**BEFORE THE PUBLIC SERVICE COMMISSION**

**OF THE STATE OF DELAWARE**

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| IN THE MATTER OF THE STATE OF EMERGENCY FOR THE STATE OF DELAWARE DUE TO A PUBLIC HEALTH THREAT**(OPENED APRIL 27, 2020)**  | )))) | PSC DOCKET NO. 20-0286 |
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**THE DELAWARE DIVISION OF THE PUBLIC ADVOCATE’S RESPONSE TO THE PUBLIC SERVICE COMMISSION STAFF’S MOTION FOR ORDER AUTHORIZING REGULATORY ASSET FOR COVID-19 RELATED INCREMENTAL COSTS**

The Delaware Division of the Public Advocate (“DPA”) hereby responds to the Delaware Public Service Commission Staff’s (“Staff”) Motion for Order Authorizing Regulatory Asset for COVID-19 Related Incremental Costs (“Motion”) as follows:

1. At the outset, it puzzles the DPA that Staff is requesting the Delaware Public Service Commission (“Commission”) to authorize Commission-regulated utilities to defer COVID-19 related incremental costs. Normally, the utilities themselves would request such treatment, since each utility would have a greater understanding of the potential impacts on its own business, and whether those possible impacts might be sufficient to harm its financial integrity – which, after all, is the primary requirement for seeking such extraordinary ratemaking treatment. Furthermore, it is the role of the Commission, and presumably its Staff, to balance the interests of the utilities and its captive customers; Staff’s Motion, however, focuses almost exclusively on the utilities. If this extraordinary treatment is granted, the utilities will likely recover every dollar of expense they book to this regulatory asset, *and* earn a profit on them. They will be made whole, and then some.
2. Staff’s Motion is ostensibly based on the Governor’s Sixth Modification to the State of Emergency (“Sixth SOE Modification”), which was issued on March 24, 2020 and became effective on March 25, 2020.[[1]](#footnote-1) The Sixth SOE Modification provides:

**D. UTILITIES:** To reduce the threat to human health caused by COVID-19 in Delaware, protect the health and safety of utility employees and customers, and save lives, it is necessary and reasonable that *residential* service companies not terminate service to *dwellings or residents* or charge fees for late or untimely payments for services to *residential dwellings*, and therefore it is ordered that, during the state of emergency:

1. No electric, natural gas, propane, telegraph, telephone, water, wastewater, cable television, or internet service provider, including municipalities, counties, and cooperatives (a “Residential Service Provider”), shall terminate the service of a customer *if the service is used, in whole or in part, in a dwelling unit or residence*.

2. *A Residential Service Provider shall not bill or collect, on an account that serves a dwelling unit or residence*, any fee or charge imposed for a late or otherwise untimely payment that becomes due from the date of this Order.

3. The Public Service Commission has the authority to enforce and carry out this Section D against all Residential Service Providers utilizing its penalty authority under § 217 of Title 26 of the Delaware Code. A violation of this Section D shall also be deemed an unlawful practice under § 2513 of Title 6 of the Delaware Code and a violation of Subchapter II of Chapter 25, Title 6 of the Delaware Code.

4. The effect of any statute, rule, or regulation of an agency of the State or a political subdivision inconsistent with this order is hereby suspended.[[2]](#footnote-2)

