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MAYOR



YVONNE HILTON
CITY SOLICITOR

CITY OF PITTSBURGH
DEPARTMENT OF LAW
CITY-COUNTY BUILDING

April 10, 2020

VIA E-FILE

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

Re: PA Public Utility Commission v. Pittsburgh Water and Sewer Authority
Docket Nos. M-2018-2640802, M-2018-2640803, P-2018-3005037, P-2018-3005039

Dear Secretary Chiavetta,

Enclosed for filing, please find the **Petition for Reconsideration and/or for Supersedeas of the City of Pittsburgh** in the above noted proceeding. Copies have been served in accordance with the attached Certificate of Service.

Respectfully submitted,

/s/ Yvonne S. Hilton
City Solicitor

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—Stage 1	:		

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

**PETITION FOR RECONSIDERATION AND/OR FOR SUPERSEDEAS OF
THE CITY OF PITTSBURGH**

City of Pittsburgh

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April 10, 2020

Pursuant to the provisions of the Rules of Practice and Procedure of the Pennsylvania Public Utility Commission (the “PUC” or “Commission”), 52 Pa. Code §§ 5.572, the City of Pittsburgh (the “City”) through its undersigned legal counsel, hereby petitions the Commission to reconsider its March 26, 2020 Opinion and Order, or in the alternative, to delay its effect until after the completion of the review process of the Cooperation Agreement submitted by the PWSA, now subject for Commission review at U-2020-3015258. In support thereof, the City states as follows:

BACKGROUND

1. On September 28, 2018, the Pittsburgh Water and Sewer Authority (the “PWSA”) filed a Petition with the Commission for approval of its Compliance Plan at Docket Nos. M-2018-2640802 (water) and M-2018-2640803 (sewage) and its Long-Term Infrastructure Improvement Plan at Docket Nos. P-2018-3005037 (water) and P-2018-3005039 (sewage). The Commission consolidated these proceedings.

2. The City, a Home Rule Municipality organized and existing under the Home Rule Charter and Optional Plans Law, 53 Pa.C.S. § 2901, *et seq.*, and city of the second class by statutory designation, is a political subdivision of the Commonwealth of Pennsylvania and maintains its principal place of business at 414 Grant Street, 5th Floor City-County Building, Pittsburgh, PA 15219.

3. As the owner of the water and sewer system, the City is a necessary party to these matters and yet, was not included in the Compliance case because it did not have formal notice to participate, in general, or that the PUC would address the issues of rates, fire hydrants and meters.

4. As explained, *infra*, in more detail, the PWSA is a municipal authority created by the City in 1984 to assume responsibility for operating the City's water supply and distribution and wastewater collection systems (the "Water and Sewer System") The PWSA services a majority of the residences, businesses, educational facilities, and other types of structures within the City's corporate limits. PWSA also services several neighboring communities.

5. The PWSA, a body corporate and politic organized and existing under the Pennsylvania Municipality Authorities Act, 53 Pa. C.S. § 5601 et seq. ("MAA"), was created pursuant to Resolution No. 36 of the Council of the City of Pittsburgh ("City Council") on February 6, 1984, approved by Mayor Richard Caliguiri on February 8, 1984, and effective on February 16, 1984. The Secretary of the Commonwealth of Pennsylvania approved the PWSA's Articles of Incorporation on February 17, 1984.

6. The Pennsylvania Department of State approved Articles of Amendment and a Certificate of Amendment was issued by the Pennsylvania Department of State on May 9, 2008, to extend the term of existence of the PWSA to May 21, 2045.

7. The PWSA's Articles of Incorporation specifically authorized it to acquire, hold, construct, finance, improve, maintain, operate, own and lease, either as lessor or lessee, projects of the following kinds and character: sewers, sewer systems or parts thereof, waterworks, water supply works, and water distribution systems, low head dams and facilities for generating surplus power.

8. While the PWSA is a separate municipal corporation from the City, the City understands that it must participate in jointly submitting loan applications with the PWSA in order for the authority to obtain certain loans.

9. Prior to the establishment of the PWSA, the City had invested in, installed and maintained the water service lines and sewer service disposal lines necessary for the Water and Sewer System to provide for the citizenry. The extensive costs of developing and maintaining this extensive infrastructure was born by the taxpayers of the City.

