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November 18, 2019

Via Electronic Filing

Rosemary Chiavetta, Secretary
PA Public Utility Commission
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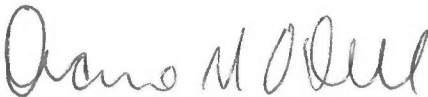
Re: Implementation of Chapter 32 of the Public Utility Code RE: Pittsburgh Water
and Sewer Authority; Docket Nos. M-2018-2640802 and M-2018-2640803

Petition of the Pittsburgh Water and Sewer Authority for Approval of Its Long-Term
Infrastructure Improvement Plan; Docket Nos. P-2018-3005037 and P-2018-3005039

Dear Secretary Chiavetta:

Enclosed for electronic filing please find Pittsburgh Water and Sewer Authority's ("PWSA")
Exceptions with regard to the above-referenced matter. Copies to be served in accordance with
the attached Certificate of Service.

Sincerely,



Deanne M. O'Dell

DMO/lww
Enclosure

cc: Hon. Conrad Johnson w/enc.
Hon. Mark Hoyer w/enc.
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CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of the PWSA's Exceptions upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

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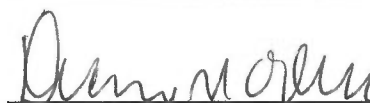
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Dated: November 18, 2019

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

| | | | |
|--|---|------------|--|
| Implementation of Chapter 32 of the Public Utility Code Re Pittsburgh Water And Sewer Authority | : | | Docket No. M-2018-2640802 (water) M-2018-2640803 (wastewater) |
| And | : | | And |
| Petition for The Pittsburgh Water and Sewer Authority for Approval of Its Long- Term Infrastructure Improvement Plan | : | Docket No. | P-2018-3005037 (water) P-2018-3005039 (wastewater) |

**EXCEPTIONS OF
PITTSBURGH WATER AND SEWER AUTHORITY**

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I. INTRODUCTION

On October 29, 2019, the Recommended Decision (“R.D.”) of Deputy Chief Administrative Law Judge Mark A. Hoyer and Administrative Law Judge Conrad A. Johnson (collectively, the “ALJs”) was issued regarding Stage 1 of this Compliance Plan Proceeding involving the transition of The Pittsburgh Water and Sewer Authority (“PWSA”) to Commission jurisdiction pursuant to 66 Pa. C.S. § 3204(b). Of the 186 discrete issues identified in this proceeding, the Parties¹ submitted a Joint Petition for Partial Settlement regarding nearly 75% of all identified issues, proposed to defer additional issues to future proceedings, and reserved for litigation issues related to five broad topics.² Notably, the consensus reached among the Parties, which includes significant compromises, was achieved as a result of significant negotiations involving numerous in-person conferences and the sharing of multiple documents. Within the 219-page R.D., the ALJs recommend approval of the Joint Petition for Partial Settlement and offer their recommended resolutions for each of the contested issues. PWSA appreciates the efforts of the ALJs regarding this matter and fully supports this recommendation for adoption of the Joint Petition for Partial Settlement.

Regarding the contested issues, PWSA accepts many of the ALJs proposed recommendations but recommends that the Commission reject the R.D.’s proposals regarding: (1) billing for to-be metered usage of the City of Pittsburgh (“City”); (2) cost allocation for installation of new meters for the City; (3) applicability of the Commission’s line extension regulations in lieu of the requirements of the Municipality Authorities Act; and, (4) concluding

¹ Parties in this proceeding include: the Bureau of Investigation and Enforcement (“I&E”), the Office of Consumer Advocate (“OCA”), the Office of Small Business Advocate (“OSBA”), Pittsburgh UNITED (“UNITED”); and Pennsylvania-American Water Company (“PAWC”).

² R.D. at 19.

that the Commission has jurisdiction regarding the water quality issue caused by lead distribution facilities.

As explained more fully in Exceptions 1 and 2, receipt of payment from the City for usage and/or the costs of installing new meters stem from the transition of the historical relationship between PWSA and City to one in which PWSA will ultimately own the current City-owned water and wastewater assets (which will occur in 2025). As part of navigating their way through this transition, the City and PWSA are in the process of negotiating a new City Cooperation Agreement to set forth the responsibilities and payment obligations of the two entities. The previously existing 1995 City Cooperation Agreement expired on October 3, 2019. Although the new City Cooperation Agreement is pending final approval from both PWSA and the City before it can be filed with the Commission for review, in this proceeding PWSA requested that the Commission approve the proposals negotiated by the City and PWSA. Those proposals include: (1) a transitional plan for billing the City for usage as new meters are installed; and, (2) a 50/50 sharing of the costs of installation for new meters. In PWSA's views, these agreed-to approaches are a reasonable path forward towards meeting compliance with the Commission's regulations.

The ALJs recommend that the Commission reject both of these proposals. For the reasons explained in Exception Numbers 1 and 2, PWSA submits that adoption of each proposal is reasonable and recommends that the Commission adopt them pending further direction that may be received as a result of a future City Cooperation Agreement proceeding. Alternatively, PWSA would support deferring resolution of each issue until a new Cooperation Agreement is filed and a proceeding is initiated to review and approve the new agreement. As set forth in the Joint Petition for Partial Settlement, the Parties all agree that PWSA will file the new City

Cooperation Agreement and support referring the review of the new City Cooperation Agreement to a formal on-the-record proceeding.³ PWSA believes the new City Cooperation Agreement will be filed within the next few months, likely prior to the Commission's entry of a Final Order in this matter. Given that both of these issues involve a complicated, historical relationship between the City and PWSA, which only just recently also implicates Commission jurisdictional issues, PWSA firmly believes that the most appropriate way to resolve these issues is for the Commission to be presented with an opportunity to evaluate the full proposals negotiated between the entities in a dedicated, comprehensive proceeding. In this way, the Commission will be able to make a fully informed decision about how to direct PWSA to proceed to ensure compliance with Commission regulations and requirements related to these two issues.

Regarding line extensions, as explained more fully in Exception Number 3, PWSA requests that the Commission reject the R.D.'s recommendation that it elevate the Commission's line extension regulations over the statutory line extension provisions of the Municipality Authorities Act. PWSA respectfully submits that the reasoning offered in the R.D. is not consistent with statutory construction or precedent. If, however, the Commission agrees with the ALJs that the law requires PWSA to upend its decades old line extension processes, then PWSA requests either that: (1) the Commission grant a waiver of its regulations; or, (2) PWSA be given a year to file either a petition for waiver or a compliance plan detailing how it will revise its operations consistent with the Commission's regulations. Under this approach, PWSA recommends that the Commission permit the status quo pending a final order regarding either the waiver petition or compliance plan.

³ Joint Petition for Partial Settlement at Section III.P.1.

Finally, while PWSA supports the ultimate recommendations of the R.D. regarding its Lead Service Line Replacement Program and not including non-residential service lines in the program, PWSA respectfully requests that the Commission reject the ALJs' conclusion that the Commission has authority over PWSA's lead service lines based on the reasoning that the Commission has jurisdiction over "service." The sole reason that the lead service lines are the subject of discussion in this case is because they produce unacceptable water quality for customers. Water quality issues are within the jurisdiction of the Pennsylvania Department of Environmental Protection, which is charged with enforcing the rules and requirements of the Federal Environmental Protection Agency. The exercise of jurisdiction by the Commission will likely lead to unavoidable conflicting water quality directives. Accordingly, PWSA will be required to attempt to manage (and pay the costs of) addressing and working with two different regulatory agencies attempting to regulate the same issue, and will likely be forced to become embroiled in time-consuming and costly litigation in both jurisdictions as a result of advocates not being satisfied with PWSA's proposed compliance approaches. All of this will erode PWSA's ability to remain focused on addressing the serious health issues caused by the continued existence of lead lines in its system.

