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December 19, 2016

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

VIA ELECTRONIC FILING


**RE: Pennsylvania Public Utility Commission, *et al.* v. City of DuBois – Bureau of Water;
Docket No. R-2016-2554150**

Dear Secretary Chiavetta:

Attached please find for filing with the Pennsylvania Public Utility Commission the Answer and Motion to Strike of the City of DuBois – Bureau of Water ("City"), which correspond to Sandy Township's Motion to Accept a Newspaper Article into the Record, dated November 28, 2016. As shown by the attached Certificate of Service, all parties to this proceeding are being duly served. Thank you.

Sincerely,

McNEES WALLACE & NURICK LLC

By 

Alessandra L. Hylander

Counsel to the City of DuBois – Bureau of Water

Enclosure

c: Deputy Chief Administrative Law Judge Mark A. Hoyer (via E-Mail and First-Class Mail)
Certificate of Service

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the participants listed below in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

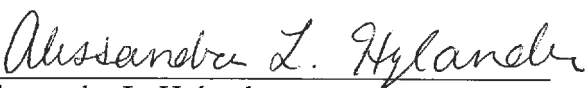
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Alessandra L. Hylander

Counsel to the City of DuBois – Bureau of Water

Dated this 19th day of December, 2016, at Harrisburg, Pennsylvania.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission, et al.	:	
	:	
v.	:	R-2016-2554150
	:	
City of Dubois – Bureau of Water	:	

**CITY OF DUBOIS – BUREAU OF WATER
ANSWER AND MOTION TO STRIKE**

TO THE HONORABLE PENNSYLVANIA PUBLIC UTILITY COMMISSION:

Pursuant to Sections 5.61(a) and 5.103 of the Pennsylvania Public Utility Commission's ("PUC" or "Commission") Regulations, 52 Pa. Code §§ 5.61(a) and 5.103, the City of DuBois – Bureau of Water ("City") hereby files this Answer to Sandy Township's November 28, 2016, Motion to Accept Newspaper Article into the Record ("Answer") and Motion to Dismiss ("Motion to Dismiss") (collectively, "Answer and Motion to Dismiss"). As set forth below, Sandy Township's decision to include extra-record information in its Main Brief flagrantly disregards the Commission's procedural rules and must not be considered in adjudicating the City's rate request.

In support, the City states as follows:

I. INTRODUCTION

1. On June 30, 2016, the City filed Supplement No. 22 to Tariff Water – Pa. P.U.C. No. 4, seeking to change its rates to recover an estimated annual increase in base rate revenues of \$257,604. The Commission subsequently issued an Order suspending the filing through March 29, 2017, and assigning the matter to the Office of Administrative Law Judge for evidentiary hearings.

2. On November 10, 2016, the City and the other parties to this proceeding attended an evidentiary hearing before Deputy Chief Administrative Law Judge ("ALJ") Mark A. Hoyer.¹ At this evidentiary hearing, the parties introduced pre-served testimony into the record and cross-examined witnesses. At the conclusion of that evidentiary hearing, the ALJ closed the evidentiary record.

3. On November 28, 2016, Sandy Township served its Motion to Accept Newspaper Article into the Record ("Motion to Admit") upon the ALJ and the parties proposing to admit an article published in the Courier-Express on November 21, 2016 ("Nov. Article") into the evidentiary record.

4. On November 29, 2016, Sandy Township appended this extra-record information to its Main Brief as Attachment 1.

II. ANSWER TO SANDY TOWNSHIP'S MOTION TO ADMIT

5. As set forth below, Sandy Township's attempt to include information outside of the evidentiary record during the briefing stage of this proceeding violates the Commission's procedural rules and regulations, as Sandy Township fails to show good cause to support its request for admission of extra-record evidence. To the contrary, admission of the Nov. Article would only obfuscate the record with irrelevant, untested, and unproven information that does not meet any evidentiary standard and unreasonably wastes valuable Commission and party resources.

6. The Nov. Article contains no material fact of any issue of substance at this docket. As such, it recites rumor, supposition and innuendo. It has no probative value and would only confuse salient issues, thereby wasting the time of the ALJ, the parties, and the Commission.

¹ The evidentiary hearing scheduled for November 9, 2016, was cancelled at the request of the parties.