10. Pursuant to a lease and management agreement dated March 29, 1984 (the “1984 Lease Agreement”) between the PWSA and the City, the City leased its Water and Sewer System to the PWSA, with the City continuing to provide services necessary to operate the system as agent of PWSA. In 1995, the parties terminated the 1984 Lease Agreement and entered into a 1995 Capital Lease Agreement dated July 15, 1995, which remains in effect today.¹

11. While transferring the operation of the Water and Sewer System to PWSA, the City owns the assets and infrastructure.

12. In addition to executing the 1995 Capital Lease Agreement, the PWSA and the City also entered into a cooperation agreement with an effective date of January 1, 1995 (the “1995 Cooperation Agreement”) pursuant to which the parties agreed to, *inter alia*:

- a. provide for the termination of the agency relationship between the parties;
- b. transfer certain City employees to the PWSA immediately;
- c. retain the provision of certain services to still be provided by the City to PWSA until other City employees were transferred to PWSA;
- d. document other services to continue to be provided by the City to PWSA;
- e. determine continuing responsibilities of the parties for various capital projects; and
- f. identify various payments and services to be made by PWSA to the City, including reimbursement for equalization payments made by the City to the Pennsylvania

¹ The City believes these items to have been submitted by PWSA in this proceeding. To the extent either item was not submitted, the City will supplement this Petition.

American Water Company, reimbursement for workers compensation benefits of transferred employees, and the entitlement of the City to receive up to 600,000,000.00 gallons of water annually to be used by the City and various instrumentalities (e.g. the Pittsburgh Zoo and Phipps Conservatory) for the benefit of the residents of the City of Pittsburgh and the general public.

13. The 1995 Cooperation Agreement, as amended, remained in effect until October 3, 2019, when the PWSA terminated it because the parties negotiated a new cooperation agreement, (the “2019 Cooperation Agreement”).

14. The 2019 Cooperation Agreement is effective as of October 3, 2019.

15. The City believes it negotiated an arms-length transaction resulting in the 2019 Cooperation Agreement and if the PUC intends to review, comment, or revise the agreement pursuant to Section 507 and 508 of the Public Utility Code, it should address all of those matters in a proceeding filed pursuant to Section 1308(d). 66 Pa.C.S.A. §§ 507, 508 and 1308.

16. The terms of the 2019 Cooperation Agreement are significant because the agreement recognizes transitions in the relationship between two distinct governmental entities, allowing each party the opportunity to implement these significant changes in a reasonable period of time to benefit the taxpayers and ratepayers, respectively, many of whom are the same residents of the City. It further confirms that the PWSA and the City are committed to changing a thirty-six (36) year relationship over the course of five (5) years, which coincides with the period left on the 1995 Capital Lease Agreement until PWSA may exercise the option to purchase among other things, the Water and Sewer System.

17. On the one hand, the 2019 Cooperation Agreement recognizes the PWSA, an independent municipal authority, is transitioning from a municipal authority that is not subject to the PUC’s authority and oversight to a municipal authority that is subject to the PUC’s authority

and oversight, assuming an identity that is more akin to a traditional public utility rather than an independent authority.

18. On the other hand, the City, the owner of the Water and Sewer System, is transitioning from its ownership position—allowing it unfettered access to *its* Water and Sewer System—to become a customer, paying a public utility for its access to water and sewer services.

19. The PWSA and the City negotiated the 2019 Cooperation Agreement, in part, to balance the significant change, understanding each party must stake specific positions: one to protect its customers and the other to protect its residents. As the majority of PWSA’s customers are City taxpayers, they will bear the economic burden in one form or another.

- a. In 2020, the City will pay a portion of the costs associated with its water usage and then, in 2024, it will pay all of the costs associated with its water usage.
- b. In 2021, the City will pay a portion of the cost to operate, maintain, repair, and replace specific, component parts of its system, specifically, maintaining, repairing, and replacing its own service lines and sewer laterals. Then, in 2025, the City assumes the full responsibility for these costs.²
- c. At the same time, the PWSA, which is purchasing the City’s water and sewer system over time, assumes the obligation to pay a Public Utility Tax. Specifically, the PWSA will pay a portion of its Public Utility Realty Tax in 2020 and then, assume the duty to provide the full payment of its Public Utility Realty Tax in 2024.

20. On December 21, 2017 Governor Wolf signed Act 65 of 2017 (“Act 65”) into law, whereby the Pennsylvania Public Utility Code was amended. New language was added to 66 Pa.C.S. sec 1301, and a new Chapter 32 was added, consisting of sections 3201 through 3209, 66 Pa. C.S. sec 3201, *et seq.* The new language addressed the jurisdiction of the PUC over the utility

² With the exception of certain designated City Parks (*see* 2019 Cooperation Agreement, e.g. Paragraph 5).

service of water, wastewater and storm water provided by Pennsylvania cities of the second class, under the MAA.

21. Pursuant to Act 65, the PUC took steps to carry out its perceived responsibilities, including, among others, the issuance of a Final Implementation Order on January 18, 2018, requiring the PWSA to file a Compliance Plan by September 28, 2018.

22. The purpose of the request by the PUC to the PWSA to file a compliance plan was to allow for the approval, by the PUC, of the tariff, ratemaking, compliance plan and assessment provisions of the PWSA. Historically, the City and the PWSA resolved some of these matters by agreement.