II. EXCEPTIONS

A. Exception No. 1: The ALJs Erred by Rejecting PWSA's Proposals Regarding The Billing Plan For Unmetered and/or Unbilled Municipal Properties Within The City of Pittsburgh [R.D. at 127-128; COL #10, 14, 15; Ordering Paragraph #2]

Due to the historical relationship of the City of Pittsburgh and PWSA, in which the City owns the water and wastewater conveyance assets that are currently managed by PWSA (but will revert to PWSA ownership in 2025), there are approximately 200-400 municipal buildings that are not currently metered and between 300-400 municipally-owned fountains, pools, etc. that

need to be metered.⁴ PWSA's management of the City's assets and other details of their relationship have been historically governed by a 1995 City Cooperation Agreement, which officially expired on October 3, 2019.

The R.D. concludes that, henceforth, "PWSA should operate on a business-like basis with the City as soon as possible" and recommends that PWSA be directed to bill the City for the full usage of each new meter as it is installed for currently unmetered and/or unbilled municipal properties.⁵ PWSA is not excepting to the ALJs recommendation that it interact with the City on a transactional basis pending Commission approval of a newly renegotiated City Cooperation Agreement.⁶ As explained in PWSA's recently filed Quarterly Compliance Plan Progress Report, the extension of the 1995 Cooperation Agreement expired on October 3, 2019. In the interim, fees for any service provided to or received from the City will be done on an actual cost basis. PWSA and the City are continuing to negotiate a new Cooperation Agreement, and PWSA will file it for the Commission's review as soon as both parties have given their final sign-off on the terms.⁷

PWSA does, however, except to the ALJ's conclusion that its transitional proposal, which establishes a phased-in and stepped payment plan for City usage as meters are installed, is not reasonable given the circumstances. PWSA supports the ultimate goal of operating on a business-like basis with the City and recognizes that part of achieving this goal involves

⁴ See PWSA St. No. C-1R at 16.

⁵ The ALJs correctly recognize that full billing for all municipal City properties is subject to PWSA's installation of meters which is not expected to be completed until December 31, 2024. In recognition of this, the ALJs recommend that PWSA be ordered to introduce a flat rate, at minimum the customer charge for the customer's class, for all unbilled customers in its next base rate case. R.D. at 127-128. PWSA does not except to the ALJs' recommendation that it introduce a flat rate as part of its next base rate case.

⁶ R.D. at 103.

⁷ See PWSA Quarterly Compliance Plan Progress Report dated October 31, 2019 at 23.

receiving full payment from the City for all City water usage. As discussed further below, PWSA's transitional proposal reasonably balances the complicated (and long-standing historical) relationship between the City and PWSA, while recognizing that the City, as a governmental entity, needs a measured path forward to payment for full usage. PWSA's proposal also has the benefit of being negotiated with the entity that will be required to pay the bills, making it more likely PWSA will receive actual payments (rather than just issuing bills that go unpaid), which creates more revenue certainty and lessens the potential for a significant increase in PWSA's uncollectible expense that all ratepayers would have to bear.

PWSA does recognize, though, the complexities created because a new City Cooperation Agreement has not yet been filed with the Commission for review. In consideration of this, PWSA recommends that the Commission either: (1) approve PWSA's transitional proposal as set forth in this proceeding (which would be subject to further direction resulting from a future Cooperation Agreement proceeding); or, (2) defer resolution of this issue to a future Cooperation Agreement proceeding that will likely be opened in the next few months. Ultimately, PWSA's view is that the best way to resolve this matter is for the City and PWSA to submit their final negotiated proposed resolution to the Commission to be adjudicated by the Commission as part of the proceeding adjudicating the new City Cooperation Agreement. Through that process, the Commission will be able to more fully evaluate the finally agreed-to resolutions. Being able to focus on and evaluate the issue of payment for City usage as part of a review of all the arrangements agreed to by PWSA and the City is a more efficient and reasonable use of the Commission's resources and will produce the most reasonable results.

1. Commission Should Approve PWSA's Transitional Payment Plan For City Meter Usage (Subject to Further Direction Resulting From a Future Cooperation Agreement Proceeding)

The Joint Petition for Partial Settlement includes PWSA's plan to identify and evaluate all unmetered properties and flat-rate customers for all locations, to include those within the City. Presently, there are approximately 200-400 municipal buildings and 300-400 municipally owned fountains, pools, etc. that are not metered. Pursuant to the Joint Petition for Partial Settlement, PWSA commits to completing the metering of all unmetered municipal and flat rate properties where meters can be installed within five years or by December 31, 2024. PWSA also agrees to accelerate this timeframe, if possible.⁸

The issue before the Commission here is limited to the amount of usage to be paid by the City as the new meters are installed. PWSA recommends that the Commission approve its transitional payment plan proposal, whereby the City agreed to start paying for usage for all metered properties at a specific percentage (starting at 20%) until that percentage reaches 100% (which would occur by year five).⁹ The ALJs recommended rejection of this proposal based on their finding that PWSA has not proven that it is reasonable given the circumstances. According to the ALJs, issuing anything less than "full bills" as City meters come on-line: (1) prevents PWSA from collecting tariffed revenue; (2) results in charging discriminatory rates; (3) "condone[s] and perpetuate[s] the imbalanced, discriminatory relationship the City has had with

⁸ Joint Petition for Partial Settlement, Section III.G. at 21-22.

⁹ Pursuant to the proposed plan, the City would agree to start paying for usage for all metered properties at a specific percentage until that percentage reaches 100%. So, in year one, the City would pay 20% of all metered usage. In year two, the City would pay 40% of all metered usage. In year three, the City would pay 60% of all metered usage. In year four, the City would pay 80% of all metered usage. By year five, the City would be paying PWSA for 100% of all metered usage. As part of the plan, the City would pay the percentage applicable in the year in which any new meter is installed. So, for example, a meter installed in year four would pay 80% of the metered usage. Compliance Plan at 110; PWSA St. C-1 (Weimar) at 27-31; *See also* PWSA M.B. 27.

PWSA for longer than necessary;” and, (4) requires “non-City ratepayers to foot their full bill for future increases while the City is still receiving free water service.”¹⁰ PWSA excepts to the conclusion that its transitional proposal is not reasonable given the circumstances and recommends that the Commission deny the ALJs’ recommendation on this issue.

(a) The R.D. fails to consider current ownership of the water and wastewater conveyance assets

The ALJs’ concern about continuing the “imbalanced, discriminatory relationship” between the City and PWSA is an oversimplified characterization of the nature of the relationship between these two entities. Despite the contrary characterization, the issue here is not one in which a public utility has been giving away free water to a favored customer. Rather, the City is the historical and present owner of the water and wastewater conveyance systems that PWSA is charged with operating. Thus, on its face, there is nothing untoward about the City using water produced by its own assets without paying anyone for that usage (or indeed ever metering that usage).

By way of more background, PWSA was created by the City and eventually charged with managing the City’s water and wastewater conveyance assets. Pursuant to a Memorandum of Lease dated July 27, 1995, PWSA is on the path of becoming the official owner of the assets on September 1, 2025. During this period of transition – whereby ownership of the City’s assets will transfer to PWSA – PWSA’s proposal that the Commission approve a transitional payment plan until the City is paying for full usage presents a reasonable and measured path forward. Importantly, PWSA’s transitional proposal will ultimately achieve full compliance with the

¹⁰ R.D. at 127-128.

Public Utility Code and the Commission's regulations, but it will do so in a way that respects the historical, current and future relationship of the City and PWSA.

(b) The R.D. fails to address problem of not receiving payment for bills as rendered

An important mistaken assumption that appears to be embedded within the conclusions of the R.D. is that by directing PWSA to bill for full usage, PWSA will receive full payment. Only by believing this to be true can one conclude that directing PWSA to immediately bill for full usage will solve the issue of PWSA "not collecting tariffed revenue."¹¹ The problem, though, is that billing does not necessarily equal payment. In the record here, PWSA explained a number of factors as to why the Commission should not assume that directing PWSA to immediately issue full bills for water usage will result in the City paying PWSA for its full usage.