1. The DPA objects to Staff’s Motion to authorize deferred accounting treatment for COVID-19 related costs for several reasons. First: The DPA questions whether there is really an emergency necessitating extraordinary treatment for the utilities. Two of the five utilities seeking this extraordinary treatment have represented to the DPA that they are continuing to carry out their capital projects as if nothing has changed. It would seem that if the utilities are in such dire financial straits, they would suspend their discretionary capital projects until such time as the emergency has passed.
2. Second: Deferred accounting treatment is reserved for items that are likely to have a significant effect on a utility’s financial integrity. While the DPA asked questions on the only phone call relating to the matter, and followed up by e-mail to all the utilities, only one utility has proffered a response. The other utilities have thus far not engaged in dialogue with the DPA to discuss the financial harm, potential costs, or current measures being taken by those utilities. Perhaps this is because there is no evidence here that COVID-19 related costs will have such effect on Commission-regulated utilities; in fact, four of the five utilities on whose behalf Staff is requesting this treatment have declared dividends since the COVID-19 crisis erupted:
* On April 28, 2020, Exelon Corporation (grandparent company of Delmarva Power & Light Company) declared a $0.3825 per share dividend to be paid on June 10, 2020.[[3]](#footnote-3)
* On April 15, 2020, Artesian Resources Corporation (parent company of Artesian Water Company), declared a $0.2496 per share dividend to be paid on May 22, 2020.[[4]](#footnote-4)
* On February 26, 2020, Chesapeake Utilities Corporation declared a $0.405 per share dividend that was paid on April 6, 2020.[[5]](#footnote-5)
* On January 29, 2020, Middlesex Water Company (parent company of Tidewater Utilities, Inc.) declared a $0.25625 per share dividend that was paid on March 2, 2020.[[6]](#footnote-6)
1. In this regard, the DPA notes that the Commission rejected regulatory asset treatment for almost $9 million of pension losses that Delmarva claimed were sustained as a result of the 2008 financial crisis. While the Commission was “not insensitive to the fact that this is a substantial amount of money,” it found “no reason to abandon our longstanding practice of including these expenses in the traditional ratemaking calculus.”[[7]](#footnote-7) In reaching this decision, the Commission observed that Delmarva had paid its parent company $28 million of dividends during the first nine months of 2009, and the parent company had paid shareholders $178 million during this same period.[[8]](#footnote-8) Unlike the current situation, the Commission denied this extraordinary treatment knowing the extent of the costs. Here, there are not even assumptions, projections, or guesstimates on what and how much each utility intends to book to its regulatory asset.
2. Third: Any regulatory asset the Commission grants would apply only to costs incurred after the date of approval, because it would be impermissible retroactive ratemaking to include costs incurred before the date of a Commission order. Moreover, a regulatory asset should exclude any costs associated with activities that the utilities have taken voluntarily. For example, on April 17, 2020, Delmarva sent an email to customers advising them that it had “made the decision to extend the COVID-19 customer support policies we announced last month through at least June 1, 2020.”[[9]](#footnote-9) Those policies included suspending disconnections and waiving late fees (both of which were included in the Sixth SOE Modification), but also Delmarva’s own decision to reconnect customers that had been disconnected prior to the Sixth SOE Modification.[[10]](#footnote-10) It must be remembered that if a regulatory asset is granted, customers will eventually pay these costs. While their benevolence may seem commendable, the utilities are not forsaking recovery of these costs.
3. Fourth: The Commission currently normalizes most costs that comprise a utility’s operation and maintenance expenses, which is what it appears Staff’s Motion is addressing. Thus, all of the utilities’ current rates include an amount for equipment, uncollectibles, etc. If the utility recovers more than that amount, it gets to keep it; it does not return the overage back to customers. There is a very real chance that the utility’s current revenue requirement includes an amount sufficient to pay for whatever the COVID-19 incremental costs are. Staff’s Motion does not address how ratepayers will be protected from potential double-payment – once through the revenue requirement and again through the regulatory asset.
4. Fifth: The Sixth SOE Modification suspends only disconnections of *residential dwellings* and late fees charged to *residential* customers. The Motion, however, is broad enough to cover disconnection of and late fees charged to small commercial, commercial, and industrial customers. If the Commission is inclined to authorize deferred accounting for COVID-19 related costs based on the Sixth SOE Modification – which, after all, is the stated impetus for Staff’s Motion[[11]](#footnote-11) - then those costs should be limited to the costs associated with suspending disconnections of residential customers and dwellings and prohibiting late fees for untimely payments from residential customers during the state of emergency.
5. Sixth: The Motion does not identify what specific COVID-19 related incremental costs would be subject to deferral to protect the utilities’ financial integrity from harm. This is tantamount to writing the utilities a blank check. The Commission has previously acknowledged that approving deferred accounting treatment, which requires a finding that recovery of the deferred amount is “probable” under FASB rules,[[12]](#footnote-12) “would [] ma[k]e it difficult for any other participant to challenge that conclusion … .”[[13]](#footnote-13)

