

COMMONWEALTH OF PENNSYLVANIA




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Rosemary Chiavetta, Secretary
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Re: Implementation of Chapter 32 of the
Public Utility Code Regarding Pittsburgh
Water and Sewer Authority – Stage 1
Docket Nos. M-2018-2640802
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
P-2018-3005039

Dear Secretary Chiavetta:

Attached for electronic filing please find the Office of Consumer Advocate's Reply
Exceptions in the above-referenced proceedings.

Copies have been served per the attached Certificate of Service.

Very truly yours,

A handwritten signature in blue ink that reads "Christine Maloni Hoover".

Christine Maloni Hoover
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Enclosures:

cc: Honorable Mark A. Hoyer, ALJ
Honorable Conrad A. Johnson, ALJ
Office of Special Assistants (email only: ra-OSA@pa.gov)
Certificate of Service

*281211

CERTIFICATE OF SERVICE

| | | |
|--|---|----------------------------|
| Re: Implementation of Chapter 32 of the Public Utility Code Regarding Pittsburgh Water and Sewer Authority—Stage 1 | : | Docket Nos. M-2018-2640802 |
| | : | 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 |
| | : | P-2018-3005039 |

I hereby certify that I have this day served a true copy of the following document, the Office of Consumer Advocate's Reply Exceptions, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 3rd day of December 2019.

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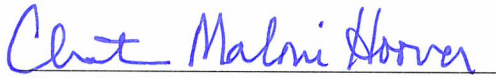
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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

| | | | |
|--|---|-------------|----------------|
| Implementation of Chapter 32 of the Public | : | Docket Nos. | M-2018-2640802 |
| Utility Code Regarding Pittsburgh Water | : | | M-2018-2640803 |
| And Sewer Authority – Stage 1 | : | | |
| | : | | |
| Petition of The Pittsburgh Water and Sewer | : | Docket Nos. | P-2018-3005037 |
| Authority for Approval of Its Long-Term | : | | P-2018-3005039 |
| Infrastructure Improvement Plan | : | | |

**REPLY EXCEPTIONS
OF THE
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TABLE OF CONTENTS

| | | |
|------|---|----|
| I. | INTRODUCTION | 1 |
| II. | REPLY EXCEPTIONS | 2 |
| | Reply to PWSA Exception No. 4: The ALJs Properly Found that the Commission Has Jurisdiction Over The Quality of Service Provided By PWSA To Its Customers. | 2 |
| III. | CONCLUSION..... | 10 |

TABLE OF AUTHORITIES

| | Page(s) |
|--|----------------|
| Court Decisions | |
| <u>Pickford v. PUC,</u> 4 A.3d 707 (Pa. Cmwlth. 2010) | 5 |
| <u>Rovin, D.D.S. v. PUC,</u> 502 A.2d 785 (Pa. Cmwlth. 1986) | 5 |
| Administrative Decisions | |
| <u>Ashbaugh v. Fitz Henry Water Co.,</u> 51 Pa. PUC 287 (1977) | 4 |
| <u>Kessler v. Shickshinny Water Co.,</u> 64 Pa. PUC 290 (1987) | 4 |
| <u>Pa. P.U.C. v. Lake Latonka Water Co.,</u> 71 Pa. PUC 507 (1989) | 3, 4 |
| <u>Pa. P.U.C. v. National Utilities, Inc.,</u> 87 Pa. PUC 1 (1997) | 3 |
| <u>Pa. P.U.C. v. Pennsylvania-American Water Co.,</u> 71 Pa. PUC 210 (1989) | 3 |
| <u>Pa. P.U.C. v. Pennsylvania Gas & Water Co.,</u> 61 Pa. PUC 409, 74 PUR4th 238 (1986) | 3 |
| <u>Petition of Pennsylvania-American Water Co. for Approval of Tariff Changes and Accounting and Rate Treatment Related to Replacement of Lead Customer-Owned Service Pipes,</u> Docket No. P-2017-2606100 Order on Remand (Oct. 3, 2019) | 8 |
| <u>Petition of York Water Company,</u> Docket No. P-2016-2577404, Order (March 2, 2017) | 8 |
| Statutes | |
| 72 P.S. § 1719-E(c)(1) | 8, 9 |

| | |
|-----------------------------|---------------|
| 66 Pa. C.S. § 501..... | 2, 7 |
| 66 Pa. C.S. § 1311(b) | 7 |
| 66 Pa. C.S. § 1501..... | <i>passim</i> |
| 66 Pa. C.S. § 1505..... | 2, 7 |
| 66 Pa. C.S. § 3205(a) | 1, 2, 6, 7 |