First, the governmental status of the City places very real constraints on the ability of the City to pay PWSA's full bills. As a governmental entity, the City has limited resources and is dependent on paying its financial obligations through taxes and other fees received by its residents (many of who are also likely to be PWSA's ratepayers). Because of this, a reasonable period of time for planning is necessary to enable the City to incorporate new financial obligations into its budget and to socialize them with the taxpayers who will be required to pay for them. Also not addressed by the ALJs is the fact that Pittsburgh only recently terminated its status as a financially distressed city under the direction of a state-appointed coordinator under Act 47, which further impacts its overall financial planning and decisions about its ability to pay.¹²

¹¹ R.D. at 127.

¹² PWSA M.B. at 23, 28; PWSA R.B. at 9; PWSA St. C-1 (Weimar) at 27; PWSA St. C-1R (Weimar) at 21.

Second, the transitional payment plan proposed by PWSA sets forth what the City has agreed to pay as part of the renegotiation of the (still to be finalized) City Cooperation Agreement. As such, it is not reasonable to expect that the City could or would pay something beyond what it has already agreed to pay. PWSA submits that this type of certainty regarding the revenue it can expect to receive from the City is a reasonable way in which to enable PWSA to continue to move forward with its transition to Commission jurisdiction.

Rather than focus on what PWSA could reasonably receive from the City, the R.D. focuses on the revenue PWSA will not receive from the City. Ignoring the very real likelihood that PWSA will not receive payment for full bills as rendered and failing to factor that into the final resolution of this issue results in an unrealistic conclusion that ultimately will cause more harm to PWSA's ratepayers. While the ALJs expressed concern that non-City ratepayers are footing the bill for free usage to the City, they never recognized that any unpaid bills will be added to PWSA's uncollectible expense that will have to be collected from all ratepayers. Acknowledging the realistic amounts of revenue that PWSA will likely receive means that both PWSA and the Commission will have more accurate information about the money that will be available to fund operations and infrastructure needs, which is very important for a cash flow utility like PWSA.¹³ Issuing bills that PWSA knows will not be paid negatively impacts the planning ability of PWSA and creates unnecessary complications regarding revenue expectations. It is also reasonable to anticipate that the likely increase in uncollectible expense will be an issue of concern for some parties in PWSA's next rate case.

¹³ PWSA R.B. at 9.

For all these reasons, PWSA recommends that the Commission approve the transition plan regarding payment for City usage as set forth in this proceeding subject to further direction resulting from a future Cooperation Agreement proceeding.

2. Alternatively, Commission Could Defer Resolution To The Future New City Cooperation Agreement Proceeding That Will Likely Be Opened In The Next Few Months

Ultimately, PWSA believes that the best way to address this issue is for the City and PWSA to submit their finally negotiated proposed payment plan to the Commission for its review and final direction. The transitional payment plan before the Commission now reflects the current results of the negotiations between the City and PWSA. While PWSA has not been in a position to file a newly renegotiated City Cooperation Agreement with the Commission (because the terms are still pending final approval by both parties), it does believe such filing is imminent – within the next few months. PWSA believes the filing will likely occur prior to the time the Commission is expected to issue its final order in this proceeding (on or before February 27, 2020). In consideration of this, the Commission could elect to resolve the issue of billing for City usage by deferring the matter to the new City Cooperation Agreement proceeding. Doing this has a number of benefits. First, it permits the Commission to have the final, approved as negotiated proposal before it for consideration. Second, the Commission can evaluate the issue of City usage in the context of all the other issues involved between the City and PWSA, so as to determine the best path forward. Finally, adjudicating this issue in a future proceeding permits a more narrow focus on these issues given that most of the 186 discrete issues at play in this proceeding will likely be resolved.¹⁴

¹⁴ R.D. at 19.

B. Exception No. 2: The ALJs Erred By Rejecting PWSA's Proposed Cost Sharing For Costs Related To Metering Municipal Properties Within The City Of Pittsburgh [R.D. at 114-115; COL #10, 12, 13; Ordering Paragraph #2]

As explained more fully in Exception Number 2, a significant amount of City usage is not metered largely due to the fact that the City is the historical owner of the water and wastewater conveyance assets. As ownership of these assets will be transferred to PWSA in 2025, PWSA is undertaking a significant project to identify and evaluate unmetered properties and flat-rate customers, so that necessary meters and equipment may be installed.¹⁵ Because this project will evaluate more than just City meters, PWSA's proposal regarding allocation of the costs of meter installation is different depending on type of property.

- In accordance with the Joint Petition for Settlement, PWSA agrees that for all non-municipal properties, it will pay for the meter and the meter installation, but Applicants will be required to pay for any plumbing charges, including service lines, in accordance with Part III, Section B.13 of PWSA's approved Tariff as well as other related appurtenances required to make the installation comply with applicable PWSA requirements and county and local plumbing codes.¹⁶
- For municipal properties, PWSA requests that the Commission approve its proposal to share the meter installation costs on a 50/50 basis with the City, which is consistent with the agreements reached in the current negotiation process of the City and PWSA regarding a new City Cooperation Agreement.¹⁷

Upon review of PWSA's proposal regarding City meter installation costs, the R.D. concluded that "PWSA failed to demonstrate how the proposed 50/50 meter cost sharing relationship with the City is a better pathway to compliance than following" 52 Pa. Code § 65.7.¹⁸ According to the ALJs, Section 65.7 of the Commission's regulations require PWSA to

¹⁵ PWSA Ex. RAW/C-37.

¹⁶ Joint Petition for Partial Settlement, Section III.G.3.a. at 22.

¹⁷ PWSA St. C-1R (Weimar) at 18; PWSA M.B. at 26.

¹⁸ R.D. at 115.

provide meter service and accept responsibility for the costs of the meter installation.¹⁹ Having defined the requirements of the regulation in this manner, and finding that PWSA's proposal does not establish a pathway to compliance, the R.D. recommended that the Commission reject PWSA's proposed 50/50 meter installation cost sharing with the City. PWSA excepts to these conclusions and the ultimate recommendation of the R.D. for the following reasons.

First, Section 65.7(b) specifically permits the Commission the discretion to authorize a different cost allocation method for meters than that which is set forth in the regulation.²⁰ The regulation specifically states: "Unless otherwise authorized by the Commission . . ." Thus, the implicit conclusion of the R.D. – that the regulation requires all public utilities to always bear the full costs of meter installation – is too narrow. The Commission has the discretion to authorize PWSA's proposed approach and still be consistent with its regulatory requirements.

Second, the R.D. appears to not recognize that PWSA's proposal is limited to this current project of metering previously unmetered City properties. As such, it is not reasonable to conclude – as the ALJs appear to conclude – that PWSA may never reach "compliance" as defined by the ALJs. Rather, PWSA is proposing the 50/50 cost sharing approach consistent with its current undertaking to meter previously unmetered City properties over the next five years. As this project is completed, the cost sharing for new City meters will likely depend on how the Commission resolves the line extension issue (which is discussed more fully in Exception Number 3 below).

Third, PWSA's proposed approach is a reasonable balance of its historical practices and Commission practices. Pursuant to the very specific line extension cost provisions of the

¹⁹ R.D. at 114.

²⁰ 52 Pa.Code § 65.7(b).

Municipality Authorities Act, PWSA requires customers to pay for the costs of meter installation.²¹ These provisions differ from general public utility concepts because the Municipality Authorities Act is generally focused on keeping the installation cost burden on municipalities as low as possible. Unlike investor-owned utilities, municipalities are not given a guaranteed monopoly right to operate within a specific service territory with the opportunity to spread costs among all ratepayers and to earn a return on investment. As likely obvious in the discussion of Exception Number 3, reconciling Municipality Authorities Act concepts with PWSA's new public utility status is complicated and will need further direction from the Commission. Pending this, PWSA's proposal to share the costs of City meter installations on a 50/50 basis is a reasonable attempt to reconcile its historical, Municipality Authorities Act practices of requiring new customers to bear the full costs with the Commission's regulations requiring the utility to bear the full costs.