7. Sandy Township fails to meet the "good cause" standard required by Section 5.431(b) for introducing evidence into the record after the record has closed. 52 Pa. Code. § 5.431(b). The Commission has previously held that when a party is "on notice as to [the opposing party's] arguments prior to the close of the record, had the opportunity to present additional evidence, but did not do so in a timely manner . . . [such party] has not shown good cause to introduce this new documentary evidence at this time." *Application of Pa. Ambulance, LLC*, 2015 Pa. P.U.C. LEXIS 395, *28 (July 30, 2015); *see also Joint Application of the United Telephone Co. of Pa. LLC*, 2009 Pa. P.U.C. LEXIS 1133, * 12-13 (declining to reopen the record to permit the introduction of new evidence into the record when such evidence was determined to be irrelevant). The Commission has also wisely declined to reopen the record where the proffered information lacks probative value and is "neither relevant nor material to the proceeding." *Application of Apollo Gas Co.*, 1994 Pa. PUC LEXIS 45, (Pa. P.U.C. 1994), at *9. Finally, the PUC will exclude evidence if its probative value is outweighed by undue delay or waste of time. 52 Pa. Code § 5.401(b)(2)(iii).

8. Sandy Township had notice of the City's position on this issue throughout the course of this proceeding and had every opportunity to present evidence to rebut the City's position. Sandy Township could have presented testimony from Falls Creek officials or utilized the Commonwealth's Open Records Act to obtain status updates from Falls Creek. The Commission should not allow Sandy Township to attempt to cure its flawed and unpersuasive evidentiary presentation with extra-record newspaper articles presenting information that could have been accessed by other means during the evidentiary phase of this proceeding

9. Additionally, the clear irrelevance of the Nov. Article compels rejection of Sandy Township's Motion to Admit, because the extra-record information constitutes inadmissible

evidence. Under Section 332(b) of the Public Utility Code, the Commission "as a matter of policy[,] provide[s] for the exclusion of irrelevant, immaterial or unduly repetitious evidence." 66 Pa C.S. § 332(b). Here, Sandy Township claims that the Nov. Article proves the "anticipated sale of water by the City to [the Borough of Falls Creek ("Falls Creek")] has moved forward since the hearing on November 10, 2016." Motion to Admit, p. 2. Despite Sandy Township's assertions to the contrary, nothing has "moved forward" and the Article merely repeats the same irrelevant facts included in Sandy Township's prior testimony. *See* Sandy Township Statement No. 1, pp. 3-6 and Attachment 1; and Sandy Township Statement No. 1SR, pp. 2-4 and Attachment 1. Consistent with the City's prior testimony, the Nov. Article confirms that the City and Falls Creek have no agreement for an interconnection and, even if an agreement manifests and leads to rapid project implementation, the most ideal project timelines point to potential completion far beyond conclusion of the future test year (December 31, 2016). *See* Sandy Township Main Brief, Attachment 1.

10. The timeline impacts the relevancy question as the Commission only recognizes revenue for ratemaking purposes when such revenue is reasonably known to be received in the test year or very shortly thereafter. On rare occasions where the PUC looks beyond the future test year in rate cases, it has limited such exceptions to projects reasonably certain to be completed within 6-7.5 months of the test year, not projects that could potentially commence construction within such periods. *See Pa. Pub. Util. Comm'n. v. The Bell Telephone Co. of Pa.*, 51 Pa. P.U.C. 570, **576; *see also Pa. Pub. Util. Comm'n. v. Phila. Suburban Water Co.*, 50 Pa. P.U.C. 407, **420-421. As a result, Sandy Township's speculation as to when construction of a Falls Creek interconnection would begin following the expiration of the suspension period is irrelevant.

Accordingly, Sandy Township fails to show any relevancy or pertinence of the Nov. Article to the pending adjudication.

11. Particularly in consideration of the sheer paucity of probative value to be gleaned from the Nov. Article, granting Sandy Township's Motion to Admit would do little more than waste valuable public resources. Notably, Sandy Township filed its Motion to Admit on November 28, 2016, a full week after publication of the Nov. Article and one day before the deadline for parties' Main Briefs. At that point, allowing the information into the record would require a modification to the procedural schedule and potentially the City's suspension date in order to protect the City's due process rights. Modifying a carefully crafted procedural schedule and statutory review period to accommodate a delayed request for consideration of meaningless information would waste the time and resources of all parties to this proceeding, each of which relies on funding from ratepayers and/or taxpayers. Accordingly, the Commission should deny Sandy Township's Motion as its probative value would be severely outweighed by unreasonable delay to the proceedings. *See* 52 Pa. Code § 5.401(b)(2)(iii).

