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April 13, 2020

Via Electronic Filing

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
PO Box 3265
Harrisburg, PA 17105-3265

Re: The Pittsburgh Water and Sewer Authority Base Rate Filing
Docket Nos. R-2020-3017951; and, R-2020-3017970

Dear Secretary Chiavetta:

Please accept for filing on behalf of The Pittsburgh Water and Sewer Authority ("PWSA") the enclosed Answer To The Bureau Of Investigation And Enforcement's Expedited Motion For Extension Of Statutory Suspension Period.

Thank you for your assistance. If you have any questions or concerns regarding this matter, please do not hesitate to contact me.

Sincerely,

A handwritten signature in blue ink that reads "Deanne M. O'Dell".

Deanne M. O'Dell
Counsel for The Pittsburgh Water and Sewer Authority

Enclosure

cc: Hon. Mary Long w/enc. (via email only)
Certificate of Service

CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of PWSA's Answer To The Bureau Of Investigation And Enforcement's Expedited Motion For Extension Of Statutory Suspension Period 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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Dated: April 13, 2020



Deanne M. O'Dell, Esq.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

PENNSYLVANIA PUBLIC UTILITY COMMISSION	:	
	:	
	:	Docket Nos. R-2020-3017951 (Water)
v.	:	R-2020-3017970 (Wastewater)
	:	
PITTSBURGH WATER AND SEWER AUTHORITY	:	
	:	

**THE PITTSBURGH WATER AND SEWER AUTHORITY’S
ANSWER TO THE BUREAU OF INVESTIGATION AND
ENFORCEMENT’S EXPEDITED MOTION FOR
EXTENSION OF STATUTORY SUSPENSION PERIOD**

Pursuant to 52 Pa. Code § 5.61, The Pittsburgh Water and Sewer Authority (“PWSA” or “Authority”) hereby submits this Answer in opposition to the Bureau of Investigation and Enforcement’s (“I&E”) Expedited Motion for an Extension of the Statutory Suspension Period of Pittsburgh Water and Sewer Authority’s Water and Wastewater Base Rate Proceedings (“Motion”).¹ In support of this Answer, PWSA submits the following:

I. INTRODUCTION

On March 6, 2020, PWSA filed water and wastewater base rate cases with the Pennsylvania Public Utility Commission (“Commission”) at the above-referenced dockets.² Since that time, the coronavirus has quickly spread and caused a global pandemic. As a result, the Commission is currently closed and staff are working remotely, and Pennsylvania is under a statewide “stay-at-

¹ Answers to I&E’s Motion have been filed by Pittsburgh UNITED (“UNITED”), the Office of Consumer Advocate (“OCA”) and the Office of Small Business Advocate (“OSBA”). Generally, each of these Answers support I&E’s Motion based on similar reasoning.

² PWSA is seeking to consolidate the water and wastewater cases. *See* Petition for Consolidation of Water and Wastewater Rate Proceedings and for Authorization to Use Combined Water and Wastewater Revenue Requirements as filed on March 6, 2020. PWSA is also seeking to consolidate its March 3, 2020 Petition for Waiver of Provisions of Act 11 to Increase the DSIC CAP, to Permit Levelization of DSIC Charges, and to Authorize the Pay-As-You-Go Method of Financing, Docket No. P-2020-301901. *See* Petition for Consolidation filed on March 6, 2020.

home” order. Through its Motion, I&E seeks to extend the statutory suspension period for PWSA’s base rate proceedings “by a period of time commensurate with the closure of the Commission’s offices during the coronavirus pandemic.” Motion at 1.

PWSA appreciates the challenges created by the orders requiring attorneys and witnesses to work remotely, as PWSA and other parties are currently experiencing those same challenges. However, simply extending the statutory deadlines in these proceedings does not provide a workable solution that properly balances the needs of all interested stakeholders. This approach would prevent the Authority from billing literally millions of dollars in revenue, thus threatening critical infrastructure projects as well as PWSA’s financial health and jeopardizing the Authority’s ability to meet its obligations in the credit markets. This outcome is not in the public interest. Additionally, these proceedings are in very early stages and have not yet been officially acted upon by the Commission. The coronavirus pandemic has created a rapidly evolving situation and it is unclear at this time how events will unfold in the coming weeks. PWSA submits that, given the financial harm that would befall the Authority, it is premature to extend the statutory suspension period at this time. There are other modifications that can be made to the schedule, if necessary, to provide I&E and the other parties with adequate time to investigate PWSA’s rate requests without the harms to PWSA that would be caused by extending the suspension period and delaying PWSA’s ability to implement a Commission authorized base rate increase. For these reasons and those discussed in detail below, I&E’s motion should be denied.