Fourth, PWSA's 50/50 cost sharing proposal is consistent with the current agreements reached with the City as part of the negotiations of a new City Cooperation Agreement (that will be filed for approval once finalized), meaning that PWSA will likely receive payment of these costs. As discussed in Exception No. 1, PWSA is unlikely to receive full payment immediately for full City usage, but it can recover 50% of the costs incurred to install the new meters from the City because the City is agreeing to make these payments. As such, it makes no practical sense to deny PWSA the opportunity to receive half of the City meter installation costs from the City while being critical of its failure to secure full and immediate payment of City usage as new meters are installed.

²¹ 53 Pa.C.S. § 5607(d)(24)(i) specifically identifies the following fees: (A) connection fee; (B) customer facilities fee which may include the cost of a water meter and installation; (C) tapping fee.

Thus, for all these reasons, PWSA urges the Commission to reject the recommendation of the R.D. and to approve its 50/50 cost sharing proposal subject to further direction resulting from a future Cooperation Agreement proceeding. Alternatively, the Commission could (as suggested above regarding Exception Number 1), elect to resolve this issue deferring the matter to the future City Cooperation Agreement proceeding that PWSA anticipates will be filed within the next few months and possibly prior to the February 28, 2020 due date for a final order in this proceeding.

C. **Exception No. 3: The ALJs Erred In Concluding That The Municipality Authorities Act, 52 Pa.C.S. § 5601, et seq. No Longer Governs PWSA's Line Extension Processes [R.D at 152-156; COL # 10, 21 -22; Ordering Paragraph #2]**

Regarding line extensions, PWSA proposes to continue to handle line extensions consistent with the Municipality Authorities Act. That Municipality Authorities Act contains very detailed provisions related to main extensions, customer advance funding, and refunds and specifically states that “No authority shall have the power to impose a connection fee, customer facilities fee, tapping fee or similar fee **except as provided specifically under [53 Pa.C.S. § 5607(d)].**”²² Since the Commission’s line extension regulations set forth customer payment requirements and fees that contradict the requirements of Municipality Authorities Act,²³ PWSA cannot be in compliance with the Municipality Authorities Act and Commission regulations at the same time.²⁴

After careful consideration of the rules of statutory construction, the processes that would need to be changed/revised to upend PWSA’s long-standing line extension procedures, all the

²² 53 Pa.C.S. § 5607(d)(24)(iii) (emphasis added).

²³ See PWSA St. No. C-4 (Quigley) at 31-34; PWSA St. No. C-4R (Quigley) at 36-38.

²⁴ R.D. at 129-130, 152; R.D. at FOF # 23.

other issues involved in transitioning to Commission jurisdiction, and the potential future liability that may result from changes to the historical line extension processes, PWSA submits that it should be permitted to continue to follow the detailed statutory line extension processes in its enabling legislation, the Municipality Authorities Act.²⁵

The R.D. adopted the contrary view (espoused by I&E)²⁶ and relied primarily on an analysis of statutory construction principles to recommend that the Commission order PWSA to revise its tariff provisions regarding line extensions to comply with the Commission's regulations.²⁷ The R.D. also concluded that PWSA did not timely request a waiver of the Commission's regulations, that no factual record exists to consider the granting of a waiver, and that PWSA should be directed to immediately revise its tariff provisions to comply with the Commission's line extension regulations.²⁸ PWSA urges the Commission to reject the ALJs' conclusions and recommendations for several reasons.

First, the supporting statutory construction analysis relied upon by the ALJs misapplied basic and well-accepted rules of statutory construction when they concluded that the Commission's line extension regulations trump the line extension requirements of the Municipality Authorities Act, a statute. Second, the ALJs were incorrect that PWSA's request for waiver of the regulations was "untimely" or that there is not an appropriate factual record upon which to consider such request. Finally, even if the Commission were to adopt the statutory analysis of the R.D. and reject granting a waiver as part of the final order, requiring PWSA to immediately file a compliance tariff upending its decades old line extension process

²⁵ R.D. at 131-146.; PWSA M.B. at 30-43; PWSA R.B. at 15-21.

²⁶ PWSA's full response to I&E's view is set forth in PWSA's briefs, and will not be repeated here. *See* PWSA M.B. at 30-43; PWSA R.B. at 15-21, which are incorporated herein by reference.

²⁷ R.D. at 152-156; R.D. at COL # 10, 21-22; R.D. at Ordering Paragraph #2.

²⁸ R.D. at 155.

will involve a significant amount of work on behalf of PWSA to evaluate, revise and provide notice to those affected by the changes to its processes. Thus, PWSA proposes that the Commission grant it one year to either file a formal waiver request or a compliance plan, detailing how it proposes to revise its operations. Although granting this small period of time to evaluate next steps in light of the Commission's direction would be a more workable outcome than the immediate compliance recommended by the ALJs, the legally sound resolution of this matter is to: (1) permit PWSA to continue to comply with the specific line extension provisions of the Municipality Authorities Act; and, (2) find that such compliance results in just and reasonable rates as mandated by the Public Utility Code.

1. Statutory Construction Analysis

It is well settled that a statute is the law and takes precedence over an agency's regulations.²⁹ There is also an undisputed general principle of statutory construction that particular statutory provisions control over general statutory provisions.³⁰ These basic statutory construction principles (and the legally recognized exceptions) can be summarized as follows:

- A statute takes precedence over a regulation;
- Seemingly conflicting statutes should be evaluated to determine if they can be read together and both given effect;
- A more particular statute takes precedence over a general statute; however, the general statute may control if:
 - The general statute was enacted later than the particular statute; and,
 - The General Assembly manifested clear intent that the general statute is to take precedence over the particular statute.

²⁹ See, e.g., *Victory Bank v. Commonwealth*, 2019 Pa.Comm. LEXIS 936, 2019 WL 5198422 (October 16, 2019) (statute takes precedence over the regulation); *Commonwealth v. Kerstetter*, 62 A.3d 1065, 1069 (Pa.Cmwlth. 2013), affirmed, 94 A.3d 991 (Pa. 2014) (a statute is law and trumps an administrative agency's regulations); *Success Against All Odds v. Department of Public Welfare*, 700 A.2d 1340, 1351 fn. 6 (Pa.Cmwlth. 1997) (regulations must give way). See also *PWSA M.B. at 43*, citing *Equitable Gas Co. v. Wade*, 812 A.2d 715 (Pa.Super. 2002) (The regulations were promulgated by the Commission, and, as such, are not a "statute," as that term is defined in statutory and case law).

³⁰ 1 Pa.C.S. § 1933; R.D. at COL #19. The exception to this general rule is described in 1 Pa.C.S. § 1933; R.D. at COL #20.

The analysis of the R.D. departs from accepted precedent and principles leading to an unreasonable conclusion that a statute must give way to a regulation. First, the R.D. incorrectly elevates the Commission's line extension regulations to the status of a "statute." Second, the R.D. erred because it fails to recognize that the requirements of the Municipality Authorities Act and the Public Utility Code can be read together with both given effect. Third, there is no explicit authorization or manifestation of clear intent by the General Assembly in Sections 3201-3209 of the Public Utility Code (which brought PWSA under the jurisdiction of the Commission) that the Commission's line extension regulations must prevail over the line extension provisions of the Municipality Authorities Act statute. For all these reasons, as discussed further below, the R.D.'s statutory analysis and resulting recommendation constitutes an error of law and must be rejected. Rather, the Commission should conclude that PWSA may continue to comply with the statutory requirements of the Municipality Authorities Act and that doing so results in just and reasonable line extension rates and policies consistent with the Public Utility Code.