Other Authorities

| | |
|---|---|
| 25 Pa. Code § 109.1101 <i>et seq.</i> | 6 |
| 52 Pa. Code § 5.533 | 1 |
| 61 Pa. PUC 409, 74 PUR4th 238 (1986) | 3 |

I. INTRODUCTION

On October 29, 2019, the Office of Administrative Law Judge issued the Recommended Decision of Deputy Chief Administrative Law Judge Mark A. Hoyer and Administrative Law Judge Conrad A. Johnson (ALJs) addressing the Stage 1 Compliance filing made by Pittsburgh Water and Sewer Authority (PWSA or the Authority) regarding its water and wastewater services. The ALJs recommended approval of the Joint Petition for Partial Settlement that the parties filed related to many issues in this proceeding. A number of issues were reserved for litigation. The OCA addressed two of those issues, related to PWSA charges for service to municipal properties and public fire hydrants within the City of Pittsburgh, and certain aspects of PWSA's plan to replace lead service lines within its service territory, in its Briefs and Exceptions.

In these Replies to Exceptions, the OCA will address PWSA's Exception to the ALJs' finding that the Commission has jurisdiction regarding water quality. PWSA Exc. at 27-36. As set forth in the OCA's Reply Brief, the ALJs properly found that the Commission has jurisdiction over the quality of service provided by PWSA pursuant to Sections 1501 and 3205 of the Public Utility Code. OCA R.B. at 4-11; 66 Pa. C.S. §§ 1501 and 3205.

Therefore, pursuant to 52 Pa. Code § 5.533, the OCA files the following replies to exceptions and submits that the Exception filed by PWSA should be denied.

II. REPLY EXCEPTIONS

Reply to PWSA Exception No. 4: The ALJs Properly Found that the Commission Has Jurisdiction Over The Quality of Service Provided By PWSA To Its Customers. R.D. at 207-08; PWSA Exc. at 27-36; OCA R.B. at 4-11.

The Commission has jurisdiction to address whether PWSA is providing adequate, safe, and reasonable service as required by Sections 1501 and 3205 of the Public Utility Code, 66 Pa. C.S. §§ 1501, 3205. PWSA filed an Exception to the ALJs' finding arguing that the Commission has no jurisdiction over water quality. As discussed below, the applicable Commission standard is that water must be suitable for "household purposes"; including drinking, cooking, bathing, and laundry. This standard is measured at the taps in the home.

The Commission is authorized to determine whether a public utility is meeting the requirements set forth in the Public Utility Code. The Commission has plenary authority under Section 501 of the Public Utility Code to carry out and enforce the Public Utility Code and any rules, regulations, orders, or other requirements. 66 Pa. C.S. § 501. One such requirement is that:

Every 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 service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. Such service shall be reasonably continuous and without unreasonable interruptions or delay. Such service and facilities shall be in conformity with the regulations and orders of the commission.

66 Pa. C.S. § 1501. The Code, therefore, places upon every public utility the obligation to remedy any deficiencies in the system to ensure that its customers receive "adequate, efficient, safe, and reasonable service." Id. A necessary corollary to Section 1501 is the Commission's authority to require PWSA to take necessary steps, including making capital and operational improvements, to address service that is not suitable for household purposes. See 66 Pa. C.S. §§ 1505, 3205.

