



December 3, 2019

VIA EFILE

Secretary Rosemary Chiavetta  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street  
Harrisburg, PA 17120

Re: Implementation of Chapter 32 of the Public Utility Code Re Pittsburgh Water and Sewer Authority, Docket Nos. M-2018-2640802, -2640803

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

Dear Secretary Chiavetta,

Please find the **Reply Exceptions of Pittsburgh UNITED**, which are being submitted for filing consistent with the Commission's October 29, 2019 Secretarial Letter in the above noted consolidated proceedings. Copies have been served on all parties of record consistent with the attached Certificate of Service.

Please do not hesitate to contact me with any questions or concerns.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John W. Sweet", with a stylized flourish at the end.

John W. Sweet  
*Co-Counsel for Pittsburgh UNITED*

CC: Certificate of Service  
Office of Special Assistants – [ra-OSA@pa.gov](mailto:ra-OSA@pa.gov) (Word Version)

Enc.

**BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Implementation of Chapter 32 of the	:	Docket No.	M-2018-2640802
Public Utility Code Re Pittsburgh	:		M-2018-2640803
Water and Sewer Authority	:		

Petition of the Pittsburgh Water and Sewer	:	Docket No.	P-2018-3005037
Authority for Approval of Its Long-Term	:		P-2018-3005039
Infrastructure Improvement Plan	:		

**Certificate of Service**

I hereby certify that I have this day served copies of the **Reply Exceptions of Pittsburgh UNITED** upon the parties of record in the above-captioned proceeding in accordance with the requirements of 52 Pa. Code § 1.54 in the manner and upon the persons listed below.

**VIA FIRST CLASS MAIL AND EMAIL**

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**REPLY EXCEPTIONS OF PITTSBURGH UNITED**

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December 3, 2019

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## **I. INTRODUCTION**

PWSA urges the Commission to disregard the ALJs' sound conclusion that this Commission has jurisdiction over the lead service lines that make PWSA's drinking water unsafe. PWSA seeks, essentially, an exemption from the Public Utility Code's requirement to provide safe, reasonable, and non-discriminatory service because aspects of PWSA's lead remediation efforts—not at issue in this proceeding—are regulated by the Pennsylvania Department of Environmental Protection (DEP). But PWSA cannot evade Commission review of a substantial infrastructure program that, by requiring customers to pay thousands of dollars up front for a lead service line replacement, will unfairly exclude low income customers.

The lead contamination caused by PWSA's aging lead service lines is a water service issue—one that the legislature brought within the Commission's control. It is also a public health issue. There is no safe level of exposure to lead; yet lead levels in PWSA's drinking water remain high for the third consecutive year, and thousands of customers still have lead service lines. The Public Utility Code gives the Commission authority to order PWSA to replace these unsafe facilities or, at a minimum, to review PWSA's proposals for doing so to ensure that they meet the Code's requirements. Contrary to PWSA's assertions, DEP has not divested the Commission of that authority. Nor does the DEP Consent Order or the federal Lead and Copper Rule conflict with the relief sought here. The Commission should reject PWSA's fourth exception, confirm that it has jurisdiction over PWSA's lead service lines, and order that PWSA amend its proposed program so it replaces all customers' lead service lines at no cost.



## II. REPLY TO EXCEPTIONS

### A. Reply to PWSA Exception 4: The ALJs properly concluded that the Commission has jurisdiction over PWSA's water service

1. *Lead contamination caused by utility infrastructure is a water service issue*

The Recommended Decision correctly determined that lead contamination and remediation are matters of water service, not just water quality.<sup>1</sup> Sections 1501 and 3205 of the Public Utility Code give the Commission authority to order PWSA to “replace facilities” that render PWSA’s water not “safe”<sup>2</sup>—that is, unfit “for basic, domestic purposes,” such as drinking and cooking.<sup>3</sup> As the record shows, and PWSA acknowledges, PWSA’s defective facilities (its lead service lines) are leaching lead into the water PWSA conveys to many customers’ taps;<sup>4</sup> that water is unsafe for customers to drink or cook with.<sup>5</sup> Consequently, the ALJs correctly concluded that, “[u]nder Sections 3205 and 1501 of the Code the Commission has authority over PWSA’s service lines, as a water service issue.”<sup>6</sup>

In asserting otherwise, PWSA ignores these provisions of the Public Utility Code vesting the Commission with jurisdiction, as well as the fact that the Commission has exercised this jurisdiction already: it approved the settlement in PWSA’s rate case, which created a legally enforceable obligation for PWSA to replace public- and private-side lead service lines.<sup>7</sup> The Commission also directed PWSA to propose in its Compliance Plan and Long-Term

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<sup>1</sup> Recommended Decision at 207-08.

<sup>2</sup> 66 Pa. C.S. §§ 1501, 3205.