II. ANSWER

A. PWSA Did Not Intentionally Submit its Rate Filings During the Coronavirus Emergency.

I&E’s Motion as well as some of the Answers imply that PWSA intentionally chose to file its base rate cases during a global pandemic. This allegation is disingenuous at best and ignores

the months of planning and development required in advance of PWSA's base rate filings. PWSA's rate filing consists of written testimony and supporting exhibits from nine witnesses in addition to the responses as required to be filed pursuant to the Commission's regulations at 52 Pa. Code § 53.52. PWSA devoted significant time and effort into developing these rate proposals and did so well in advance of the current pandemic situation or the Commonwealth's declaration of an emergency. I&E's own motion argues that the rate filings present complex issues and novel proposals. These filings were clearly not developed quickly in an attempt to take advantage of a public health emergency as I&E suggests. PWSA provided notice to the Commission 30 days before filing the base rate cases as required by 52 Pa. Code § 53.45(a), and had no way of knowing when it submitted this notice in early February that the Commission's operations would be affected by the COVID-19 pandemic in March. It was simply a matter of chance that PWSA filed these base rate cases on the same day that Governor Wolf issued a Disaster Proclamation regarding the coronavirus outbreak, and not an intentional choice to gain some unspecified advantage. Further, PWSA is not proposing that its rates go into effect during the pandemic. As proposed, the rates would not go into effect until January 1, 2021, which presumably will be well after the current emergency situation has passed. I&E's argument is entirely unfounded and should be disregarded.

B. The Parties are Currently Investigating PWSA's Proposals Remotely.

I&E also claims that it is prejudiced by its lack of resources to investigate PWSA's filing remotely. I&E notes in its Motion that Governor Wolf issued a Disaster Proclamation on March 6, 2020 and the Commission closed ten days later on March 16, 2020. It is unclear why I&E did not make arrangements in the intervening ten days to allow it to continue its work on a remote basis.

Notably, despite claims of limitations created by teleworking, I&E, UNITED, OCA and OSBA began serving discovery requests to PWSA on March 19, 2020. As of April 13, 2020, PWSA has received eighteen sets of discovery totaling well over seven hundred questions (inclusive of subparts). This evidences an ability by those who have intervened to continue to investigate PWSA's filing despite the teleworking status. Importantly, this is exactly what would be occurring under normal circumstances – discovery. PWSA is working diligently (also remotely) to provide timely responses to those interrogatories. PWSA should not be penalized by a delay in these proceedings on the basis that working remotely is somehow impeding the ability of interested entities to investigate the rate filing.

Concerns about access to confidential documents can and are being addressed via an appropriate Protective Order. PWSA, I&E, OCA, OSBA and UNITED have agreed to a form of Protective Order that will be submitted to the ALJ for approval. The agreed-to Protective Order recognizes some of the challenges for parties needing access to confidential documents in a teleworking environment. In addition, the parties have already agreed to electronic service of documents among themselves, thereby decreasing the need for personnel to print, copy and mail hard copies of documents. PWSA has also made all of its documents and discovery responses available via a secured, password protected website that the parties have successfully used in prior proceedings and are regularly accessing in this case as well. Thus, appropriate accommodations have been established to enable what would “normally” be occurring at this stage of a rate case, the exchange of information via discovery.

In light of the harms an extension would cause, as discussed further below, it is not in the public interest to delay these proceedings and I&E's Motion must be dismissed.

C. Any Extension of the Suspension Period will Harm PWSA's Finances and Delay Critical Infrastructure Projects.

If I&E's Motion is granted and the suspension period is extended, PWSA will suffer significant financial harm as a result. As an illustration, if the suspension period is extended by one month, PWSA will lose over \$2.1 million based on current projections due to the delay. Any extension may require PWSA to delay planned and budgeted projects and maintenance. I&E has not specified how long it seeks to have the suspension period extended, but rather seeks to extend the statutory suspension period for PWSA's base rate proceedings "by a period of time commensurate with the closure of the Commission's offices during the coronavirus pandemic." Motion at 1. An extension for a longer or indefinite period of time would result in an even greater negative financial impact. Furthermore, without the proposed rate increase going into effect by January 2021, PWSA is projecting that, starting in January, its debt service coverage would be below the minimum requirements of its bond indentures and its cash flow will be negative.³ If there is a significant delay before a rate increase can go into effect in 2021, PWSA may be forced to seek emergency rate relief in order to avoid defaulting under its bond documents.

