Indeed, that is why the Commission requires a 60-day notice for rate cases: so that the Commission can organize its employees' workload in preparation for the rate case. And employee witnesses should be prepared to be asked about everything about which they testified in their rate case filings, including the support for how the witnesses reached their conclusions and the material on which they relied. Furthermore, utilities generally retain outside consultants before they file their rate cases to provide testimony; the DPA has never heard of a utility hiring an outside consultant just to respond to discovery filed on the utility's direct case. Moreover, if this unlikely scenario were to present itself, it would be more likely to occur with the utility being presented with "hundreds" of data requests from Staff, the DPA, and intervenors all on the same day, which is what happens under the current rules of practice. Additionally, the initial discovery in rate cases (which is often the most voluminous) is generally requesting documents and information that supports the statements made in and schedules attached to the witnesses' direct testimony. One would think those documents and information would be readily available to the respondents since it was used to support the direct testimony.

To the extent the utilities need 20 or 21 days to draft responses and then send those responses through upper management and counsel for review and editing, they will just have to do it a little faster. The DPA doesn't think that's an unreasonable request.

Finally, the rule specifically states that the Commission, the Hearing Examiner, or the presiding officer can change the length of time. If the utilities find a 15-calendar day response time problematic for a particular set of discovery, they can ask the Hearing Examiner or Commission to change the response time for that discovery. Or they can ask the proponent of that discovery for additional time. Staff and the DPA have worked with the utilities before with respect

to time extensions, and have not unreasonably withheld consent in the past. There is no reason to believe we would do so with a shorter time period for discovery responses.

Subsection 2.6.7 reduces the time for objecting to discovery to 10 calendar days after service of the discovery, and then adds provisions governing the filing of motions to compel and their resolution. Artesian suggests adding the words “after notification of the objection” after “within seven (7) calendar days.” The DPA does not oppose that addition.

Subsection 2.7.1 adds deadlines of seven calendar days to clarify when responses and replies to responses to motions must be filed. This change is intended to shorten the time in which a dispute is presented to the Hearing Examiner or the Commission for resolution.

Delmarva is the only commenter to oppose this change, asserting that it does not provide opposing parties with adequate time to prepare and file a response, especially considering weekends and holidays. Delmarva suggests a deadline of ten business days, claiming that our courts exclude holidays and weekends when computing any time period that is less than seven or eleven days.

While Delmarva’s suggested change might not make much of a difference in a motion that is before a Hearing Examiner, it may make a significant difference in a motion will be heard by the Commission. The Commission generally only meets twice a month, and sometimes only once a month. A 10-day response and reply time could very well mean that it will be a month, or more, before the Commission hears a motion. And depending on the matter addressed in a motion, it could make a big difference. Even if the motion is initially directed to the Hearing Examiner, in the past the Hearing Examiner has declined to consider it and instead has sent the matter to the Commission for its consideration. That happened most recently in Docket No. 20-0149, with the DPA’s and Staff’s joint motion to strike portions of Delmarva’s rebuttal testimony.

Once again, the DPA notes that it is within the Hearing Examiner's or the Commission's discretion to waive application of the seven-day response and reply period should circumstances warrant. The parties have worked with each other in the past to accommodate schedules, and the DPA does not know why that would change.

Of course, this Commission is not bound by court-determined deadlines, as the Commission has reminded the DPA from time to time. And while it is not the DPA's desire to have anyone work weekends and holidays, the DPA notes that the rules apply equally to it and Staff, which generally have substantially fewer resources than the utilities. Yet Staff and the DPA have managed to quickly turn around responses and replies to motions in the past. And once again, no utility other than Delmarva objects to this proposed change. The DPA is confident that Delmarva can meet a seven-day response or reply deadline.

CONCLUSION

The DPA respectfully requests the Commission to adopt the Proposed Rules, with the minor changes proposed to subsections 2.6.3 and 2.6.7 suggested by Delmarva and Artesian respectively.

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