<sup>3</sup> PUC v. Pa. Gas & Water Co., Docket Nos. R-850178 et al., (Opinion and Order entered Apr. 24, 1986).

<sup>4</sup> PWSA Exceptions at 28.

<sup>5</sup> Pittsburgh UNITED St. C-3SUPP-R, at 3-6.

<sup>6</sup> Recommended Decision at 208.

<sup>7</sup> PUC v. PWSA, Order, Docket Nos. R-2018-3002645, -3002647, at 11-13 (Opinion and Order entered Feb. 27, 2019).

Infrastructure Improvement Plan—the subject of this proceeding—a “comprehensive plan to address lead levels in its water supply and the replacement of lead service lines.”<sup>8</sup> Indeed, this proceeding is the result of the legislature’s decision to bring PWSA *within the Commission’s jurisdiction*—a move that was spurred in part by the lead crisis and aimed at “providing necessary help to protect the health and safety of those citizens relying on PWSA for provision of clean water.”<sup>9</sup> It is nonsensical to say that the Commission now lacks authority over PWSA’s lead service lines.

Yet PWSA argues just that. In doing so, it attempts to extend the holdings of Rovin v. PUC and Pickford v. PUC far beyond the factual circumstances and legal authorities considered by those decisions.<sup>10</sup> Those cases involved the utilities’ addition of water treatment chemicals.<sup>11</sup> Neither addresses the issue presented here: the Commission’s power to order utilities to replace facilities that render drinking water unsafe. PWSA nonetheless argues that, under Rovin and Pickford, any nexus between water service and water quality is enough to strip the Commission of its authority over a utility’s unsafe infrastructure—even utility-owned public service lines.<sup>12</sup> The ALJs rightly rejected this “novel” and radical contraction of Commission jurisdiction as inconsistent with the Public Utility Code.<sup>13</sup> PWSA’s deteriorating facilities leach lead into

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<sup>8</sup> Implementation of Ch. 32 of the Public Utility Code Re Pittsburgh Water and Sewer Authority, Final Implementation Order, Docket Nos. M-2018-2640802, -2640803, at 32 (Order entered Mar. 15, 2018).

<sup>9</sup> House Co-Sponsorship Memoranda for HB 1490, PA House of Representatives Session 2017-18, Regular Session, May 24, 2017, <https://legis.state.pa.us/cfdocs/Legis/CSM/showMemoPublic.cfm?chamber=H&SPick=20170&cosponId=23989>; see also Recommended Decision at 208.

<sup>10</sup> PWSA Exceptions at 32-33.

<sup>11</sup> See Rovin v. PUC, 502 A.2d 785, 786 (Pa. Commw. Ct. 1986) (involving fluoridation of drinking water); Pickford v. PUC, 4 A.3d 707, 708-09 (Pa. Commw. Ct. 2010) (involving a switch from chlorinated to chloraminated water).

<sup>12</sup> PWSA Exceptions at 31 (asserting that the Commission “lacks jurisdiction to order PWSA to replace not only private lead service lines, but also public lead service lines” and that a holding to the contrary would “improperly expand Commission jurisdiction”).

<sup>13</sup> Recommended Decision at 207-08.

customers' drinking water—a problem the Public Utility Code puts squarely under the Commission's control.<sup>14</sup>

2. *DEP oversight does not deprive the Commission of authority to ensure PWSA is providing safe service*

PWSA continues to wrongly argue that DEP's oversight of lead remediation precludes the Commission's involvement.<sup>15</sup> But it is settled law that the Commission has concurrent jurisdiction with DEP over matters affecting the safety of drinking water—particularly where, as here, the utility's infrastructure is responsible for making the drinking water unsafe.<sup>16</sup> In fact, the Commission has already recognized these “joint regulatory roles” in this case.<sup>17</sup>

The state legislature was well aware of DEP's authority when it brought PWSA under the Commission's jurisdiction, and still chose to charge the Commission with ensuring that PWSA provides safe service to its customers.<sup>18</sup> That is because the legislature concluded that the Commission's oversight was necessary to address the persistent, unresolved lead crisis that is endangering the health and safety of PWSA's customers.<sup>19</sup> Commission jurisdiction here thus complements an existing regulatory framework. This situation is not unique to lead remediation: the Commission routinely exercises its jurisdiction as part of larger regulatory regimes that include other state and federal agencies and associated regulatory standards.<sup>20</sup>

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<sup>14</sup> See Pittsburgh UNITED Main Br. at 19; Pittsburgh UNITED Exceptions at 17-18; Pittsburgh UNITED St. C-2 at 6, 16-17.

<sup>15</sup> PWSA Exceptions at 34-35.

<sup>16</sup> Pittsburgh UNITED Exceptions at 22-23; Pickford v. Pa. Am. Water Co., Docket Nos. C-20078029 et al., at 16 (Opinion and Order entered Mar. 20, 2008).