Additionally, the Commission's ratemaking process is a long and costly process. It would be irresponsible for PWSA to put this proceeding on hold given the time and expense it has already incurred to develop its proposals, only to restart the process and potentially require an additional nine months to receive a resolution from the Commission. Moreover, some of PWSA's proposals include increasing benefits to qualifying low income customers and there is no good reason to delay implementing these proposals.⁴

³ See PWSA Exh. JP-1 which demonstrates that, at existing rates, debt service coverage ratios will fall below the minimum requirement of 1.10 in FY 2021.

⁴ UNITED's "additional relief" that PWSA be required to "update its filing and its associated rate request based on then-current market conditions and the needs assessment in its service territory within 30 days of the Governor's Emergency Proclamation is lifted, and prior to commencing with a procedural schedule in this matter" is a significant overreach that does not serve a legitimate purpose. While the current pandemic situation is

An extension of the suspension period and the related loss of revenue will also likely cause a delay in critical infrastructure improvement projects. As a municipal authority, PWSA does not have shareholders who can fund projects or who will benefit from a rate increase; rather, the requested rate increases are largely for the purpose of improving PWSA's aging infrastructure. A delay in receiving additional funds could well result in delays in lead service line replacements, replacement of the clearwell, and other critical infrastructure projects. Many of these are projects that I&E has pushed PWSA to complete on an expedited basis, and that are a high priority to the Commission. Several of these projects are mandated by other regulators, including the Pennsylvania Department of Environmental Protection, and PWSA is subject to the imposition of monetary penalties if it fails to complete them – monetary penalties that would necessarily need to be paid with ratepayer funds.

I&E's requested open-ended extension (to extend for however long the Commission is physically not open) would also raise concerns with the credit rating agencies about the Authority's ability to timely establish rates sufficient to meet its operational expenses, pay debt service and meet the financial covenants it has made with bondholders.. Such concerns will make it more difficult and expensive for the Authority to raise necessary capital. PWSA's ability to fund its ambitious infrastructure improvement plan is substantially dependent on its ability to issue long term debt at reasonable rates. That ability, in turn, is dependent on its continued relatively good standing with the credit rating agencies. Difficulty in continuing to access the municipal bond market at reasonable rates would delay necessary funding and jeopardize the timelines for

unprecedented, changing market conditions during the pendency of a rate case is not unusual and requiring a utility to constantly update its filing based on a prediction of how changing market conditions will affect a future period (2021) is unrealistic. Doing so here, will delay the ability of PWSA to implement the upgrades to its universal service programs that are proposed with this rate filing. PWSA may need to revise some of its 2021 budget projections but any such revisions can be submitted in supplemental or rebuttal testimony, a standard practice in rate cases. Such revisions do not justify a full scale delay of the entire rate case. As such, UNITED's proposal appears to be designed merely to avoid the implementation of a rate increase and not for any other legitimate reason.

completion of these projects. This outcome is not in the public interest as it could hinder PWSA's ability to provide adequate, efficient, safe and reasonable service and facilities pursuant to Section 1501 of the Public Utility Code.⁵ Therefore, I&E's Motion must be denied.

D. PWSA has a Statutory Right to New Rates Becoming Effective No Later Than Nine Months After its Filings.

Sections 1308(d) of the Public Utility Code provides for a maximum of nine months between the filing of a general rate increase request and the date when rates are permitted to go into effect.⁶ Section 1308(d) states, in relevant part:

Before the expiration of such seven-month period, a majority of the members of the commission . . . shall make a final decision and order . . . granting or denying, in whole or in part, the general rate increase requested. If, however, such an order has not been made at the expiration of such seven-month period, the proposed general rate increase shall go into effect at the end of such period [subject to refund].

66 Pa. C.S. § 1308(d). Existing case law establishes that the Commission does not have the authority to delay the effective date of rates beyond the statutory suspension period.⁷ The Commission has also recognized that "there appears to be a statutory right to have an effective date of new rates no later than the end of the suspension period date. . ."⁸

While the Commission's March 20, 2020 Emergency Order gives the Commission discretion to waive certain regulatory or statutory deadlines, this authority should be exercised

⁵ 66 Pa. C.S. § 1501.

