

THOMAS P. DiNAPOLI  
STATE COMPTROLLER



110 STATE STREET  
ALBANY, NEW YORK 12236

STATE OF NEW YORK  
OFFICE OF THE STATE COMPTROLLER

September 1, 2021

John B. Howard  
Chair  
Public Service Commission  
Building 3, Empire State Plaza  
Albany, NY 12223

Re: Enforcement of Commission Orders  
and Other Agreements  
Report 2021-F-5

Dear Mr. Howard:

Pursuant to the State Comptroller's authority as set forth in Article V, Section 1 of the State Constitution and Article II, Section 8 of the State Finance Law, we have followed up on the actions taken by officials of the Public Service Commission to implement the recommendations contained in our audit report *Enforcement of Commission Orders and Other Agreements* (Report [2018-S-27](#)).

**Background, Scope, and Objective**

The Public Service Commission (Commission) regulates 650 utilities operating in New York State including the utility steam service in New York City; 225 small water companies; 41 municipal and small electric utilities; 10 municipal and small natural gas utilities; 24 cable companies; and hundreds of competitive telecommunications companies, power generation companies, and energy service companies. Through its Department of Public Service (Department), the Commission seeks to ensure affordable, safe, secure, and reliable access to electric, gas, steam, telecommunications, and water services for New York's residential and business customers, while also protecting the environment.

The Commission reviews and approves applications for potential mergers and acquisitions, rate cases, and other agreements with utility companies. Approval of these applications is often based on conditions such as replacing or upgrading infrastructure, providing access to services to outlying areas, or improving the quality of service. These conditions are listed in Commission Orders (Orders), and any violation of an Order's terms is grounds for the Commission to seek reparations, terminate the approved acquisition/merger, or even revoke a utility's license. The Commission also has the statutory authority to pursue penalties against utilities pursuant to Section 25 of the Public Service Law. According to Department officials, penalties pursued under Section 25 can only be collected when the Commission sues the utility in court, while Section 25-a provides the Commission with the authority to assess civil penalties against combination gas and electric companies and the officers thereof. Between January 1, 2019 and February 28, 2021, the Department reported six settlements under provisions of the Public Service Law, totaling \$76.75 million, which includes

a \$38 million settlement with National Grid to lift the natural gas moratorium in Long Island, Queens, and Brooklyn.

The Department oversees access to utilities and is responsible for advising the Commission on all decisions, including rate determinations, utility financing, consumer protection, safety and reliability of utility services, siting of gas and electric transmission facilities, and reviewing utility mergers. The Department develops and implements State regulatory and energy policies; inspects utility facilities; conducts and participates in hearings; oversees management and operations audits; and receives, investigates, and resolves complaints regarding billing, services, and other utility or energy service company practices.

For electric and gas utilities, the Department employs individualized measures of utility service quality, reliability, and safety, which include performance improvement goals that utilities agree are appropriate and achievable. The Department monitors the major electric and gas utilities' performance in relation to benchmarks in each utility's performance plan. These performance plans state the utilities have sufficient resources to meet agreed-upon performance standards. Failure to meet the goals in these plans may result in fines based on fixed-dollar amounts or a percentage of equity.

We issued our initial audit report on March 3, 2020. The audit objective was to determine whether the Commission monitors utilities' compliance with merger/acquisition Commission Orders and other agreements (including performance plans) and uses its enforcement power to hold utilities accountable when the terms and conditions of those agreements are not met, including applying monetary penalties and other sanctions. Our initial audit covered the period from January 1, 2015 through July 10, 2019. The audit found the Department does not always adequately monitor compliance with Order conditions – and in some cases even lacks the equipment necessary to do so. Orders are, at times, ambiguous and lack time frames for completion, interim performance measures, and consequences for non-compliance, making enforcement difficult and inconsistent. In the absence of policies and procedures, Department staff use their own discretion for identifying non-compliance and the Commission imposes fines and/or sanctions. Additionally, the audit found that utilities submitted required documents per the Orders and performance plans. However, the Department does not always verify the information it receives from utilities and shares with the Commission – information the Department and Commission then may use for decision-making purposes.

The objective of our follow-up was to assess the extent of implementation, as of May 4, 2021, of the four recommendations included in our initial audit report.