10. In this regard, Colorado utilities seeking deferred accounting treatment from their commission made an attempt to identify COVID-19 related incremental costs.[[14]](#footnote-14) But even a cursory examination of those costs establishes that the utility is already recovering such costs in base rates, or that they can be dealt with in a subsequent rate case. (In considering these items, the DPA observes that this Commission’s policy is to include a normalized level of many of these costs in a utility’s revenue requirement, and that the level of cost that the utility actually incurs fluctuates during the period that rates are in effect, so that there are times than the utility recovers more than its actual expense level and times that it recovers less than its actual expense level.)

* “Implementing technology to enable larger portions of [the] utility workforce to work from home”: Many utilities already have the technology that enables their employees to work remotely, for which ratepayers are already paying. The one utility with which the DPA has spoken advised that it did not need to purchase laptops and there were no new IT costs associated with their employees working remotely. And if they don’t, no utility has provided an estimate of what this would cost.
* “Paid time off to employees in alignment with self-quarantine guidance”: None of the utilities with whom the DPA has had discussions has mentioned this as a cost. Nor has any utility provided any estimate of how many employees, if any, to whom it has provided paid time off, or an estimate of the associated cost.
* “Additional personal protective equipment”: Some of the utilities have mentioned this in their discussions with the DPA. Only one utility has identified specific additional protective equipment that was purchased, however, and that utility noted that the cost was several hundred dollars. Other than this utility, none has provided any estimate of cost for additional PPE.
* “Suspension of disconnections”: The DPA agrees that suspending disconnections would prevent utilities from disconnecting customers that otherwise would have been disconnected, and that this item is specifically encompassed in the Sixth SOE Modification. But the DPA is aware that one utility frequently waits until a customer has failed to pay their bills for several months before it considers disconnections, so we wonder how it will be able to establish that it has incurred any costs from being unable to disconnect non-paying customers that it would not have incurred under its normal business practices. As for other utilities, none has provided any information regarding how many disconnections they were performing prior to the governmentally-mandated suspension of disconnections. Two of Delaware’s regulated water utilities bill monthly, and those utilities also have a predominantly residential customer base, so their costs resulting from an inability to disconnect are likely to be less. Moreover, these costs can be accounted for in the utility’s next rate case through a normalization adjustment.
* “The increase in arrearages and uncollectible expense”: The DPA acknowledges that some of the regulated utilities may experience increases in arrearages and uncollectible expense *in the short term*. But again, the DPA is aware from its experience with one utility that it frequently waits until a customer has not paid for several months before it considers disconnections, so we wonder how it will be able to establish that it has incurred increased arrearages and uncollectible expense as a result of COVID-19 versus its usual business practices. And, again, this can be accounted for in the utility’s next rate case. This Commission’s policy is to normalize uncollectible expense over a certain number of years tied to the frequency with which a utility files rate cases. It is likely that this expense will be encompassed within the number of years over which the normalization calculation is performed.
* “Increases in administrative and financing costs associated with arrearages and uncollectible expenses”: What additional administrative costs would be incurred? The utilities’ revenue requirements include the cost of sufficient personnel, which are generally salaried rather than hourly. If overtime is required, that can be addressed in a rate case. And what are the additional financing costs? None of the utilities has identified any additional financing costs, or what the estimated amount of those costs would be.
* “Increased need for outside services”: What additional outside services would a utility need during the state of emergency? Again, none of the utilities has identified any.
* “Tools”: Don’t the utilities already have the tools necessary to provide utility services? What additional tools would they need?
* “Materials” and “Supplies”: Utilities already receive an allowance for materials and supplies in their rate bases, which is calculated on a 13-month average. Any increased costs can be addressed in their next base rate case.
* “Other things”: The wide-open door this catch-all provides speaks for itself. One utility mentioned additional trucks and personnel; but the trucks and personnel are already in its revenue requirement.