<sup>17</sup> PUC, Secretarial Letter - Assignment of the Pittsburgh Water and Sewer Authority Compliance Plan to the Office of Administrative Law Judge (Corrected), Docket Nos. M-2018-2640802, -2640803, at 3 (Nov. 28, 2018).

<sup>18</sup> See 66 Pa. C.S. § 3204(b)-(c).

<sup>19</sup> See House Co-Sponsorship Memoranda for HB 1490, PA House of Representatives Session 2017-18, Regular Session, May 24, 2017, <https://legis.state.pa.us/cfdocs/Legis/CSM/showMemoPublic.cfm?chamber=H&SPick=20170&cosponId=23989>.

<sup>20</sup> See, e.g., Harrisburg Taxicab & Baggage Co. v. PUC, 786 A.2d 288, 292 (Pa. Commw. Ct. 2001) (“The Public Utility Code clearly assigns the PUC the authority and the duty to regulate taxicab services for safety. Although this creates an overlap with the authority of DOT under the Vehicle Code, such overlap does not divest the PUC of its

Therefore, the Public Utility Code and Commission precedent do not support PWSA's assertion that the Lead and Copper Rule and DEP Consent Order comprehensively and exclusively regulate the utility's lead remediation efforts.<sup>21</sup> The Code establishes a safe service mandate enforceable by the Commission through, for instance, orders that require lead service line replacements under § 3205 or revisions to a utility's Long-Term Infrastructure Improvement Plan under § 3204.<sup>22</sup> And even if PWSA "voluntarily" offers customers private-side lead service line replacements,<sup>23</sup> it must do so fairly and equitably, through an efficient and reasonable use of ratepayer funds.<sup>24</sup> Section 1311 provides for Commission review of utility proposals, such as PWSA's income-based reimbursement program, to replace customer-owned lead service lines.<sup>25</sup>

As explained at greater length in Pittsburgh UNITED's Main and Reply Briefs and Exceptions, such review is critical here. The evidence shows that PWSA must replace all lead service lines in its system. But PWSA has not developed a program that will fairly or efficiently remove these dangerous pipes. Its small-diameter water main replacement program will not replace the lead lines from PWSA's system for another three decades. PWSA's proposal for addressing this shortcoming—the income-based reimbursement program, which requires customers to initiate replacements and front the costs—will disproportionately exclude low income, Black, and Latinx customers, leaving the most vulnerable households to drink water from lead pipes for decades longer than their wealthier neighbors, and will incur excessive

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statutory authority or duty."); Kuniegel v. Pa.-Am. Water Co., Docket No. C-20078223, at 4 (Opinion and Order entered May 2, 2008) ("This case illustrates well the overlapping enforcement duties and responsibilities of the Commission and the DEP.").

<sup>21</sup> PWSA Exceptions at 31, 34-35.

<sup>22</sup> 66 Pa. C.S. §§ 3204(c), 3205(a).

<sup>23</sup> PWSA Exceptions at 29-30.

<sup>24</sup> See 66 Pa. C.S. §§ 1301, 1304; Pittsburgh UNITED Exceptions at 20-21.

<sup>25</sup> 66 Pa. C.S. § 1311(b)(2)(i), (v).

administrative costs.<sup>26</sup> The Commission has the power to protect customers from the dangerous flaws in PWSA's income-based reimbursement program.

3. *The relief sought here does not conflict with either the DEP Consent Order or the federal Lead and Copper Rule*

PWSA's claims that a Commission order on lead remediation will conflict with either the Consent Order or the federal Lead and Copper Rule are wholly speculative. The Commission should reject them.

Pittsburgh UNITED seeks an order directing PWSA to revise its income-based reimbursement program to provide free, utility-initiated lead pipe replacements to all customers. PWSA fails to offer a single specific example of how this relief would impede PWSA's compliance with any directive by DEP.<sup>27</sup> That is because it cannot. DEP has never evaluated PWSA's proposed income-based reimbursement program—a program first proposed two years after PWSA and DEP executed the Consent Order.<sup>28</sup> DEP has not considered any of the voluminous evidence showing that the program will disproportionately exclude low income customers and people of color, and result in excessive administrative costs.<sup>29</sup> Nor has DEP determined what PWSA must do to provide safe, reasonable, nondiscriminatory service as defined by the Public Utility Code.<sup>30</sup> The record also lacks any evidence supporting PWSA's claim—raised for the first time in its Exceptions—that DEP considered and rejected a Consent

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<sup>26</sup> See Pittsburgh UNITED Main Br. at 28-36; Pittsburgh UNITED Exceptions at 24-31.

<sup>27</sup> PWSA Exceptions at 34-36.