### **Summary Conclusions and Status of Audit Recommendations**

We found that the Department has made significant progress in addressing the issues noted in our initial report. Of the four recommendations made in our initial report, the Department has implemented two and partially implemented two.

### **Follow-Up Observations**

#### **Recommendation 1**

*Actively monitor all conditions listed in Orders to ensure all utilities are in compliance.*

Status – Implemented

Agency Action – In April and July 2020, the Department issued policies and procedures that addressed responsibilities related to monitoring and tracking, compliance filing reviews, staff independent verification processes, and steps to take if documentation is missing or not understood. Additionally, the Department has developed plans to improve compliance tracking in its Order computer system, including real-time results of compliance tracking that will be available to utilities as they log into the Department's Document and Matter Management System. This system is currently being upgraded, with full implementation of these improvements planned in 2022.

We selected two new merger or acquisition Orders approved between January 1, 2019 and February 28, 2021 for review and found the Department appropriately monitored the utilities' compliance with the Orders in both instances.

### **Recommendation 2**

*Develop and issue Orders that include well-defined, measurable, and enforceable conditions. The Orders should also include the consequences for non-compliance, as appropriate.*

Status – Partially Implemented

Agency Action – The Department issued a policy that includes guidance to avoid the use of open-ended dates and subjective language, and instead encourages the use of words such as “shall” and “must” in the Orders. In July and August 2020, a formal training program was provided to all relevant Department staff, which covered the recommendations from our audit, Order drafting process improvements, proposed changes to the electronic tracking system, and overdue Department reviews of Order conditions.

In addition, the Department's Office of Investigations & Enforcement began reviewing all draft Orders quarterly to ensure compliance with the new requirements. The Department's Office of Internal Audit also reviews a sample of Order conditions to ensure they continue to meet this criteria. We reviewed all compliance tracking results and found the conditions were tracked as required.

We selected two new merger or acquisition Orders approved between January 1, 2019 and February 28, 2021 for review and found both contained well-defined, measurable, and enforceable conditions. However, neither Order contained consequences for non-compliance. The Department maintains its position that there is no legal or policy reason to include this information in every Order because the State Legislature has already specified the potential consequences for violating Orders as established in Public Service Law.

The Department did provide a list of penalty actions taken under Public Service Law for not fulfilling conditions as documented in the Orders between January 1, 2015 and March 9, 2021. Specifically, we noted that nine of the 13 penalties occurred within the last 2 years, six of which occurred after our initial audit. Of the nine recent penalties, three totaling \$99 million are pending approval and six totaling \$76.75 million have been approved.

### **Recommendation 3**

*Verify the accuracy of data submitted by utilities that is used by the Commission or Department to evaluate or make decisions concerning the utilities. This includes data submitted for performance metrics, safety standards, and Utility Service Quality Reports.*

Status – Partially Implemented

Agency Action – The Department’s Office of Consumer Services issued standard operating procedures related to the verification of data submitted by utilities for their Utility Service Quality Reports. The Department’s Office of Electric, Gas, and Water (OEGW) recently began implementing this recommendation. Starting April 2021, OEGW requires utilities to submit information quarterly for review. However, Department staff have not completed the verification of this data. Additionally, OEGW has drafted written procedures detailing its data collection and review processes, which are in the final approval phase.

### **Recommendation 4**

*Develop policies and procedures that provide employees with standard monitoring steps to perform when overseeing compliance with merger or acquisition Orders, as well as steps addressing the auditing of data submitted in support of Utility Service Quality Reports.*

Status – Implemented

Agency Action – The Department has developed policies and procedures related to overseeing compliance with merger, acquisition, and auditing data for Utility Service Quality Reports. The Department has updated and issued several standard operating procedures for the Management Operations Audit Unit and Office of Accounting, Auditing, and Finance between March 2020 and September 2020. For example, the Department issued a procedure for conducting audits that includes their processes for audit initiation, audit work, and report issuance.

Major contributors to this report were Brandon Ogden, Amanda Dare, Jenna Agars, and Emily Vandenburg.

We would appreciate your response to this report within 30 days, indicating any actions planned to address the unresolved issues discussed in this report. We thank the management and staff of the Department for the courtesies and cooperation extended to our auditors during this review.

Very truly yours,

Cynthia Herubin, CIA,CGAP  
Audit Manager

cc: David Bell