23. The March 26, 2020 Order leads the City to believe that the PWSA integrated a number of the provisions of the 2019 Cooperation Agreement into its Compliance Plan and Long-Term Infrastructure Improvement Plan. The City believes they should be evaluated *in toto* and not considered piecemeal and therefore, out of context.

24. Proceedings commenced at the PUC are an administrative, legal process. These proceedings included: PWSA's submission of its Compliance Plan; the requests for intervention; discovery; public comment; settlement negotiations; hearings; and appeals.

25. Administrative Law Judges assigned to the matter presented their Recommended Decision on October 29, 2019. PWSA, as well as the Intervenors filed Exceptions, and Replies to Exceptions.

26. PWSA filed its 2019 Cooperation Agreement with the PUC on December 20, 2019 at U-2020-3015258.

27. On April 9, 2020, the City, pursuant to 52 Pa. Code § 5.72, filed a petition with the PUC to intervene in this matter, citing, amongst other reasons, the substantial effect the determinations of the Commission will have on the City, specifically its residents.

OPINION AND ORDER IN QUESTION

28. On March 26, 2020, the Commission filed its Opinion and Order, (the “Decision”) effecting the City, *inter alia*, with regard to:

- a. the 1995 Cooperation Agreement and the 2019 Cooperation Agreement;
- b. payment responsibility for metering City-owned properties;
- c. billing for unmetered or unbilled City-owned properties;
- d. billing plan for fire hydrants in the City; and
- e. residency issues for PWSA employees

29. The Decision consists of extensive discussion, including background, history and the issues in dispute. The Decision includes an Order on 16 specific enumerated points, determining the matters referenced above.

SPECIFIC DETERMINATIONS AT ISSUE

30. The City requests reconsideration and a stay of the following provisions, as these issues should be reviewed and addressed in proceedings filed under the Public Utility Code, 66 Pa.C.S.A. §§ 507, 508 and 1308(d):

- a. that, within thirty (30) days of the entry date of this Opinion and Order, a revised Compliance Plan be filed consistent with this Opinion and Order regarding the litigated issues in this proceeding, specifically as follows: (1) that the 1995 Cooperation Agreement be terminated, and business transactions conducted with the City of Pittsburgh be required to occur on a transactional basis until a new Cooperation Agreement is reviewed and approved by the Commission (Paragraph 10, (1) of the Decision, page 179);

- b. That, within thirty (30) days of the entry date of this Opinion and Order, a revised Compliance Plan be filed consistent with this Opinion and Order regarding the litigated issues in this proceeding, specifically as follows:....; (3) that the Compliance Plan be revised to require the Pittsburgh Water and Sewer Authority 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, and, as customers are metered, to immediately bill full usage; (Paragraph 10, (3) of the Decision, page 179); and
- c. That, within thirty (30) days of the entry date of this Opinion and Order, a revised Compliance Plan be filed consistent with this Opinion and Order regarding the litigated issues in this proceeding, specifically as follows:....; (4) that the Compliance Plan be revised to eliminate the residency requirement (Paragraph 10, (4) of the Decision, page 179).

LEGAL STANDARD

31. “A petition for reconsideration . . . may properly raise any matters designed to convince the Commission that it should exercise its discretion under this code section to rescind or amend a prior order in whole or in part. In this regard we agree with the [Superior Court] in [*Pennsylvania R. Co. v. Pennsylvania Pub. Utility Comm’n*, 179 Atl. 850 (Pa. Super. Ct. 1935)] where it was announced ‘[p]arties..., cannot be permitted by a second motion to review and reconsider, to raise the same questions which were specifically considered and decided against them...’ What we expect to see raised in such petitions are new and novel arguments not previously heard, or **considerations which appear to have been overlooked or not addressed by the Commission.**” *Pennsylvania Pub. Util. Comm'n v. W. Penn. Power Co.*, 84 P.U.R.4th 198, 201 (Apr. 17, 1987) (emphasis added).

32. For the foregoing reasons, the City meets the PUC’s announced standard.

DISCUSSION

33. On several occasions in the Decision, the PUC identifies the adverse economic impact this Order will have upon the City. The City, which requested intervention, agrees that there is a severe adverse impact and is providing notice of the adverse impact.³

34. Although the City may have received the PWSA's Compliance Plan, it did not receive formal notice of the intent of the Commission to rule in a fashion that would cause financial harm to City taxpayers. Had the City been placed on formal notice, it would have had the opportunity to advocate its position.

35. The Commission's Bureau of Investigations and Enforcement (I & E) suggests PWSA is losing revenue because it provides "free" water to the City, estimating the loss to exceed \$11.4 million dollars, annually. (Decision, page 51.) This position is mere unsupported speculation. PWSA and the City have never treated the water as "free."

