



COMMONWEALTH OF PENNSYLVANIA

December 3, 2019

E-FILED

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

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

Dear Secretary Chiavetta:

Enclosed please find the Reply Exceptions, on behalf of the Office of Small Business Advocate (“OSBA”), in the above-captioned proceedings.

Copies will be served on all known parties in these proceedings, as indicated on the attached Certificate of Service.

If you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in blue ink, appearing to read 'EK Fure'.

Erin K. Fure
Assistant Small Business Advocate
Attorney ID No. 312245

Enclosures

cc: Brian Kalcic
Parties of Record

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Implementation of Chapter 32 of the	:	Docket No. M-2018-2640802
Public Utility Code Regarding Pittsburgh	:	Docket No. M-2018-2640803
Water and Sewer Authority – Stage 1	:	
	:	
Petition of The Pittsburgh Water and	:	Docket No. P-2018-3005037
Sewer Authority for Approval of Its Long-	:	Docket No. P-2018-3005039
Term Infrastructure Improvement Plan	:	

**REPLY EXCEPTIONS
ON BEHALF OF THE
OFFICE OF SMALL BUSINESS ADVOCATE**

Erin K. Fure
Assistant Small Business Advocate
Attorney ID No. 312245

For: John R. Evans
Small Business Advocate

Office of Small Business Advocate
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Date: December 3, 2019

I. Introduction

On September 28, 2018, Pittsburgh Water and Sewer Authority (“PWSA” or the “Authority”) filed its Petition for Approval of its Compliance Plan at Docket Nos. M-2018-2640802 (water) and M-2018-2640803 (wastewater) (collectively, “Compliance Plan dockets”).

On October 18, 2018, Answers to PWSA’s Petition for Approval of its Compliance Plan were filed by the Office of Small Business Advocate (“OSBA”) and the Office of Consumer Advocate (“OCA”). The Commission’s Bureau of Investigation and Enforcement (“I&E”) filed Notices of Appearance on October 22, 2018. Pennsylvania-American Water Company (“PAWC”) filed a Petition to Intervene on October 30, 2018. On November 1, 2018, Pittsburgh UNITED (“UNITED”) filed a Petition to Intervene.

On November 27, 2018, the Pennsylvania Public Utility Commission (“Commission”) issued a Secretarial Letter assigning the Compliance Plan dockets to the Office of Administrative Law Judge (“OALJ”) and establishing two stages of review for PWSA’s Compliance Plan. The November 27, 2018 Secretarial Letter designated Stage 1 to focus on health and safety issues and Stage 2 to focus on Chapter 56 billing and collection issues and the development of a stormwater tariff. Also on November 27, 2018, the Commission’s Technical Staff Initial Report and Directed Questions for Stage 1 (“Directed Questions”) was issued. Corrected versions of the November 27, 2018 Secretarial Letter and Directed Questions were issued on November 28, 2018.

A telephonic Pre-Hearing Conference was held on December 20, 2018, at which time a litigation schedule was determined. The litigation schedule was memorialized in the December 27, 2018 Order.

On February 1, 2019, PWSA filed its Compliance Plan Supplement. On February 21, 2019, an Order was issued consolidating the Implementation of Chapter 32 of the Public Utility Code Regarding PWSA-Stage 1 proceeding and the Petition of PWSA for Approval of its LTIP at Docket Nos. P-2018-3005037 and P-2018-3005039.

On April 5, 2019, the OSBA submitted the direct testimony of Brian Kalcic. PWSA filed a Status Report on April 30, 2019 addressing the anticipated completion date for negotiations between the City of Pittsburgh and PWSA.

On May 6, 2019, the OSBA submitted the rebuttal testimony of Brian Kalcic. PWSA filed an Expedited Motion for Extension of Commission-Created Deadlines on May 13, 2019. PWSA's uncontested Motion was granted by Secretarial Letter dated May 15, 2019. On May 17, 2019, the OSBA submitted the surrebuttal testimony of Brian Kalcic.