<sup>28</sup> See PWSA Reply Br. at 24 (conceding the “fact that PADEP has not evaluated or specifically approved PWSA's income-based reimbursement program”). This case, thus, contrasts with Pickford in which DEP had determined that the utility's use of the water treatment chemical satisfied safety standards and issued a permit approving the use; the customer's challenge asked the PUC to second-guess DEP's permitting decision. Pickford, 4 A.3d at 714.

<sup>29</sup> See Pittsburgh UNITED Main Br. at 28-36 (summarizing that evidence).

<sup>30</sup> The lead action level is not, as PWSA maintains, a “health-based” standard. PWSA Exceptions at 34. PWSA's continuing description of it as such is troubling in light of the overwhelming evidence establishing that there is no safe level of lead in drinking water. See, e.g., Pittsburgh UNITED St. C-3SUPP-R, at 3-6.

Order term directing the utility to provide free, private-side lead service line replacements.<sup>31</sup>

Thus, contrary to PWSA's assertions, a Commission order would not conflict with a DEP order, or impose on PWSA obligations that DEP considered and declined.

Commission intervention also would not “divert” resources away from DEP compliance efforts.<sup>32</sup> PWSA itself proposed the income-based reimbursement program and has agreed, as part of the partial settlement in this case, to remove all lead lines within seven years.<sup>33</sup> Pittsburgh UNITED is simply asking that the Commission modify how PWSA plans to use ratepayer funds so that PWSA's program is more cost efficient and no longer disproportionately excludes low income, Black, and Latinx households, who are among the most vulnerable to lead exposure.<sup>34</sup>

Notably, PWSA is already coordinating its Commission-based efforts on lead remediation with its DEP obligations, proving that the conflict PWSA complains of is mere hyperbole. The parties in this proceeding have entered into two settlement agreements that impose requirements on PWSA regarding lead service line replacement, tap water sampling and monitoring, and other issues that are subject to DEP oversight. The rate case settlement has been implemented without a conflict, notwithstanding its overlapping subject matter with the Consent Order. And PWSA has expressed its support for the partial settlement in this proceeding, which governs an even broader array of lead remediation issues, again without contradicting or undermining the terms of the Consent Order.

Unable to point to conflict with a DEP directive, PWSA—for the first time—raises the proposed revisions to the federal Lead and Copper Rule as another vague source of tension.<sup>35</sup>

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<sup>31</sup> PWSA Exceptions at 35.

<sup>32</sup> PWSA Exceptions at 35.

<sup>33</sup> Pittsburgh UNITED St. C-1SUPP-R, at 4; Recommended Decision at 51-52 (Partial Settlement ¶ III.QQ.2).

<sup>34</sup> Pittsburgh UNITED St. C-3SUPP-R, at 5.

<sup>35</sup> PWSA Exceptions at 34-35.

But again, PWSA offers easily refuted speculation in support of its position. First, nothing in the proposed Lead and Copper Rule revisions is in tension with the relief sought by Pittsburgh UNITED. To the contrary, Pittsburgh UNITED’s requested relief—that PWSA offer free, utility-initiated lead service line replacements to all customers—is consistent with the “more comprehensive response” and “proactive planning” that PWSA says the revised Lead and Copper Rule will require.<sup>36</sup> Second, the changes to the Lead and Copper Rule are only proposed and may undergo additional revisions during the notice and comment process.<sup>37</sup> As a result, even if PWSA could point to a conflict (which it has not), that conflict is necessarily hypothetical. Last, in the unlikely event the final, revised Lead and Copper Rule conflicts with a Commission order, PWSA could seek further relief from the Commission to modify that order.

A Commission order requiring PWSA to perform lead service line replacements in a fair and efficient manner, as advocated by Pittsburgh UNITED, I&E, and OCA, would be consistent with the Consent Order and the federal Lead and Copper Rule. The Commission should reject PWSA’s attempts to prevent it from exercising its jurisdiction with unsupported references to unsubstantiated conflicts.

### **III. CONCLUSION**

For the foregoing reasons, the Commission should reject PWSA’s fourth exception and confirm that it has jurisdiction over PWSA’s water service, including lead contamination caused by lead service lines. For the reasons detailed in Pittsburgh UNITED’s exceptions and briefs, the Commission should likewise find that it has jurisdiction to review PWSA’s proposed income-based reimbursement program, and—in light of the extensive evidence demonstrating that the program will not ensure safe service or make reasonable use of ratepayer funds—reject it. The


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<sup>36</sup> PWSA Exceptions at 34.

<sup>37</sup> See 84 Fed. Reg. 61684, 61684 (Nov. 13, 2019).

Commission should instead order PWSA to develop a different strategy for conducting private-side lead service lines replacements—one that offers free, utility-initiated replacements to all customers by 2026. Until PWSA proposes such a strategy and the Commission approves it in an on-the-record proceeding, the Commission should order PWSA to continue its neighborhood-based program.

Respectfully Submitted,



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