(a) R.D. Incorrectly Identifies Source of Conflicting Requirements

The R.D. erred by recommending that PWSA be required to abandon its long-established Municipality Authorities Act compliant line extension processes and implement the Commission's line extension regulations on the basis that the line extension provisions of the Municipality Authorities Act statute must give way to the Commission's regulations regarding line extensions.³¹ Notably, the R.D. does not describe any conflict between the two statutes, i.e. the Municipality Authorities Act and the Public Utility Code. In fact, this lack of statutory conflict is clear, since there would be no conflict if the Commission's line extension regulation

³¹ R.D. at 129-130, 152; R.D. at FOF # 23.

did not exist. Rather – and despite its attempted characterization to the contrary – the conflict here lies in the language/requirements in the Municipality Authorities Act statute and the Commission regulations.³²

Unique to this issue is the fact that the Municipality Authorities Act is a statute which sets forth very detailed processes related to the line extensions for municipal authorities and specifically provides that: “No authority shall have the power to impose a connection fee, customer facilities fee, tapping fee or similar fee except as provided specifically under [53 Pa.C.S. § 5607(d)].”³³ No other provision of the Municipality Authorities Act has such language granting an authority the power only to follow these line extension rules. Moreover, there is no parallel level of detail regarding line extensions in the Public Utility Code. Rather, the “parallel” level of detail is found in the Commission’s regulations that were promulgated in 1997.³⁴ These regulations, however, are “interpretative” in that they define one method of achieving reasonable rates and services under the Public Utility Code, but they are not the only method of achieving such result.³⁵ Because the Public Utility Code contains no specific line extension provisions while the Municipality Authorities Act statute contains specific line extension provisions, the statutory analysis should end here and PWSA should be permitted to

³² R.D. at 129-130, 152; R.D. at FOF # 23. *See also* footnote 24.

³³ 53 Pa.C.S. § 5607(d)(24)(iii) (emphasis added).

³⁴ Line Extension Order, 27 Pa.B. 785, 799 (February 15, 1997). Notably, the R.D. uses a recent general statutory directive (that the Public Utility Code apply to PWSA in the “same manner as a public utility”) to support the application of language that was actually promulgated by the Commission in 1997. If the regulation is treated as a statute (which it should not), the formula and processes in the Municipality Authorities Act was enacted later (2001) than the formula and processes in the Commission’s regulation (1997). *See* PWSA M.B. at 36, 43. Regarding FOF # 24, the Act 19 of 2017 amended the Municipality Authorities Act for the limited purpose of providing municipal authorities serving five or more municipalities and imposing tapping fees for a specific project will have the deadline to start construction on the project increased from the current 15 years to 20 years. Importantly, this amendment did not alter the fundamental line extension requirements that continue to be a part of the Municipality Authorities Act.

³⁵ *See* Line Extension Order, 27 Pa.B. 785, 799 (February 15, 1997). *See also* PWSA M.B. at 38, fn 150.

continue to ensure compliance with the line extension provisions of the Municipality Authorities Act. There is simply no precedent to support the result of the R.D. – that the Commission’s regulations take precedence over the Municipality Authorities Act statute.

(b) R.D. Does Not Give Effect To All Applicable Statutory Provisions

Section 1933 of the Statutory Construction Act requires that statutory provisions be construed, if possible, so that effect may be given to both.³⁶ The R.D. erred by failing to evaluate whether the (more general) provisions of the Public Utility Code can be read together with the (more particular) provisions of the Municipality Authorities Act to give effect to both. The results of such an evaluation shows that the two statutes can be read together with both given effect. By following the requirements of the Municipality Authorities Act, PWSA’s line extension processes can be viewed as resulting in just and reasonable rates as required by the Public Utility Code. As the Public Utility Code does not specifically detail line extension rules and procedures (as does the Municipality Authorities Act), reading the two statutes in this way is perfectly logical and results in giving both statutes effect.

Nothing in the section of the Public Utility Code that brought PWSA under the Commission’s jurisdiction undermines the ability to read the two statutes together in this manner. Section 3202(a)(1) states that the provisions in the Public Utility Code apply to PWSA in the “same manner as a public utility.”³⁷ Other provisions in the Public Utility Code require regulated utilities to “observe, obey, and comply with” the Commission’s regulation or orders.³⁸

³⁶ 1 Pa.C.S. § 1933.

³⁷ 66 Pa.C.S. § 3202(a)(1).

³⁸ R.D. at 48; *See, e.g.*, 66 Pa.C.S. § 501(c) (“Every public utility...subject to the provisions of this part, affected by or subject to any regulations or orders of the commission or of any court, made, issued, or entered under the provisions of this part, shall observe, obey, and comply with such regulations or orders, and the terms and conditions thereof”); 66 Pa.C.S. § 1501 (“[A public utility’s] service and facilities shall be in conformity with the regulations and orders of the commission”).

All of these statutory provisions can be read together.³⁹ The line extension regulations provide one method to achieve reasonable rates and service under the Public Utility Code.⁴⁰ The Commission may also determine as part of this proceeding that the provisions in the Municipality Authorities Act provide another method (only available to municipal authorities) for achieving reasonable rates and service under the Public Utility Code. This interpretation achieves the general goal of the General Assembly of placing PWSA and its line extension processes under the Commission's oversight and regulatory authority without needing to elevate a regulation over a statute through a flawed application of well-established statutory construction principles.

(c) No Expression Of Legislative Intent That Commission's Line Extension Regulations Should Replace Municipality Authorities Act Requirements

The language used by the legislature is the best indication of its intent.⁴¹ A deeper analysis of the language of the new statutory sections bringing PWSA under the jurisdiction of the Commission reveals that there is no language to demonstrate that the General Assembly considered there to be any conflict between the Municipality Authorities Act and the Public Utility Code. Despite this, the R.D. concluded that the General Assembly intended to place

³⁹ PWSA M.B. at 35, 37-38.

⁴⁰ The Commission's line extension regulation is an "interpretative" regulation. *See* Line Extension Order, 27 Pa.B. 785, 799 (February 15, 1997). It defines one method of achieving reasonable rates and service under the Public Utility Code. *Id.* It is not the only method of achieving reasonable rates and service for line extensions. *Id.* *See also* PWSA M.B. at 38, fn 150.

⁴¹ *See, e.g., Dorsey v. Redman*, 96 A.3d 332, 340 (Pa. 2014). The objective of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. 1 Pa.C.S. § 1921(a). When the words of a statute are clear and unambiguous, we may not go beyond the plain meaning of the language of the statute "under the pretext of pursuing its spirit." 1 Pa.C.S. § 1921(b).

PWSA under the Commission's oversight "in the same manner as a public utility."⁴² According to the logic of the R.D., this language means that the General Assembly intended to elevate the Commission's line extension regulations over the specific line extension provisions of the Municipality Authorities Act. Because such a result is so contrary to precedent and established statutory construction principles, it is not reasonable to believe that the General Assembly would select such "coded" language to achieve that desired result. A much more rational reading of the explicit language is that an entity can be a municipal authority required to comply with the line extension provisions of the Municipality Authorities Act while also being: (1) subject to the Public Utility Code which applies to PWSA in the "same manner as a public utility;"⁴³ and, (2) required to "observe, obey, and comply with" the Commission's regulation or orders.⁴⁴ This is achieved through a Commission recognition that compliance with the Municipality Authorities Act line extension requirements result in just and reasonable rates and services as required by the Public Utility Code.

To support this point, it must be presumed⁴⁵ that the General Assembly was familiar with extant judicial precedent holding that the Municipality Authorities Act statute would prevail over the Commission's regulations.⁴⁶ No intention to override that precedent (so that the regulation would prevail over a statute) is clearly discernable from Sections 3201-3209 of the Public Utility Code subjecting PWSA to the Commission's jurisdiction. As the Commission may not read

⁴² R.D. at 154; 66 Pa.C.S. § 3202(a)(1). The plain language in Section 3202(a) (apply in the "same manner") does not define PWSA as a "public utility." *Id.*; 66 Pa.C.S. § 102 (definitions). Nor does that language expressly confer any additional rights or powers upon PWSA.

⁴³ 66 Pa.C.S. § 3202(a)(1).

⁴⁴ *See, e.g.*, 66 Pa.C.S. § 501(c), 1501.

⁴⁵ The Commission is required to presume that when enacting legislation, the General Assembly is familiar with extant law. *White Deer Twp. v. Napp*, 985 A.2d 745, 762 (Pa. 2009).