The Commission's standard for determining that water service is safe and adequate for purposes of 66 Pa. C.S. § 1501 was set forth in Pa. P.U.C. v. Pennsylvania Gas and Water Co., which states that "every customer is entitled to water that is fit for the basic, domestic purposes (e.g. cooking, drinking, washing and bathing)." 61 Pa. PUC 409, 416, 74 PUR4th 238, 245 (1986) (PG&W 1986); see also Pa. P.U.C. v. Pennsylvania-American Water Co., 71 Pa. PUC 210, 218-19 (1989); Pa. P.U.C. v. National Utilities, Inc., 87 Pa. PUC 1, 5 (1997).

In PG&W 1986, the Commission stated in more detail what is necessary to support claims of inadequate and unreasonable water service:

In reaching a determination as to whether a utility has provided adequate and reasonable service, we note that *every* customer is entitled to water that is fit for the basic, domestic purposes (e.g., cooking, drinking, washing and bathing). Although a few isolated or sporadic instances or complaints of water received by customers . . . that is unfit for the aforementioned basic, domestic purposes would not warrant a finding that a utility has failed in its provision of adequate and reasonable service, we believe that probative evidence in a particular case showing a *significant* failure on the part of a utility to provide adequate and reasonable service would provide a basis for a conclusion that a utility has provided inadequate service. Finally, we point out that customers are entitled to adequate and reasonable service at the time they are paying their bills, not some optimistic point in the future.

61 Pa. PUC at 416. These statements were made in the context of a base rate proceeding, but the description of "adequate and reasonable service" is no less applicable in this compliance proceeding. Further, the Commission has stated that:

It is our opinion that in exchange for the utility's provision of safe, adequate, and reasonable service, the ratepayers are obligated to pay rates which cover the cost of service which includes reasonable operation and maintenance expenses, depreciation, taxes and a fair rate of return to the utility's investors. Thus, as the OCA contends, a quid pro quo relationship exists between the utility and its ratepayers.

PG&W 1986, 61 Pa. PUC at 415-16.

Water does not need to be a public health risk in order to be unsuitable for all domestic purposes. Pa. P.U.C. v. Lake Latonka Water Co., 71 Pa. PUC 507, 522 (1989) (holding that a

utility provides inadequate water even when the water “has non-health, aesthetic quality problems”); see Kessler v. Shickshinny Water Co., 64 Pa. PUC 290, 296-97 (1987) (holding that ground debris in pipes resulting in “dirty, smelly water which was unsatisfactory for virtually every purpose except toilet flushing” violated 66 Pa. C.S. § 1501). In Ashbaugh v. Fitz Henry Water Co., 51 Pa. PUC 287 (1977), the Commission held that water was inadequate despite being safe to drink. 51 Pa. PUC at 291. Customers of Fitz Henry testified to the discoloration of their water and produced filters with sediment. Id. at 288. Testing by the Pennsylvania Department of Environmental Resources determined that, although the water was somewhat acidic, it was mostly within the recommended public health limits for drinking water that were in place at the time. Id. at 289. However, the Commission ruled that the water was inadequate because of the water’s “unpleasant taste, sediment, and unsuitability for laundry purposes” and held that the utility had violated its statutory obligation. Id. at 291.

These long-standing legal standards establish the Commission’s authority and obligation to require a utility to take the necessary actions to effect improvements in quality of service. As will be discussed below, the case law PWSA cites is focused specifically on water quality, not quality of service, and thus is not instructive. Further, the cases discussed above demonstrate that there is overlap between “water quality” and “quality of service.” Just because an issue touches on water quality does not necessarily mean that the Commission lacks jurisdiction to require action to address those concerns. By its nature, the “household purposes” standard is measured at the tap and thus is related to water quality. The Commission has stated, and PWSA has agreed, that “the Commission and PADEP are State agencies jointly charged with protection of fundamental aspects of public health and safety.” November 28, 2018 Corrected Secretarial Letter, at 3; PWSA M.B. at 69. Lead service lines raise significant public health and safety concerns, from the perspective

of water quality as regulated by the Pennsylvania Department of Environmental Protection (DEP), as well as the quality of water service provided by water utilities as regulated by the Commission.