12. As set forth above, Sandy Township failed to demonstrate good cause for admission of the Nov. Article. The information therein bears no relevancy to Sandy Township's claim that a connection to Falls Creek should be recognized for ratemaking purposes, as the article only reiterates that a connection will not be completed in 2016 and could possibly be completed by the end of 2017. This information offers no probative value and as such, the delay in proceedings necessary to protect the City's due process rights would be wholly unreasonable. For these reasons, the Commission must deny Sandy Township's Motion to Admit.

III. MOTION TO STRIKE

13. In addition to filing the Motion to Admit, Sandy Township brazenly appended extra-record evidence to its Main Brief. In doing so, Sandy Township assumes the role of

evidentiary gatekeeper, which the Public Utility Code and the Commission's Regulations expressly preserve for the ALJ and the Commission. *See* 66 Pa. C.S. § 331(d); 52 Pa. Code § 5.431(a). To correct this egregious overreach, the City moves to strike Sandy Township's Motion, Attachment 1 to Sandy Township's Main Brief, and all references to Sandy Township's Attachment 1. *See* 52 Pa. Code § 5.103.

14. As demonstrated by the above Answer, Sandy Township's Motion to Admit proposes to introduce irrelevant and inadmissible evidence following close of the record. Even assuming Sandy Township presented a good cause argument in support of its Motion (which it did not), attaching the Nov. Article to its Main Brief would remain sharply contrary to the Commission's evidentiary procedures.

15. Section 5.431(a) of the Commission's Regulations states that the record closes "at the conclusion of the hearing unless otherwise directed by the presiding officer or the Commission." 52 Pa. Code § 5.431(a). Once the record closes, "additional matter may not be relied upon or accepted into the record unless allowed for good cause shown by the presiding officer or the Commission upon motion." *Id.* at § 5.431(b).

16. Because neither the ALJ nor the parties have had the opportunity to review and adjudicate the propriety of Sandy Township's Motion and Article, this Nov. Article remains extra-record evidence. Consequently, when Sandy Township appended the Nov. Article to its Main Brief, Sandy Township egregiously violated Section 5.431 of the Commission's Regulations. *See* 52 Pa. Code § 5.431.

17. Therefore, to preserve the integrity of the record and cure Sandy Township's reckless action, the City respectfully requests the Commission strike Sandy Township's Motion, its attached Article, and all references thereto, including:

- a. Attachment 1 to the Main Brief of Sandy Township, and all references thereto including the reference to such Attachment at pages 5 and 6 of Sandy Township's Main Brief; and
- b. References to Attachment 1 on page 4 of the Reply Brief of Sandy Township.

IV. CONCLUSION

WHEREFORE, the City requests that ALJ Mark A. Hoyer grant its Motion to Strike Sandy Township's Motion, Attachment 1 thereto, and all references thereto, including:

- a. Attachment 1 to the Main Brief of Sandy Township, and all references thereto including the reference to such Attachment at pages 5 and 6 of Sandy Township's Main Brief; and
- b. References to Attachment 1 on page 4 of the Reply Brief of Sandy Township.

Respectfully Submitted,

McNEES WALLACE & NURICK LLC

By Alessandra L. Hylander

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Counsel to City of DuBois – Bureau of Water

Dated: December 19, 2016

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission, et al.	:	
	:	
v.	:	R-2016-2554150
	:	
City of Dubois – Bureau of Water	:	

NOTICE TO PLEAD

To: Sandy Township

YOU ARE HEREBY NOTIFIED TO FILE A WRITTEN RESPONSE TO THE ENCLOSED MOTION WITHIN TWENTY (20) DAYS OF THE DATE OF SERVICE HEREOF OR A JUDGMENT MAY BE ENTERED AGAINST YOU.

Respectfully Submitted,

McNEES WALLACE & NURICK LLC

By *Alessandra L. Hylander*

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Dated: December 19, 2016