



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE
REFER TO OUR FILE

February 15, 2017

Secretary Rosemary Chiavetta
Pennsylvania Public Utility Commission
400 North Street, 2nd Floor North
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: City of DuBois – Bureau of Water Request for
Approval to Increase Water Rates
Docket No. R-2016-2554150

Dear Secretary Chiavetta:

Enclosed please find the Bureau of Investigation and Enforcement's (I&E)
Motion to Strike for this proceeding.

Copies are being served on all active parties of record as evidenced in the attached
Certificate of Service. If you have any questions, please contact me at (717) 783-6151.

Sincerely,

Phillip C. Kirchner
Prosecutor
Bureau of Investigation and Enforcement
PA Attorney I.D. #313870

PCK/sea
Enclosure

cc: ALJ Mark A. Hoyer
Certificate of Service

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

City of DuBois – Bureau of Water :
Request for Approval to : Docket No. R-2016-2554150
Increase Water Rates :

CERTIFICATE OF SERVICE

I hereby certify that I am serving the foregoing **Motion to Strike** dated February 15, 2017, in the manner and upon the persons listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party):

Served via First Class and Electronic Mail

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Phillip C. Kirchner
Prosecutor
Bureau of Investigation and Enforcement
PA Attorney I.D. #313870

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission	:	
	:	
v.	:	Docket No. R-2016-2554150
	:	
City of DuBois – Bureau of Water	:	
	:	

**THE BUREAU OF INVESTIGATION AND ENFORCEMENT’S
MOTION TO STRIKE A PORTION OF EXCEPTIONS
OF THE CITY OF DUBOIS – BUREAU OF WATER**

On June 30, 2016, the City of DuBois - Bureau of Water (“City” or “DuBois”) filed Supplement No. 22 to Tariff Water - Pa. P.U.C. No. 4 (“Supplement No. 22”) to become effective August 29, 2016. Supplement No. 22 contains proposed changes in rates, rules, and regulations calculated to produce approximately \$257,604 (33.7%) in additional revenues from customers based on a historic test year ending December 31, 2015 and a future test year ending December 31, 2016. Pursuant to 66 Pa. C.S. § 1308(d), the filing was suspended by operation of law until March 29, 2017, unless permitted by Commission Order to become effective at an earlier date on August 11, 2016.

A Prehearing Conference was held on September 9, 2016, with Deputy Chief Administrative Law Judge Mark A. Hoyer (“ALJ”) presiding. In addition to the Commission’s Bureau of Investigation and Enforcement (“I&E”), the Office of Consumer Advocate (“OCA”), the Office of Small Business Advocate (“OSBA”), and

Sandy Township (“Sandy”) each actively participated in the full litigation of this proceeding. An evidentiary hearing was held on November 10, 2016 in Harrisburg, PA. The record of this proceeding was closed on December 21, 2016 by Order.¹

Following the submission of Main and Reply Briefs, the Secretary’s Bureau issued the Recommended Decision (“RD”) of ALJ Hoyer on January 13, 2017, which recommends the City be granted an overall increase of \$97,534 in lieu of I&E’s recommended increase of \$49,180. Exceptions were filed by all parties on February 2, 2017. DuBois has inserted new claims in its Exceptions, which are over a month beyond the formal close of the record. I&E respectfully requests that the new claims contained in the Exceptions be stricken as they are procedurally inexcusable and deprive I&E of its right to cross-examine, rebut or meaningfully reply.

In support of this Motion, I&E avers as follows:

1. In its Exceptions, DuBois inserted self-admitted “new evidence”² of additional rate base expenses incurred after the record closed and attempts to claim it justifies deviation from the Recommended Decision.