PWSA attempts to characterize the OCA's and other parties' concerns about lead service lines as relating to water quality rather than quality of service. PWSA Exc. at 31; PWSA M.B. at 55; see also PWSA M.B. at 65, 66. PWSA then argues that the Commission does not have jurisdiction to address these issues because water quality is under the purview of the Pennsylvania Department of Environmental Protection (DEP). This argument mischaracterizes both the nature of the OCA's concerns as well as the legal precedent on this issue.

PWSA points to a number of cases in support of this position. These cases, however, present very different factual situations than those involved in this case and, as such, are not instructive. PWSA relies heavily on two cases: Rovin, D.D.S. v. PUC, 502 A.2d 785 (Pa. Cmwlth. 1986) (Rovin) and Pickford v. PUC, 4 A.3d 707 (Pa. Cmwlth. 2010) (Pickford). PWSA Exc. at 32-33. In both Rovin and Pickford, the petitioners challenged "the substances used in the treatment of the water and the resultant impact on the health of the public." Pickford, 4 A.3d at 714. The petitioner in Rovin challenged a water utility's practices for adding fluoride to its water supply. 502 A.2d at 786. Similarly, the petitioners in Pickford challenged a water utility's switch from treating its water with chlorine (chlorinated water) to treatment with chlorine and ammonia (chloraminated water). 4 A.3d at 708-709. In these cases, the Commonwealth Court found that the complaints concerned water quality which is under DEP jurisdiction, and that the complaints were actually a "collateral attack on the DEP permitting process." See Pickford at 714.

In the instant proceeding, the OCA and other parties are not challenging PWSA's DEP-approved discretionary water treatment methods, as was the case in Rovin and Pickford. Rather, the parties' concerns relate to PWSA's infrastructure and whether the quality of service provided

to customers meets the “adequate, efficient, safe, and reasonable service and facilities” standard under Sections 1501 and 3205 of the Public Utility Code. 66 Pa. C.S. §§ 1501, 3205. PWSA explained that “[t]here is no detectable lead in PWSA’s water when it leaves the treatment plant and travels through PWSA’s water mains. However, lead can enter drinking water through lead service lines.” PWSA Exc. at 28; PWSA M.B. at 51 (citations omitted). Thus, lead is leaching from the lead service lines into drinking water, resulting in service and facilities that are not “adequate, efficient, safe and reasonable” as required by Section 1501 of the Public Utility Code.

PWSA raises concerns that any direction from the Commission regarding lead service line replacements would conflict with DEP’s requirements under the Lead and Copper Rule. PWSA Exc. at 34-35; PWSA M.B. at 68-69. The OCA is not specifically seeking to enforce the Lead and Copper Rule under the Pennsylvania Safe Drinking Water Act, 25 Pa. Code § 109.1101 *et seq.*, which would clearly be under DEP jurisdiction. DEP’s enforcement of the Lead and Copper Rule is reflected in the 2017 Consent Order and Agreement with PWSA, which requires PWSA to inventory and replace lead service lines and to implement a corrosion control program. The OCA is seeking to address serious deficiencies in the water provided to customers because the water at the customers’ taps, when there are public and private lead service lines, puts customers at risk of lead exposure, which the OCA submits constitutes unsafe, unreasonable, and inadequate service in violation of Section 1501 of the Public Utility Code. None of the recommendations made by the OCA or other parties in this proceeding would conflict in any way with the directives that DEP has given PWSA regarding lead remediation. These are quality of service issues that fall squarely within the Commission’s jurisdiction as established by the long-standing precedent discussed above.

The OCA is seeking to address serious deficiencies in the water provided to customers because the water at the customers' taps, when there are private lead service lines, puts customers at risk of lead exposure, which the OCA submits constitutes unsafe, unreasonable, and inadequate service in violation of Section 1501 of the Public Utility Code. The Commission has the authority to ensure that PWSA takes the necessary steps to address the inadequate service that PWSA is providing. 66 Pa. C.S. §§ 501, 1501, 1505, and 3205. Section 1505 of the Public Utility Code provides Commission authority to prescribe the facilities to be furnished or employed including “all such repairs, changes, alterations, extensions, substitutions, or improvements in facilities as shall be reasonably necessary and proper for the safety, accommodation, and convenience of the public.” 66 Pa. C.S. § 1505. This authority is specifically captured in Section 3205(a), which gives the Commission the authority to maintain, repair and replace facilities and equipment used to provide service “to ensure that the equipment and facilities comply with section 1501....” 66 Pa. C.S. § 3205(a).