⁶ 66 Pa. C.S. § 1308(a) requires that a public utility provide 60 day notice before changing existing rates. 66 Pa. C.S. § 1308(d) (regarding general rate increases) allows the Commission to suspend the rate increase for up to seven additional months. This results in a maximum of nine months between the rate filing and the date when new rates go into effect.

⁷ *Bell Telephone Co. of Pa. v. Pa. Public Utility Commission*, 452 A.2d 86 (Pa. 1982), *affirmed per curiam*, 482 A.2d 1272 (Pa. 1984) (*Bell Telephone*); *see also National Fuel Gas Distribution Corp. v. Pa. Public Utility Commission*, 464 A.2d 546, 567 (Pa.Cmwlth. 1983).

⁸ *Petition of Philadelphia Electric Company for Declaratory Order*, P-890349, Opinion and Order entered May 3, 1989; 1989 Pa PUC LEXIS 56 (*citing Bell Telephone*).

with caution and only to the extent necessary to ensure that the deadlines do not interfere “with the overall conduct of Commission business in the public interest during the emergency.”⁹ As discussed above, extending the suspension period is not in the public interest and would cause significant harm to PWSA.

Moreover, it does not appear that the Commission has the authority to simply suspend the provisions of Section 1308(d). The Emergency Order states that, for pending rate cases, the Administrative Law Judge may “establish reasonable deadlines under the circumstances.”¹⁰ The Order does not specify that the ALJ or the Chief ALJ has been given the authority to actually suspend a non-procedural statutory directive – Section 1308(d) – and no emergency order of the Governor (or anyone else) appears to extend that power to the PUC.¹¹

The Commission’s power to suspend or extend the statutory suspension period is limited. The Commission’s Emergency Order is based upon the March 6th Proclamation of Disaster Emergency by Governor Wolf. That being said, while very broad, the Governor’s powers are not unrestrained. The Constitution of the Commonwealth of Pennsylvania states that: “No power of suspending laws shall be exercised unless by the Legislature or by its authority.”¹² The Governor of Pennsylvania assumes his emergency management powers under specific provisions of the Emergency Management Services Code (the “Emergency Code”), 35 Pa. C.S. §§ 7101-7104. Section 7301(f) of the Emergency Code provides, in part, that the Governor may: “Suspend the provisions of any regulatory statute prescribing the *procedures* for conduct of

⁹ *Emergency Order re: Suspension of Regulatory and Statutory Deadlines; Modification to Filing and Service Requirements*, Docket No. M-2020-3019262 (March 20, 2020), at 1-2 (*Emergency Order*).

¹⁰ *Id.* at 2.

¹¹ *Id.*

¹² Pa. Const., Art. I, § 12.

Commonwealth business, or the orders, rules or regulations of any Commonwealth agency, *if strict compliance* with the provisions of any statute, order, rule or regulation *would in any way prevent, hinder or delay necessary action in coping with the emergency.*¹³ In the Proclamation regarding COVID-19 issued on March 6, 2020, the Governor stated he suspended “the provisions of any regulatory statute prescribing the procedures for conduct of Commonwealth business, or the orders, rules or regulations of any Commonwealth agency, *if strict compliance* with the provisions of any statute, order, rule or regulation *would in any way prevent, hinder, or delay necessary action in coping with this emergency.*”¹⁴

Thus, to be consistent with Constitutional and legislative authority, any suspension of any regulatory statute must: (1) have to do with procedures proscribed by the state; and, (2) be based upon a finding that strict compliance would prevent, hinder or delay necessary action in coping with the emergency. PWSA submits that said standard has not been satisfied for the statutory suspension period. First, the right to put rates into effect at the end of the suspension period (subject to refund, if the Commission has failed to act), is not a procedural right but a substantive one granted to utilities.

Second, the allegations by I&E (in its Motion) and the other Answers merely state (at best) that it would be difficult or inconvenient for the Commission and the parties to respond to PWSA’s proposals within the statutory suspension period. As noted previously, even in the current situation, the interested stakeholders have managed to proceed with discovery that is typical at this point in time for a rate case. Thus, strict compliance with the statutory suspension period does not prevent, hinder or delay necessary action in coping with the emergency or even in continuing to process and investigate PWSA’s rate request in the normal course.