⁴⁶ *See* footnote 29. In addition, Act 65 did not expressly or impliedly repeal any part of the Municipality Authorities Act. *See* PWSA M.B. at 39-40.

words into an unambiguous statutory provision,⁴⁷ there is no language stating any intention to have the Commission's line extension regulations govern over the particular statutory provisions of the Municipality Authorities Act. As such, a more rational reading of the explicit language is that an entity can be a municipal authority (with the ability to exercise the powers granted under the Municipality Authorities Act) and also be subject the Commission's oversight and regulatory authority.

Adopting the R.D.'s recommendations would create absurd results.⁴⁸ PWSA is unique among the "traditional" public utilities regulated by the Commission because: (1) it is an independent agency of the Commonwealth;⁴⁹ and, (2) is the only Commission-regulated public utility created and organized under the Municipality Authorities Act.⁵⁰ The Municipality Authorities Act provides for certain powers that PWSA may exercise.⁵¹ By recommending compliance with the Commission's regulations (and the related departure from the powers granted to PWSA under the Municipality Authorities Act),⁵² the R.D. results in directing PWSA to perform an action (such as charge a fee/rate) that PWSA is not legally able to do (or charge) pursuant to the Municipality Authorities Act.⁵³ That result is unreasonable, since nothing in the Public Utility Code (including, the statutory sections bringing PWSA under the Commission's

⁴⁷ See 1 Pa.C.S. § 1921(b).

⁴⁸ When ascertaining the intent of the General Assembly, there is a presumption that the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable. 1 Pa.C.S. § 1922(1).

⁴⁹ COL #3.

⁵⁰ PWSA M.B. at 4.

⁵¹ COL # 16.

⁵² See R.D at 152-156; COL # 10, 21-22; Ordering Paragraph #2.

⁵³ PWSA M.B. at 41-42; PWSA R.B. at 19-20. PWSA, as a municipal authority, possess only the powers to act that General Assembly has granted to it. *Naylor v. Township of Hellam*, 773 A.2d 770, 773-774 (Pa. 2001). In addition, the Commission is a creature of statute and has only those powers which are expressly conferred upon it by necessary implication. *Feingold v. Bell of Pennsylvania*, 383 A.2d 791, 794 (Pa. 1977).

jurisdiction) explicitly authorizes the Commission to rewrite the powers granted to PWSA under Municipality Authorities Act. Moreover, the Commission is not expressly empowered to direct PWSA to take otherwise unlawful actions (i.e., actions that conflict with another statute).⁵⁴ Because adopting the recommendations of the R.D. would lead to such result, they must be rejected.

2. The R.D. Incorrectly Concluded That PWSA Did Not Timely Request A Waiver

Setting aside the fact that the statutory arguments set forth in the R.D. do not establish that the line extension provisions in the Municipality Authorities Act statute must give way to the Commission's regulations, the R.D. concluded that PWSA's "request for a waiver of the regulations is untimely" and "a factual record would be necessary to appropriately consider such a request."⁵⁵ Both of these conclusions are incorrect and must not be adopted.

First, it is unclear why the ALJs concluded that a request for a waiver was untimely or why a waiver is not a reasonable way to address this issue. PWSA specifically stated in its September 28, 2018 Compliance Plan that it intended to continue to comply with the Municipality Authorities Act "subject to Commission approval."⁵⁶ PWSA received final Commission approval (as part of its rate case) to include the Municipality Authorities Act compliant provisions in its currently effective Commission-approved tariffs with the understanding that the issue would be further considered as part of this proceeding.⁵⁷ PWSA's testimony further explained the irreconcilable nature of the statute and the regulations, noted that

⁵⁴ PWSA M.B. at 41-42; PWSA R.B. at 19-20.

⁵⁵ R.D. at 155.

⁵⁶ Compliance Plan at 67-69.

⁵⁷ *Pennsylvania Public Utility Commission v. PWSA*, Docket No. R-2018-3002645 (water) and R-2018-3002657, Joint Petition for Settlement dated November 29, 2018, Section III.H.7(j) at 28..

it was not proposing any changes to the current structure, and identified the changes to existing processes that would need to be undertaken to revise its historical processes.⁵⁸ Thus, it is unclear why consideration of a waiver should be rejected on the basis of being considered untimely.

Second, Section 3202(b) permits the Commission to “suspend or waive the applicability of any provision of [the Public Utility Code] to the authority.”⁵⁹ Nothing in this Section specifies when such request must be made nor deems that if any such request is not made in a specific timeframe, the Commission loses the ability to grant a waiver where deemed appropriate. Moreover, the entire purpose of this Compliance Proceeding is to determine how and to what extent PWSA should be required to adhere to Commission rules and regulations, thus obviously negating the need for a separate “waiver petition”, particularly regarding an issue that can be decided through a legal, statutory construction analysis. In other words, the entire Compliance Proceeding has as one of its goals to determine necessary waivers of the Commission’s regulations, where deemed reasonable.

Finally, the R.D. errs in concluding that a sufficient factual record does not exist upon which to grant PWSA a waiver of its line extension regulations. As noted previously, PWSA’s witness Quigley provided testimony explaining the practical issues related to upending its historical line extension practices.⁶⁰ This testimony supports granting a waiver by establishing that divergence from PWSA’s current practices (consistent with the Municipality Authorities Act) would: (a) be complex and costly;⁶¹ and, (b) could result in litigation and potential damage

⁵⁸ See PWSA St. No. C-4 (Quigley) at 31-34; PWSA St. No. C-4R (Quigley) at 36-38.

⁵⁹ 66 Pa.C.S. § 3202(b).

⁶⁰ See PWSA St. No. C-4 (Quigley) at 31-34; PWSA St. No. C-4R (Quigley) at 36-38.

⁶¹ PWSA M.B. at 32; PWSA St. C-4R (Quigley) at 37-38.

awards.⁶² This information provides the factual record necessary upon which the Commission could elect to grant PWSA a waiver of compliance with its line extension regulations.

Thus, if the Commission adopts the statutory analysis of the R.D. (which it should not do), PWSA respectfully requests that the Commission grant a waiver of its line extension regulations so as to permit PWSA to continue to use the formula and processes required by the Municipality Authorities Act.

3. If Commission Declines To Permit Current Processes And Declines to Grant A Waiver, The Commission Should Permit A Reasonable Period Of Time For PWSA To Either Seek A Waiver Or Revise Its Processes Rather Than Directing Immediate Compliance

Alternatively – and in lieu of directing immediate compliance with the Commission’s line extension regulations – PWSA recommends that the Commission permit the status quo to remain until further Commission action. PWSA proposes that the Commission grant it one year to either file a formal waiver request or a compliance plan detailing how it will revise its operations. The path forward regarding this issue would be as determined pursuant to the final Commission order entered as a result of either the waiver request or in response to the compliance plan proposal. Taking this course will result in providing more clear direction to PWSA about the Commission’s expectations. This direction – coupled with the resolution of so many of the other complicated and significant issues involved in the transition to the Commission’s jurisdiction – will enable PWSA to better focus on its line extension procedures and processes. The alternate approach – as recommended by the ALJs – does not give due consideration to the fact that PWSA has operated pursuant to the Municipality Authorities Act requirements for decades and

⁶² PWSA M.B. at 32; PWSA St. C-4R (Quigley) at 36; *See Hidden Creek, L.P. v. Lower Salford Twp. Auth.*, 129 A.3d 602 (Pa.Cmwlth. 2015) (regarding developer's claim of excessive tapping fees in violation of the MAA).

will need some time to determine how to upend these historical processes and to give affected customers appropriate notice. Moreover, if the Commission is not foreclosing the ability of PWSA to file a future waiver petition (which it should not), directing immediate compliance now while leaving open the possibility that a future waiver petition may be granted (which would reverse actions PWSA would have to take now for immediate compliance regarding line extensions) is a waste of time and resources and will create more confusion for PWSA, its customers and those who do business with PWSA.

