



State of Rhode Island
Division of Public
Utilities & Carriers

89 Jefferson Blvd.
Warwick, R.I. 02888
(401) 941-4500

Fax: (401) 941-9207
TDD: (401) 941-4500

February 28, 2020

Luly Massaro, Clerk
Public Utilities Commission
89 Jefferson Blvd.
Warwick, RI 02889

Docket No. 4943

Dear Ms. Massaro,

The Division of Public Utilities and Carriers (“Division”) writes to provide written comment regarding the Draft Guidance Document (“Guidance Document” or “Document”) of the Public Utilities Commission (“Commission” or “PUC”) regarding Principles for the Development and Review of Performance Incentive Mechanisms (“PIMs”).

R.I. Gen. Laws § 42-35-2.12 sets limits on an agency’s use of a guidance document to the detriment of any person in any proceeding. To name a few of the limits identified in that statute, in a contested case a guidance document does not bind the final decision maker in the exercise of its discretion; the agency cannot use a guidance document to foreclose consideration of issues raised in the document; and any person that may be adversely impacted by the guidance document in an administrative proceeding must be afforded the opportunity to contest the legality or wisdom of a position taken in the document. Nowhere does the Guidance Document refer to R.I. Gen. Laws § 42-35-2.12 and these important legal rights. The Division recommends that the Guidance Document be amended to reference R.I. Gen. Laws § 42-35-2.12 and explicitly provide notice of the rights that the statute affords individuals who may be detrimentally impacted by the PUC’s reliance on the Document.

The Guidance Document states that it provides “direction on how the PUC will apply its general and specific statutory authority to set rates, tariffs, tolls and charges in Title 39 to proposals for [PIMs] for public utilities under the PUCs jurisdiction.” While the Document correctly provides that it “does not modify existing regulatory or evidentiary standards and guidance,” and further, that it “is not intended to expand or detract from the current rights and obligations of the parties before the PUC,” nowhere does the Document explicitly state that judicial precedent and ratemaking principles must also guide the Commission’s assessment of PIMs. The Document should be amended to make clear that judicial precedent and ratemaking principles must also govern the PUC’s future assessment of any PIM.

On a similar note, the Document incorrectly characterizes allowed reasonable return on equity, statutory remuneration, and minimum service quality standards as “incentives”. Although the Document recognizes that these items “are the current norms and default in utility regulation,” it incorrectly provides that they are “reasonably allowed” rather than that they are legally required either by state law and/or the state and/or the federal constitution. The Document should be revised to correctly denote the legal status of a reasonable return on equity, statutory remuneration, minimum service quality standards and other legal requirements in the ratemaking process.

The Document proceeds to provide that the PUC will apply the Principles to proposals for other PIMs with “consideration” of any “existing incentives . . . *to the extent possible.*” (Emphasis added). By only requiring “consideration” of these legal prerequisites “to the extent possible,” the Document creates a loophole that potentially renders their required consideration in the future assessment of any PIM a nullity. The Document should be revised to eliminate the clause “to the extent possible” in Paragraph Nos. 2(f) and 2(g) and make consideration of a reasonable return on equity, statutory remuneration, minimum service quality standards, *etc.* in any PIM analysis mandatory.

The First Principle provides that a PIM can be considered when the utility “lacks an incentive . . . *and* there is evidence of underperformance or evidence that improved performance will deliver incremental benefits.” (Emphasis added). The criteria—where a utility “lacks an incentive” and where there is “evidence of underperformance”—set the bar for PUC consideration of any PIM quite low. The words “incentive” and “underperformance” are not defined in the Guidance Document. Accordingly, subjective assessments will govern their meaning and application.

Equally as problematic, there may be any number of reasons that explain why underperformance is occurring in connection with a program and/or the actual cause of the underperformance may not be evident from the data and information provided to the PUC by the utility. Nonetheless by its terms, the First Principle could allow PUC consideration of a PIM even if the “underperformance” is due to program mismanagement or incompetence. This can hardly be the intended or desired result. The First Principle should set the bar much higher. The Division recommends that the Principle be revised to allow for PUC consideration of a PIM only if it will produce material, incremental utility performance as measured from a level of excellent performance *and* delivers incremental

benefits to ratepayers and the utility. Rewarding a public utility with a PIM for underperformance or average performance should never be acceptable.

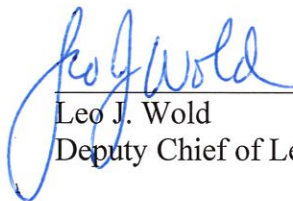
While the General Assembly has authorized the PUC to consider PIMs, it has left the determination of the propriety of their application in the ratemaking process to the discretion of the PUC. In the Division's opinion, the Commission should be wary of approving any PIM where the quantifiable and verifiable, cash net benefits to ratepayers are relatively small even though non-cash system and societal benefits are relatively large. The Guidance Document should be amended to incorporate this maxim.

The Third Principle provides that "incentives *should* be designed to maximize customers' share of total quantifiable, verifiable net benefits." (Emphasis added). The Division recommends that the word "should" be replaced by the word "shall" to ensure the maximum net benefits inure to ratepayers.

These comments reflect only a few of the Division's thoughts regarding the Principles set forth in the Document. It is difficult to anticipate the propriety of language, or, the justness of any result that the application of the Principles' language will produce, in a vacuum. Accordingly, these comments should not be deemed to constitute the Division's exclusive comments regarding the Document. The Division reserves all of its rights on behalf of ratepayers as provided by law.

Respectfully submitted,

Division of Public Utilities and Carriers,



Leo J. Wold
Deputy Chief of Legal Services, DPUC

cc: Service List