¹³ 35 Pa. C.S. § 7103(f)(1) (emphasis added).

¹⁴ *Proclamation of Disaster Emergency*, 50 Pa.B. 1637, 1644 (Saturday, May 21, 2020) (emphasis added).

Accordingly, since the Commission itself lacks the authority to waive the Section 1308(d) deadline for action, and to the extent that the Commission fails to act by then, the remedy is already established by the statute – PWSA has the option of placing the rates into effect subject to refunds. As the Commission has continued to hold public meetings and issue orders during the physical closure of its offices, it does not appear that timely ruling on PWSA’s rate case would present a particular challenge for the Commission.

Moreover, it is not reasonable to extend the suspension period for an indefinite time period as I&E’s Motion requests. As will be discussed below, there are a number of less extreme measures that could accommodate the parties’ due process rights to investigate PWSA’s proposals without the harm that an extended suspension period would cause to PWSA. As such, I&E’s Motion should be denied.

E. Scheduling Considerations and Alternatives

The Commission’s March 20, 2020 Emergency Order states that in pending rate case litigation, the Chief Administrative Law Judge may “establish reasonable deadlines under the circumstances.” It is not reasonable to simply extend the statutory suspension period, particularly given that these proceedings are in the very early stages. The Commission has not yet issued a suspension order and a litigation schedule has not been set. Based on previous litigation schedules, PWSA anticipates that other parties will not be required to file direct testimony until approximately June 10, 2020 based on the current end of suspension date. The COVID-19 pandemic has created a quickly evolving situation and it is unclear how events will play out in the coming weeks. If necessary, other less extreme measures could be taken to provide the parties with adequate time to develop their respective cases. For example, the parties could agree to reduce the rounds of testimony to two (other party direct and PWSA rebuttal) with any further testimony conducted at

the hearings, shorten the briefing period, certify the record directly to the Commission for decision or the Commission could also shorten its review time of a recommended decision. The Commission could also conduct any public input hearings telephonically if necessary. PWSA submits that it is not necessary to make such adjustments at this time, but that the parties could revisit these possibilities in 30 days to determine whether any scheduling modifications are warranted at that time. This is a more reasonable and balanced approach under the circumstances that will allow the parties to adjust timelines if necessary without causing significant harm to PWSA.

In the alternative, if the suspension period is extended, PWSA's proposed rates should either: (1) be allowed to go into effect after the suspension period ends, subject to refund;¹⁵ or (2) once approved, the increased rates must apply retroactively to the date they would have gone into effect under the original suspension date. These approaches respect PWSA's statutory rights and help limit the damage that any delay in these proceedings would cause to PWSA's finances while permitting the delay sought by I&E and the other stakeholders filing answers to the Motion.

¹⁵ See 66 Pa. C.S. §1308(d), which provides that “[i]f, however such an order has not been made at the expiration of the seven-month period, the proposed general rate increase shall go into effect at the end of such period, but the commission may by order require the interested public utility to refund, in accordance with section 1312 (relating to refunds), to the persons in whose behalf such amounts were paid, such portion of such increased rates as by its decision shall be found not justified, plus interest...”

III. CONCLUSION

For the foregoing reasons, PWSA respectfully requests that I&E's motion be denied. In the alternative, any extension of the suspension period must allow PWSA's rates to go into effect as scheduled subject to refund, or allow rates to be effective retroactively.

Respectfully submitted,



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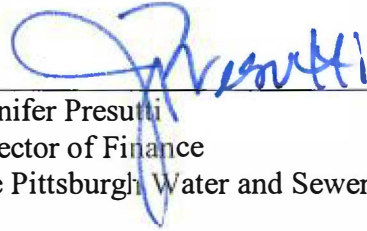
Dated: April 13, 2020

Counsel for
The Pittsburgh Water and Sewer Authority

VERIFICATION

I, Jennifer Presutti, hereby state that: (1) I am the Director of Finance for The Pittsburgh Water and Sewer Authority (“PWSA”); (2) the facts set forth in the foregoing document are true and correct (or are true and correct to the best of my knowledge, information and belief); and, (3) 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 18 Pa. C.S. § 4904 (relating to unsworn falsification to authorities).

Date: April 13, 2020



Jennifer Presutti
Director of Finance
The Pittsburgh Water and Sewer Authority