36. Both the City and PWSA recognize the need to meter and account for all water provided to the City, and they have negotiated a pathway to achieve that goal; the 2019 Cooperation Agreement.

37. The 2019 Cooperation Agreement achieved two important purposes:

- a. It commits to a graduated introduction of metering and payment, by the City for water services. By 2025, the 2019 Cooperation Agreement calls for the City to pay full metered rates, as set by PWSA; and
- b. The City continues to provide service to PWSA, that by 2025 will be assumed fully by PWSA, thereby relieving the expense currently carried by the City taxpayers.

³ The City is in the process of intervening in the other PWSA-related proceedings, the Section 507 Case and Rate Case.

38. The Decision by the PUC criticizes the “phased in” approach. However, the Decision fails to give weight to the 2019 Cooperation Agreement, whereby the City agrees that all water usage will be metered and accounted for within five (5) years. It also fails to quantify and balance the services PWSA receives from the City. Further, the City agrees to pay for water service at a rate of 20% for 2020, 40% for 2021, 60% for 2022, 80 % for 2023 and 100% for 2024 and thereafter.

39. The criticism of the PUC, in part, appears to be that non-city entities will somehow be subsidizing the “free water” the City would continue to receive, in diminishing quantities, over the 5 year phase in:

Private consumers should not be compelled to bear any part of the cost of the service rendered to Pittsburgh except as they contribute as taxpayers to the general fund of the City. The City is a consumer the same as any of its residents who patronize the PWSA and is not entitled to any privilege as to rates. (Decision, page 60.)

40. This aspect of the Decision fails to take into account two important factors: First, the City’s investment in the system, as owner of the infrastructure that delivers the water to public facilities, City residents and the few non-city customers who receive PWSA services; second, the services that the City provides to the PWSA, benefiting all recipients of services, including non-city customers.⁴

41. Therefore, the City disagrees with the Commission and asks for reconsideration of the March 26, 2020 Order.

42. The City, and the PWSA are meticulously separating themselves enabling them to conduct all business at arm’s length.

⁴ For relevance, the PWSA has 80,569 water and sewer accounts and 30,728 sewer only accounts within the City. By contrast, there are only 1,678 water only accounts in the Borough of Millvale.

43. The City notes the language of the Commission on page 62 of the Decision:

While we recognize the fact that the practice of including any subsidy is inconsistent with the cost of service principles, additional factors such as the **principles of gradualism, equity and fairness also need to be considered in the setting of rates within the construct of a base rate proceeding.** (Emphasis added.)

44. Accordingly, a full and fair review of the 2019 Cooperation Agreement should occur, prior to the Commission making such important determinations.

45. The City believes the residency decision is incorrect. It appears that the PUC has overstepped its bounds by interfering with the terms of a labor contract negotiated in accordance with the Public Employee Relations Act (1970, July 23, PL 563, No. 195), 43 P.S. § 1101.101, *et seq.*

46. For all of the aforementioned reasons, the City requests reconsideration of the March 26, 2020 and Decision and Order, as these issues should be reviewed and addressed in proceedings filed under the Public Utility Code, 66 Pa.C.S.A. §§ 507, 508 and 1308(d).

47. The City is represented in this proceeding by the City of Pittsburgh Department of Law:

Yvonne S. Hilton, Solicitor;
John F. Doherty, Associate City Solicitor;
Lawrence H. Baumiller, Assistant City Solicitor; and
John V. DeMarco, Assistant City Solicitor.

48. The City consents to the service of documents by electronic mail, as provided in 52 Pa. Code § 1.54(b)(3).

CONCLUSION

WHEREFORE, the City respectfully requests that the Commission enter an order reconsidering its March 26, 2020, or in the alternative, delaying the implementation of that Order until the completion of the review process of the 2019 Cooperation Agreement.

Respectfully submitted,

/s/ Yvonne S. Hilton, Esquire
City Solicitor

City of Pittsburgh
City of Pittsburgh Department of Law
City-County Building, Suite 313
414 Grant Street
Pittsburgh, PA 15219

Date: April 10, 2020

Verification

I, Kevin Pawlos, on behalf of the City of Pittsburgh, hereby state that the facts contained in the foregoing *Petition to for Reconsideration of the City of Pittsburgh* are true and correct to the best of my knowledge, information and belief, that I am duly authorized to make this Verification, and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 10 Pa. C.S. § 4904 (relating to unsworn falsification to authorities).

Date: April 10, 2020

/s/ Kevin Pawlos

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

Certificate of Service

I hereby certify that I have this day served copies of the **Petition for Reconsideration of the City of Pittsburgh** upon the parties and interested stakeholders 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 EMAIL

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Respectfully submitted,

/s/Yvonne S. Hilton, Esquire
City Solicitor