A second telephonic Pre-Hearing Conference was held on June 7, 2019. PWSA filed a Status Report on June 14, 2019 updating the Commission on the status of settlement discussions. The June 14, 2019 Status Report represented that the parties had, at that point, participated in three full-day settlement workshops, and had four additional full-day settlement workshops scheduled. On June 18, 2019, an Order was issued setting forth an amended litigation schedule.

The OSBA submitted the supplemental direct testimony of Brian Kalcic on August 2, 2019. On August 14, 2019, the OSBA submitted the supplemental rebuttal testimony of Brian Kalcic.

An evidentiary hearing was held before Deputy Chief Administrative Law Judge ("ALJ") Mark A. Hoyer and ALJ Conrad A. Johnson on August 21, 2019, at which time the parties represented that they had reached a partial settlement of the Stage 1 issues. At the August 21, 2019 hearing, the OSBA moved the testimony of its witness, Brian Kalcic, into the record.

On September 13, 2019, a Joint Petition for Partial Settlement (“Partial Settlement”) was filed. The OSBA was a signatory to the Partial Settlement.

On September 19, 2019, the OSBA, OCA, I&E, UNITED, and PWSA submitted Main Briefs (respectively, “OSBA MB,” “OCA MB,” “I&E MB,” “UNITED MB,” and “PWSA MB”).

On September 30, 2019, the OSBA submitted its Reply Brief (“OSBA RB”). OCA, I&E, UNITED, and PWSA filed their Reply Briefs on September 30, 2019 as well (respectively, “OCA RB,” “I&E RB,” “UNITED RB,” and “PWSA RB”).

On October 29, 2019, ALJ Hoyer and ALJ Johnson issued their Recommended Decision (“RD”).

The OSBA, OCA, I&E, CAUSE-PA, and PWSA filed Exceptions on November 18, 2019.

The OSBA submits the following Reply Exception in response to PWSA’s Exceptions.

II. Reply Exception

Reply to PWSA Exception No. 4: The ALJs correctly concluded that the Commission has jurisdiction regarding water quality. (PWSA Exceptions, at 27-36)

In the RD, the ALJs concluded the following:

[W]ater quality and water service are inseparable in this proceeding. There would be no need for water quality, if PWSA was not delivering water service to its customers. ...

Section 1501 requires PWSA to make repairs and changes to its facilities necessary to ensure safe service and public safety. Under Sections 3205 and 1501 of the Code the Commission has authority over PWSA's service lines, as a service issue if the water quality is not safe. Accordingly the Commission has jurisdiction over PWSA's water service.

RD, at 207-208.

The ALJs correctly interpret Sections 1501 and 3205 as conferring upon the Commission jurisdiction over PWSA's water service, and specifically, jurisdiction to require PWSA to furnish and maintain safe service and facilities. (*See* RD, at 208 *citing* 66 Pa. C.S. § 1501). PWSA excepts to this conclusion and argues that the only service issue presented in this case is whether lead in customers' water creates an unsafe and unreasonable water quality. (PWSA Exceptions, at 30-31). However, the ALJs point out that the legislature enacted Chapter 32 to place PWSA under Commission jurisdiction, and Section 3205 provides that the Commission may require an authority to maintain, repair, and replace facilities and equipment used to provide water service to ensure compliance with Section 1501. (RD, at 208, *See also* 66 Pa. C.S. § 3205). Section 1501 in turn requires PWSA to furnish and maintain safe service and facilities and make all such repairs or alterations necessary to such service and facilities as shall be necessary for the safety of its patrons and the public. (66 Pa. C.S. § 1501). The Commission has clear jurisdiction over

PWSA's water service, and that includes the authority to order PWSA to repair and replace lead service lines ("LSLs") to comply with Section 1501. (66 Pa. C.S. § 1501).