As discussed in the OCA's Main and Reply Briefs, recent changes in Pennsylvania law allows and encourages water utilities to replace private-side lead service lines. OCA M.B. at 18-19; OCA R.B. at 9. The Pennsylvania General Assembly has recognized the significant public health issue created by lead service lines and has taken action to encourage water utilities to replace customer-owned lead service lines. As of December 2018, the amended Section 1311(b) of the Public Utility Code, 66 Pa. C.S. § 1311(b), *inter alia*, established a framework for water utilities replacing the customer-owned portion of lead service lines, including Commission-approved budget caps, and established a cost recovery mechanism that permits the inclusion of the lead service line replacement costs in the utility's rate base. While these changes were primarily aimed at investor-owned utilities (as a municipal authority, PWSA does not have a rate base on which it

can earn a return), this amendment to the Public Utility Code is indicative of Pennsylvania's policy goals. Further, Act 44 of 2017 amended the Fiscal Code to clarify that municipal authorities have the ability to replace private water or wastewater laterals in order to benefit public health. 72 P.S. § 1719-E(c)(1). The legislature clearly intended to encourage water utilities and municipal authorities to replace the customer-owned portion of lead service lines, and PWSA is one of a number of water utilities in Pennsylvania that will be replacing these lead service lines. York Water Company received approval from the Commission to replace customer-owned lead service lines, including a temporary waiver of the portion of its tariff that did not allow the Company to bear the costs associated with replacing customer-owned lines. Petition of York Water Company, Docket No. P-2016-2577404, Order (March 2, 2017). Regarding private-side lead service lines, the Commission stated as follows:

Rather than rely upon customers to replace their lead service lines, **which would result in a haphazard approach**, York Water proposes to assume that responsibility at its initial expense. While performing the replacement of the Company-owned lead service lines, York Water proposes to simultaneously replace the customer-owned portions of the lead service lines as they are discovered. In instances where the customer-owned lead service line is connected to a Company-owned non-lead service line, York Water would still replace customer-owned lead service lines, as they are discovered. York Water proposes to pay up to the Company's average contracted cost for replacing a customer-owned lead service.

Id. at 4 (emphasis added). Pennsylvania-American Water Company also received Commission approval, including the necessary waivers, to replace customer-owned lead service lines. Petition of Pennsylvania-American Water Co. for Approval of Tariff Changes and Accounting and Rate Treatment Related to Replacement of Lead Customer-Owned Service Pipes, Docket No. P-2017-2606100 Order on Remand (Oct. 3, 2019).

In its Exceptions, PWSA argues that replacing customer-owned lead service lines is discretionary on the part of the utility and thus cannot be required by the Commission. PWSA

Exc. at 29-30. In support of this, PWSA cites the language of Act 44, which allow municipal authorities to replace private-side lead service lines, “if the authority determines that the replacement or remediation will benefit the public health, public water supply system or public sewer system.” 72 P.S. § 1719-E(c)(1). PWSA’s argument here is moot given that PWSA has clearly already made a determination that replacing private-side lead service lines will benefit the public health and the public water supply, since the Authority has already replaced thousands of private-side lead service lines and continues to do so. PWSA has already determined that replacing private-side lead service lines will benefit the public health and the public water supply; the issue in this proceeding relates to how PWSA is implementing its program. The issue, as discussed in OCA’s Exceptions at 4-19, is with PWSA’s proposed income-based reimbursement policy for private-side only lead service lines.

III. CONCLUSION

For the reasons set forth in the Recommended Decision and supported above, the Office of Consumer Advocate respectfully requests that the Public Utility Commission deny Exception No. 4 of Pittsburgh Water and Sewer Authority.

Respectfully submitted,



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