11. Seventh: Assuming that the Commission is inclined to grant the Motion, what criteria should be used to determine whether the costs are “incremental” as compared to those that would have been incurred in the utility’s normal cost of business? The Motion proposes no such criteria.

12. Eighth: assuming that all of the above issues are addressed, why should utilities be made whole for incremental costs? Ratepayers will ultimately pay these costs, and many of them are likely to have been far more adversely affected than the utilities. We do not know yet the full impact of the COVID-19 crisis on Delaware’s employment, but we do know Delaware received “61,842 unemployment claims from March 15, 2020 to April 11, 2020.”[[15]](#footnote-15) This is “just under the total claims from the past 23 months.”[[16]](#footnote-16) These captive customers have to purchase PPE for themselves. They are not paid back for their purchases and certainly do not earn a return on their purchase. Our utilities have been granted returns on equity that far exceed the return on low-risk assets; if the Commission authorizes dollar-for-dollar recovery of costs for utilities, then it should also reduce their allowed returns to something commensurate with the risks they actually face.

13. Staff’s Motion does include offsets to the regulatory asset that the utilities may receive from federal sources. But the envisioned offset seems to be limited to stimulus funds. What about beneficial tax treatments such as employee retention credits and net operating loss carry-back provisions for 2018, 2019 and 2020, all of which are included in the CARES Act? What about other non-cash stimulus or incentives that provide benefits to the utilities? And what if the relief the utilities receive actually exceeds the incremental costs? Will the utilities agree that that excess constitutes a regulatory liability to be returned to ratepayers? Fairness would dictate that if utilities will be permitted to record and defer COVID-19 related costs as a regulatory asset, then any benefit they receive that exceeds the amount of that asset should be recorded and deferred as a regulatory liability.

 14. Finally, are there any actions the utilities can take to mitigate discretionary operating costs? For example, paying executive incentive benefits is unnecessary to provide utility services. The utilities could forego dividends to shareholder to retain cash, as General Motors has done.[[17]](#footnote-17) That would give the utilities additional money to pay any incremental costs that they may incur due to COVID-19. The utilities could reduce the pay of their executives, as many companies have done.[[18]](#footnote-18) The DPA also expects that costs of attending industry conferences are being saved because those conferences have been canceled. If the conferences have not been canceled, the utilities could impose a moratorium on employees attending them. Likewise, the utilities are unlikely to be incurring entertainment expenses (such as golf tournaments) given the SOE limitation on gatherings of more than ten people. The Motion does not even contemplate exploring these other avenues of mitigating anticipated costs associated with COVID-19.

 15. The DPA respectfully submits that the Commission should reject Staff’s Motion. The utilities have admitted that they don’t know what additional costs they may incur, nor have they even hazarded a guess as to the amount of costs they may incur. When the DPA asked pertinent questions, all but one of the utilities simply ignored the questions. One utility has had nearly a month to respond to questions from Staff and the DPA but has not proffered any response.[[19]](#footnote-19)

16. These are unique circumstances. But that’s why the utilities receive a much higher return on equity – to account for potential risk. It is not a reason to provide for extraordinary treatment. That some other states are allowing utilities to record and defer costs that utilities claim are related to COVID-19 is also not a valid reason for this Commission to do so.

 17. Many are suffering as a result of the COVID-19 crisis, but they have no guarantee that their job will still be there when it is over (or somewhat controlled), or that they will not be asked to take a pay cut. Many businesses have been shuttered, and may not be permitted to reopen at normal capacity for some time. The notion of shared sacrifice should also extend to utilities who are insulated from the economic realities that far too many residential, small commercial, and industrial customers now face. They are trying to cut costs wherever possible, and so too should the utilities. We are all in this together.