PWSA cites to *Rovin, D.D.S. v. PUC*, 502 A.2d 785 (Pa. Cmwlth. Ct. 1985) and *Pickford v. PUC*, 4 A.3d 707 (Pa. Cmwlth. Ct. 2010) in support of its argument. (PWSA Exceptions, at 32-33). As correctly noted by the OCA in its Reply Brief, "these cases present very different factual situations than those involved in this case and, as such, are not instructive." (OCA RB, at 7).

In *Rovin*, a dentist residing in the utility's service area filed a complaint alleging that some customers were receiving fluoridated water while others were not, and this resulted in unsafe, inadequate, and unreasonable service because not all customers were receiving the benefit of fluoridated water, and those who were receiving fluoridated water could be harmed if their pediatricians prescribed a fluoride supplement. (*Rovin* 502 A.2d, at 786). The Commonwealth Court determined the complaint centered on the quality of the water, rather than quality of water service, and that jurisdiction over such issue was properly vested in the Department of Environmental Resources and the Federal Environmental Protection Agency. (*Rovin*, 502 A.2d, at 787).

Pickford concerned challenges to a utility's intended conversion of certain treatment plants from chlorinated water (disinfectant process using chlorine) to chloraminated water (disinfectant process using a combination of chlorine and ammonia). (*Pickford*, 4 A.3d, at 708). The Department of Environmental Protection ("DEP") had determined chloramines posed no health concerns to humans at levels used for drinking water disinfection and had granted public water supply permits to the utility. (*Pickford*, 4 A.3d, at 708-709). The Commonwealth Court

found that the contested issues in *Pickford* were water quality issues, which are regulated by the DEP. (4. A.3d, at 713).

Unlike in *Pickford* and *Rovin*, the challenges in this case to PWSA's plans to address its LSLs relate to PWSA's infrastructure and whether PWSA must make repairs and changes to its facilities necessary to ensure safe service and public safety. The ALJs found that there is no detectable lead in PWSA's water when it leaves the treatment plant and travels through water mains, but lead can enter drinking water through LSLs that serve individual customers. (RD, at 12). These findings of fact were not challenged in PWSA's Exceptions and come directly from PWSA's hearing exhibit. (See RD, at 12 *citing* PWSA Hearing Exh 1, Appendix 1 (Compliance Plan), p. 119). Additionally, PWSA did not challenge the ALJs' finding of fact that "Corrective (or remedial) actions to mitigate the release of lead from lead service lines to drinking water include corrosion control, public education and the physical replacement of the lead service lines." (RD, at 13). Section 1501 requires PWSA to make repairs and changes to its facilities, such as the physical replacement of LSLs, to ensure the safety of its patrons and the public.¹ (RD, at 208). The ALJs correctly found that the Commission has jurisdiction over PWSA's water service and that the Commission has authority over PWSA's lead service lines as a service issue. (RD, at 208).

Finally, PWSA indicated that it is inappropriate for the Commission to claim jurisdiction over lead remediation efforts as water quality issues may only be regulated by the Pennsylvania DEP. (PWSA Exceptions, at 35). This argument is meritless. As noted by the OCA, "none of the recommendations made by the OCA or other parties in this proceeding would conflict in any way with the directives that [the Pennsylvania] DEP has given PWSA regarding lead

¹ "The adverse health conditions associated with residential lead service lines is undisputed in this proceeding." (RD, at 207).

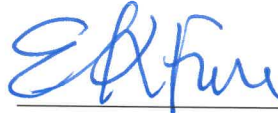
remediation.” (OCA RB, at 9). The ALJs correctly concluded that the Commission has jurisdiction over water service issues, and that the remediation of LSLs in PWSA’s system is a water service issue. (RD, at 208).

The Commission should reject PWSA Exception No. 4.

III. Conclusion

For the reasons set forth above, the OSBA respectfully requests that the Commission deny PWSA Exception No. 4.

Respectfully submitted,



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For: John R. Evans
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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing have been served via email and/or First-Class mail (*unless other noted below*) upon the following persons, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

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DATE: December 3, 2019



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