D. Exception No. 4: The ALJs Erred In Concluding That The Commission Has Jurisdiction Regarding Water Quality [R.D. at 207-208]

PWSA has committed extraordinary efforts and expended significant resources to remediate lead on its system. It had done so in part in response to: (1) a PA DEP water quality mandate⁶³; and, (2) a 2017 Consent Order and Agreement it entered into with the Pennsylvania Department of Environmental Protection (“PA DEP”) (“Lead COA”)⁶⁴. PWSA’s Board has also adopted a Lead Service Line Replacement Program policy that goes beyond what is required by federal Environmental Protection Agency (“EPA”)/DEP water quality regulations and the Lead COA. Significantly, PWSA’s lead remediation efforts go above and beyond any state or federal law, regulation or mandate.⁶⁵

Before describing the language in the R.D. that concerns PWSA, we provide additional context regarding the regulatory scheme for lead remediation and the sole issues on which the Parties have failed to agree. Federal and state drinking water regulations require that public

⁶³ 25 Pa. Code §§ 109.1101 to 109.1108, collectively known as the “lead and copper rule.”

⁶⁴ UNITED St. 4 (Welter) at Appendix D.

⁶⁵ PWSA M.B. at 56.

drinking water suppliers regularly test for contaminants, such as lead and copper. The goal of the regulations, such as the Lead and Copper Rule, is to minimize levels of lead and copper in drinking water, primarily by reducing water corrosivity. The “action level” is currently set for 0.015 milligram per liter (mg/l) for lead based on 90th percentile levels of tap water samples. If a public drinking water supplier exceeds the action level, requirements can be triggered such as a requirement to implement corrosion control treatment, public education efforts, and lead service line replacement.⁶⁶

There is no detectable lead in PWSA’s water when it leaves the treatment plant and travels through PWSA’s mains. Nevertheless, lead can enter drinking water through lead service lines.⁶⁷ The Lead COA establishes actions for PWSA to take if its water sampling demonstrates that lead levels exceed the “action level” under PA DEP’s Lead and Copper Rule. The Lead COA requires implementation of a corrosion control program. PWSA has implemented a corrosion control program using orthophosphate, which is anticipated to reduce lead levels well beyond the PA DEP/EPA “action level.”

The Lead COA also contains deadlines for completing a lead service line system inventory and the performance of lead service line replacements. With regard to replacements, PWSA agreed in the Lead COA to replace at least 7% of its existing public lead service lines in each year in which its lead levels in the prior six months fall above the “action level,” as well as customer notification and follow up testing procedures when the action level is exceeded. Finally, PWSA agreed in the Lead COA to a Community Environmental Project pursuant to

⁶⁶ PWSA M.B. at 53.

⁶⁷ PWSA M.B. at 53-54.

which PWSA will spend up to \$1.8 million to replace private lead service lines for low-income homeowners, in addition to other replacements agreed to in the Lead COA.⁶⁸

The Lead COA also establishes what PWSA is not required to do pursuant to federal and state drinking water regulations. The Lead COA leaves replacement of privately owned portions of lead service lines in the discretion of the Authority. This is because federal and state drinking water regulations do not mandate replacement of privately owned portions of lead services lines. PWSA has voluntarily gone above and beyond what is required by environmental regulations or any federal or state mandates regarding lead, as described in its July 26, 2019 Lead Service Line Replacement Program. Importantly, PWSA has elected to replace a residential customer-owned private side lead service line whenever it replaces the public side, and to do so at no direct cost to the customer. PWSA has also voluntarily established a sliding scale reimbursement program for residential customers who elect to replace their own line. The sliding scale reimbursement has PWSA pay all costs for low and moderate income customers and provides at least a \$1,000 stipend to non-low/moderate income customers.⁶⁹ In addition to PWSA's July 26, 2019 Lead Service Line Replacement Program, PWSA has committed to creating a plan for the eventual replacement of all residential public side lead service lines through its Small Diameter Water Main Replacement Program.⁷⁰ The Joint Petition for Settlement sets forth the parties agreed upon comprehensive plan for addressing lead remediation issues (with the exception of PWSA's

⁶⁸ The Lead COA allows PWSA to direct up to 75% of the civil penalty (under the Lead COA) toward private-side lead service line replacements for low-income homeowners in its service area (i.e., the "Community Environmental Project" or "CEP"). Consistent with the Lead COA, funding for the CEP ends in November 2020. The CEP targets private lead service line replacements for households with income levels below 250% of the federal poverty level, as adjusted annually. The Lead COA allows PWSA to apply up to \$1.8 million of what would have been a civil penalty to the CEP. Whatever portion of the \$1.8 million PWSA does not spend by November 2020 PWSA will pay to the PADEP as a fine. PWSA M.B. at n. 225.

⁶⁹ PWSA M.B. at 57.

⁷⁰ PWSA Hearing Exh. 3 (LTIIP) at 28, Table 2-8; PWSA R.B. at 27.

income-based reimbursement policy memorialized in its July Lead Service Line Replacement Program policy). PWSA believes these voluntary lead remediation efforts fairly balance the needs of the community and PWSA's other substantial operational and infrastructure obligations.

The opposing parties in this proceeding insist that PWSA do even more. The opposing parties advocate that PWSA be ordered to: (1) pay 100% of the cost of replacing private-side lead service lines when a residential customer who is not currently slated to have his or her line replaced by PWSA requests such replacement; (2) continue a neighborhood based replacement program in addition to lead service line replacement as part of its Small Diameter Water Main Replacement program; and (3) expand its July 26, 2019 Lead Service Line Replacement Program to offer a stipend to non-residential property owners to subsidize the replacement of their private-side service line.

PWSA fully agrees with the ALJs recommendation that the Commission reject the above-referenced requests of the opposing parties. In doing so, the ALJs properly found that the Commission does not have jurisdiction to oblige the opposing parties' requests because the "Commission lacks jurisdiction to order PWSA to replace customer-owned lead lines."⁷¹ The ALJs properly recommended that the Commission approve the lead remediation components of the Joint Petition for Partial Settlement and that it not interfere or modify PWSA's July 26, 2019 Lead Service Line Replacement Program.⁷²

While PWSA supports the ultimate recommendations of the ALJs, it excepts to their initial conclusion that the Commission has authority over PWSA's service lines "as a service issue if the water quality is not safe."⁷³ The Recommended Decision implicitly found, therefore,

⁷¹ R.D. at 208.

⁷² R.D. at 209, 213.

⁷³ R.D. at 208.

that if the issues in controversy had to do with replacing PWSA's "public side" lead service lines, the Commission *would* have jurisdiction over those claims. PWSA respectfully submits that this conclusion is erroneous as a matter of law. If adopted by the Commission, this recommendation would improperly expand Commission jurisdiction to water quality issues such as lead remediation efforts that involve PWSA-owned public service lines that are fully regulated by other government agencies. As explained below, the Commission lacks jurisdiction to order PWSA to replace not only private lead service lines, but also public lead service lines, to address a water quality issue. The only service issue presented here is whether lead in customers' water creates an unsafe and unreasonable water quality. It is well established that water quality issues are outside the Commission's jurisdiction. The water quality issues created by lead are already comprehensively regulated by PA DEP and EPA.

The Commission lacks the jurisdiction to decide issues pertaining to lead in PWSA's water supply and to order PWSA to replace lead service lines. The Commission may not exceed its jurisdiction and must act within it. Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy,⁷⁴ and jurisdiction may not be conferred where none exists.⁷⁵ The Commission holds only the statutory authority the Legislature has specifically granted to it in the Public Utility Code.⁷⁶

Section 1501 of the Public Utility Code requires that "[e]very public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such

⁷⁴ *Hughes v. Pennsylvania State Police*, 619 A.2d 390 (Pa.Cmwlth. 1992), *appeal denied*, 637 A.2d 293 (Pa. 1993).

⁷⁵ *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967).