18. If the Commission is inclined to permit the utilities to defer COVID-19 related costs, its order should be carefully circumscribed to allow deferral of only those costs specifically identified in the Sixth SOE Modification, rather than granting the blank check that Staff’s Motion appears to envision. If the Commission does not want to limit the types of costs that can potentially be deferred, the Commission at the very least should impose specific guardrails as discussed in this response, and should require utilities to reduce discretionary costs unrelated to the provision of safe and reliable utility service.

Respectfully submitted,

 /s/ *Regina A. Iorii*

 Regina A. Iorii (De. Bar No. 2600)

 Deputy Attorney General

 Delaware Department of Justice

 820 N. French Street, 4th Floor

 Wilmington, DE 19801

 (302) 577-8159

 regina.iorii@delaware.gov

 Counsel for the Delaware Division

 of the Public Advocate

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1. Motion at ¶¶2-3. Staff’s Motion states an incorrect date of March 16, 2020. [↑](#footnote-ref-1)
2. *Id.* (emphasis added) [↑](#footnote-ref-2)
3. Attachment A. [↑](#footnote-ref-3)
4. Attachment B. [↑](#footnote-ref-4)
5. Attachment C. [↑](#footnote-ref-5)
6. Attachment D. [↑](#footnote-ref-6)
7. *In the Matter of the Application of Delmarva Power & Light Company for an Increase in Electric Base Rates and Miscellaneous Tariff Changes* and *In the Application of Delmarva Power & Light Company for Approval of a Modified Fixed Variable Rate Design for Electric Rates*, Docket No. 09-414 and 09-276T, Order No.8011, ¶157 (Del. PSC Aug. 9, 2011) [↑](#footnote-ref-7)
8. *Id.* [↑](#footnote-ref-8)
9. Attachment E. [↑](#footnote-ref-9)
10. https://www.delmarva.com/News/Pages/DelmarvaPowerExtendingCustomerSupportPracticestoEnsureAllResidentsHaveSafeandReliableEnergyServiceDuringTh.aspx?sf231832390=1&fbclid=IwAR1MahiaV6P1HQsK9DFfMF\_y-QTh6qgwbE4ijpSrGQoCDkpykA8GV1ernQM. [↑](#footnote-ref-10)
11. Motion at ¶¶2-3. [↑](#footnote-ref-11)
12. A finding which occurs nowhere in the proposed Order accompanying the Motion. [↑](#footnote-ref-12)
13. *Delmarva Power*, Order No. 8011, ¶155. [↑](#footnote-ref-13)
14. *In the Matter of the Joint Petition of Atmos Energy Corporation, Colorado Natural Gas, Black Hills Colorado Gas, Inc., Black Hills Colorado Electric, Inc. and Rocky Mountain Natural Gas, LLC for Authorization to Track Expenses Resulting from the Effects of COVID-19 and Record and Defer Such Costs Into a Regulatory Asset,* Proceeding 20V-1509EG, Notice of Intervention as of Right by Staff, Entry of Appearance and Notice Pursuant to Rule 1007(a) and Rule 1401, pp. 2-3. (Attachment F) [↑](#footnote-ref-14)
15. Two years’ worth of unemployment claims in a month. https://www.middletowntranscript.com/news/20200423/two-years-worth-of-unemployment-claims-in-month [↑](#footnote-ref-15)
16. *Id.* [↑](#footnote-ref-16)
17. GM suspends its dividend and stock repurchases to preserve cash. https://www.marketwatch.com/story/gm-suspends-its-dividend-and-stock-repurchases-to-preserve-cash-2020-04-27 [↑](#footnote-ref-17)
18. 48 CEOs taking pay cut to help their companies survive the coronavirus. http://www.msn.com/en-us/money/companies/48-ceos-taking-pay-cuts-to-help-their-companies-survive-the-coronavirus/ss-BB13l1Hr?ocid=ientp [↑](#footnote-ref-18)
19. Staff sent an e-mail on April 6, 2020. The DPA submitted an e-mail on April 9th. [↑](#footnote-ref-19)