2. This new evidence included in Appendix A and the following portions of Exceptions should be stricken from the City’s Exceptions:

Accordingly, the City requests that the Commission take judicial notice of the additional invoices pursuant to Section 5.408 of the Commission’s Regulations. In light of the new evidence, the PUC should reject the R.D.’s recommended adjustments and impose alternative relief. The PUC should either reject the R.D.’s decision to exclude \$98,206 in

1 *Second Interim Order Addressing Outstanding Motions to Strike, Striking Attachment 1 to Sandy Township’s Main Brief and References Thereto, and Closing the Hearing Record* (Order entered December 21, 2016).
2 DuBois Exceptions, Pg. 3.

claimed rate base additions or modify the R.D. to reflect the invoices supporting the claimed rate base additions for the heating and air conditioning, High Street main additions, and billing [sic] payroll and accounting Software expenses totaling \$113,200.64. Alternatively, if the PUC declines to consider the additional invoices, the PUC should reverse the R.D's recommendation on the grounds that reasonably anticipated capital expenditures should be included in rate base where evidentiary hearings are held prior to conclusion of the test year.³

As anticipated, the City incurred significant capital expense after the evidentiary hearing and before December 31, 2016. Between the close of the evidentiary record and the conclusion of the FTY, the City incurred \$113,200.64 in expenses attributable to rate base additions (\$35,437.20 on heating and air conditioning systems,³ \$54,430 on High Street main additions, and \$23,333.44 on phone system equipment). See appendix A. Taking judicial notice of such evidence pursuant to Section 5.408 of the Commission's Regulations would ensure a clear and complete record of the City's rate base additions.

The City believes it is critical to acknowledge these expenditures in order to develop an appropriate rate base calculation. The City only budgeted \$98,206 for heating and air conditioning; High Street main additions; High Street fire hydrants; billing, payroll, and accounting software; and the phone system. However, per Appendix A, the City actually incurred \$113,200.64 in rate base expense just for heating and air conditioning, High Street main additions, and phone system expenses. Because the City's expenses for three rate base categories exceeded its budgeted expense for all five rate base categories, the PUC should approve the City's total rejected rate base additions in the R.D. or approve the City's actual expenses for heating and air conditioning, High Street mains, and phone service for which the City furnished invoices in Appendix A. Any other result would be unfair and unreasonable.⁴

³ DuBois Exceptions, Pg. 3-4.

⁴ Dubois Exceptions, Pg. 5.

3. It is procedurally improper for the City to request the Commission to take judicial notice of the \$113,200.64 in rate base additions that occurred after the close of the record.

4. These rate base claims would have altered testimony entered, discovery sought, cross-examination considerations, and litigation strategy for I&E had this evidence been properly entered into the record.

5. The City explicitly acknowledges this is an attempt to rebut an unfavorable decision stemming from deficiencies in their previous claims.⁵

6. Commission Regulations at 52 Pa. Code § 5.243(e) forbids parties from introducing rebuttal evidence that should have been included in the party's case-in-chief.

7. The City's test year ended December 31, 2016, and it failed to properly project its rate base additions. It is inappropriate to allow new claims in the Reply Exceptions phase of this proceeding.

8. The City attempts to circumvent proper evidentiary rules and procedure by requesting the ALJ and Commission take judicial notice pursuant to 52 Pa. Code §5.408.

9. The Commission's ability to take judicial notice pursuant to 52 Pa. Code §5.408 is not intended as means to deprive opposing parties of their right to cross-examine, rebut or meaningfully reply to new claims.

10. The record in this matter was closed on December 21, 2016 upon order by ALJ Hoyer.

⁵ DuBois Exceptions, Pg. 4-5.

11. After the record is closed, 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.⁶

12. Parties may not use procedural mechanisms, such as judicial notice, to manufacture a second opportunity to present evidence that could have been introduced earlier.⁷

13. I&E respectfully submits that DuBois' procedural violations leave I&E with an incurable disadvantage.

14. For the above reasons, I&E respectfully requests that the instant motion be granted and that Appendix A be stricken from the record along with the portions of the City's Exceptions referenced above.

Respectfully Submitted,



Phillip C. Kirchner
Prosecutor
PA Attorney ID #313870

Bureau of Investigation and Enforcement
Pennsylvania Public Utility Commission
Post Office Box 3265
Harrisburg, Pennsylvania 17105-3265

Dated: February 15, 2017

⁶ 52 Pa. Code § 5.431(b).

⁷ *Application of CMV Sewage Co, Inc.*, Docket No. A-230056F2002, Pgs. 10-11 (Order entered Dec. 23, 2008).