⁷⁶ *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967).

service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public.”⁷⁷

Additionally, Section 1505(a) of the Code provides that if the Commission finds that a utility’s “service or facilities” are “unreasonable, unsafe, inadequate, insufficient, or unreasonably discriminatory ...,” the Commission has the authority to mandate actions to make them reasonable, safe and adequate (etc.).⁷⁸

Thus, the Commission has jurisdiction to decide matters relating to a utility’s facilities and service. However, the Commonwealth Court has made clear that there is a distinction between water service, which the Commission may regulate pursuant to Sections 1501 and 1505, and water quality, which is outside of the Commission’s jurisdiction.⁷⁹ Consequently, PWSA submits that the R.D. erred by finding that “water quality and water service are inseparable in this proceeding.”⁸⁰

The Commonwealth Court in *Rovin v. PUC* reviewed a Commission decision to dismiss a complaint that alleged that a water utility failed to provide adequate, safe and reasonable water service in violation of Section 1501 of the Public Utility Code when it provided only some of its customers with fluoridated water.⁸¹ The Commonwealth Court found “[i]t is apparent that Petitioner herein is not complaining about the quality of service but rather the quality of water.”⁸² The Court explained that water quality is statutorily regulated by the provisions of the

⁷⁷ 66 Pa.C.S. § 1501.

⁷⁸ 66 Pa.C.S. § 1505(a).

⁷⁹ *Rovin, D.D.S. v. PUC*, 502 A.2d 785; *Pickford v. PUC*, 4 A.3d 707 (Pa.Cmwlt. Ct. 2010); *see also Country Place Waste Treatment Company, Inc. v. PUC*, 654 A.2d 72 (Pa.Cmwlt. 1995) (Commission lacks authority to regulate air quality where sewage treatment plant caused odor).

⁸⁰ PWSA M.B. at 58; R.D. at 207.

⁸¹ *Rovin, D.D.S. v. PUC*, 502 A.2d 785.

⁸² *Rovin*, 502 A.2d at 787.

Pennsylvania Safe Drinking Water Act and the Federal Safe Drinking Water Act. Enforcement of these statutes is specifically vested in the PA DEP and the EPA.⁸³

Similarly, the Commonwealth Court emphasized in *Pickford v. PUC* the distinction between water service and water quality when determining whether the Commission has jurisdiction. In the *Pickford* case, the Commonwealth Court found that customer complaints on the conversion of water treatment plants from chlorinated water to chloraminated water were challenges to the health effects of chloramines under permits issued by PA DEP. Consequently, the Court found such challenges to be outside the Commission's jurisdiction.⁸⁴ The Court held "[p]recedent makes clear the distinction between water service, which the Commission may regulate, and water quality, which may only be regulated by the PADEP."⁸⁵ Significantly, the Court found that it was beyond the Commission's jurisdiction to conduct its own evaluation of PADEP-approved water treatment chemicals.⁸⁶

The *Pickford* and *Rovin* cases are directly applicable to the evaluation of lead remediation efforts at issue in this case as the only reason lead service lines are being replaced is to reduce the level of lead in the customer's tap water. PWSA is not performing lead service line replacements to address a service issue and no party has suggested that there is any other basis that requires replacing these lines outside of PWSA's established program to modernize its facilities. The sole purpose of lead service line remediation efforts is to improve a water quality issue (i.e., to ensure that the customer's water does not have an unacceptable level of lead in it).⁸⁷

⁸³ *Rovin*, 502 A.2d at 787.

⁸⁴ *Pickford v. PUC*, 4 A.3d 707 (Pa. Commw. Ct. 2010).

⁸⁵ *Pickford*, 4 A.3d at 713

⁸⁶ *Pickford*, 4 A.3d at 714.

⁸⁷ PWSA R.B. at 25.

It's important for the Commission to recognize that environmental regulations – not the Commission's regulations – direct PWSA's actions and requirements related to lead service line remediation and range from a health-based lead "action level" to inventory, sampling, lead service line replacement and customer notification requirements.⁸⁸ For PWSA specifically, these requirements include: (1) federal regulations (the EPA's Copper and Lead Rules), which the PA DEP enforces,⁸⁹ that govern the water quality issue at hand; and, (2) a Lead COA between PWSA and PA DEP intended to resolve regulatory issues such as lead service line replacements and corrosion control treatment.⁹⁰ For these reasons, the R.D. erred by concluding that PWSA's lead service line remediation efforts – which are informed and guided by PA DEP – are also within the jurisdiction of the Commission.

If the Commission adopts the ALJ's finding that it has jurisdiction over lead remediation issues, PWSA is very concerned that conflict will result. The Commission's directives could easily conflict with the directives of PA DEP. As the Commission may be aware, the EPA recently proposed significant changes to the Lead and Copper Rule.⁹¹ The changes would require a more comprehensive response at the lead action level and would introduce a trigger level that requires proactive planning in communities with lead service lines. Other changes would alter water sampling requirements, inventory requirements, the timeframe for lead service line replacement programs and customer notification procedures.⁹²

⁸⁸ PWSA R.B. at 24.

⁸⁹ 25 Pa. Code § 109.1107.

⁹⁰ R.B. at 24.

⁹¹ See National Primary Drinking Water Regulations: Proposed Lead and Copper Rule Revisions; pre-publication version available at https://www.epa.gov/sites/production/files/2019-10/documents/lcrr_prepub_fn_0.pdf

⁹² *Id.*

The PA DEP will enforce any changes to the Lead and Copper Rule. PA DEP has jurisdiction over lead remediation efforts as those efforts address a water quality issue. It is significant that water quality issues handled by PA DEP include not only treatment of the water, but also infrastructure replacement. While infrastructure replacement can be directed by the Commission for service related issues (leaks, water backups, etc.), PA DEP has jurisdiction over infrastructure replacement resulting from water quality issues such as elevated levels of lead in water. As PA DEP comprehensively addresses lead remediation efforts, the Commission should defer to its judgment.

Especially in light of the anticipated changes to the Lead and Copper Rule, it is not appropriate for the Commission to claim jurisdiction over lead remediation efforts as water quality issues may only be regulated by PA DEP. PWSA is working to remediate lead service lines under a PA DEP mandate and will be required to comply with any changes to the Lead and Copper Rule (which is enforced by PA DEP). Commission interference could easily result in conflicting directives from PA DEP and the Commission.

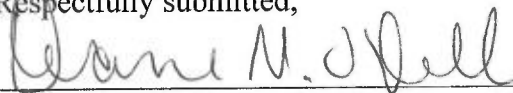
There is also a very high likelihood that PUC directives could impose obligations on PWSA that DEP had specifically declined to impose, in favor of requiring PWSA to direct its efforts in different ways. For example, DEP's comprehensive regulatory scheme and the Lead COA do not require PWSA to replace private-side lead service lines. If the Commission were to direct PWSA to replace private-side lead service lines, that directive would interfere with PA DEP's order to focus on public-side (PWSA owned) lead service line replacements as PWSA would have to divert resources away from public-side lead service line replacements to comply with the Commission's directive. Consequently, Commission interference in this arena is not reasonable or prudent.

If the Commission claims jurisdiction over lead remediation issues, utilities may be unable to comply with conflicting water quality directives from PA DEP and the Commission. Ultimately such result is a disservice to consumers because it leaves public utilities attempting to manage (and pay the costs of) potentially conflicting directives, coordination with multiple regulatory agencies and the likely litigation that will result due to differing opinions about whether or not the utility is in compliance. Such result is not in the public interest and PWSA urges the Commission to reject the R.D.'s finding that it has jurisdiction over PWSA's lead service line remediation efforts.

III. CONCLUSION

PWSA appreciates the efforts of the ALJs regarding this matter and fully supports adoption of the Joint Petition for Partial Settlement. Regarding the contested issues, PWSA recommends that the Commission grant these Exceptions and reject the R.D.'s proposals regarding: (1) billing for to-be metered usage of the City of Pittsburgh ("City"); (2) cost allocation for installation of new meters for the City; (3) applicability of the Commission's line extension regulations in lieu of the requirements of the Municipality Authorities Act; and, (4) concluding that the Commission has jurisdiction regarding water quality issue.

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