

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission,  
Bureau of Investigation and Enforcement

v.

Metropolitan Edison Company and  
North Heidelberg Sewer Company

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P-2017-2594688

**RECOMMENDED DECISION**

Before  
Elizabeth H. Barnes  
Administrative Law Judge

**INTRODUCTION**

This decision recommends the Ex Parte Emergency Order issued on March 22, 2017, by Chairman Gladys M. Brown, as ratified on April 6, 2017, remain in effect with some modifications.

**HISTORY OF THE PROCEEDING**

On March 21, 2017, the Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement (I&E or Petitioner) filed a Petition for Issuance of an Ex Parte Emergency Order against Metropolitan Edison Company (Met-Ed) and North Heidelberg Sewer Company (NHSC). The Petition averred that Met-Ed had begun termination procedures against NHSC due to non-payment of a \$157,000 arrearage for electric services rendered. Petitioner requested the Commission enjoin Met-Ed from terminating electric service to NHSC without prior Commission approval. Petitioner further requested that the Commission direct NHSC to cease withholding electric service payments to Met-Ed. Finally, Petitioner requested the

Commission direct NHSC to notify its customers that they will continue to receive wastewater services.

On March 22, 2017, Chairman Gladys M. Brown signed an Ex Parte Emergency Order (Ex Parte Order). The Ex Parte Order granted the Petition as modified to ensure continued wastewater service from NHSC to its customers, subject to ratification by the full Commission at the next Public Meeting on April 6, 2017. The Ex Parte Order directed that the Office of Administrative Law Judge (OALJ) schedule a hearing within ten days of the date of the Ex Parte Order. By notice dated March 24, 2017, this case was assigned to me and a hearing was scheduled for April 3, 2017. On March 28, 2017, OCA filed a petition to intervene and public statement seeking to represent the interests of NHSC and Met-Ed customers. On March 28, 2017, I received a letter from the Department of Environmental Protection indicating it had no current intention of intervening in the proceeding; however, it reserved a right to intervene at a later time.

A hearing was held on April 3, 2017. I&E was represented by Michael L. Swindler, Esquire, who presented one witness, John Van Zant, and no exhibits. Met-Ed was represented by Tori L. Giesler, Esquire, who presented two witnesses, Robin Delp and Brian Lowe, and 6 exhibits. NHSC was represented by Sean M. Cooper, Esquire, who presented one witness, Joseph Aichholz, Jr., and no exhibits. Office of Consumer Advocate (OCA) was represented by Christine Maloni Hoover, Esquire, who presented no witnesses or exhibits. Aqua Pennsylvania Wastewater, Inc. (Aqua) was represented by Thomas T. Niesen, Esquire, who presented no witnesses or exhibits. A 91 page transcript was filed on April 4, 2017. The Ex Parte Order was ratified by the full Commission on April 6, 2017. The issue of whether the Ex Parte Order, as ratified on April 6, 2017, should remain in effect is ripe for a decision.

### FINDINGS OF FACT

1. The Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement (I&E) is authorized under 66 Pa.C.S. §§ 308 and 701 as well as 52 Pa.Code §§ 1.8 and 3.2 to bring the instant Petition for Issuance of Ex Parte Emergency Order against

Respondents. *See Delegation of Prosecutory Authority to Bureaus with Enforcement Responsibilities*, Docket No. M-00940593 (Order entered September 2, 1994), as amended by Act 129 of 2008, 66 Pa.C.S. § 308.2(a)(11).

2. North Heidelberg Sewer Company (NHSC) is a wastewater company certificated by the Commission at Docket No. A-230009 with a principal place of business located at 231 East Second Street, P.O. Box 609, Bernville, PA 19506. N.T. 57, 73.

3. NHSC currently serves 273 residential customers and one commercial customer (a country club), in portions of North Heidelberg Township and Jefferson Township, Berks County, Pennsylvania since 1990. N.T. 57, 73.

4. The Office of Consumer Advocate (OCA) is authorized by Act 161 of the Pennsylvania General Assembly, 71 P.S. § 309-2, as enacted July 1, 1976, and 52 Pa. Code §5.72(b) to intervene in this matter and represent the interests of Pennsylvania consumers before the Pennsylvania Public Utility Commission. OCA Notice of Intervention and Public Statement.

5. Aqua Pennsylvania Wastewater, Inc. is a jurisdictional public utility providing residential and commercial wastewater service in the Commonwealth of Pennsylvania.

6. Metropolitan Edison Company (Met-Ed) is a jurisdictional electric distribution company that has been providing continuous electric service to NHSC since October 19, 1990. N.T. 11, 22; Met-Ed Exhibits 1-4.

7. On or about May 28, 2013, NHSC entered into a Settlement Agreement with OCA, I&E, and some customers to resolve all issues in the Rate Proceeding before the Commission at Docket No. R-2012-2330877. N.T. 11.

8. The Settlement Agreement was approved by Commission Order entered July 16, 2013. N.T. 11.

9. Paragraph 8 of the Commission's Order approving the Joint Petition for Settlement states as follows:

That North Heidelberg Sewer Company will provide the Office of Consumer Advocate with the terms of its repayment agreement with Metropolitan Edison Company to address the Company's approximately \$60,000 past-due balance within thirty days of the Company entering into the repayment agreement or the entry of the Commission Order approving this Joint Petition, whichever date is later.

10. To date, NHSC has neither entered into nor provided OCA with any terms of a repayment agreement with Met-Ed to address an arrearage of approximately \$60,000. N.T. 12.

11. NHSC has multiple electric service accounts with Met-Ed; however, the arrearage owed on NHSC's account number ending in 808 has increased in the past 4 years to \$160,217 as of the date of hearing. N.T. 22, 72; Met-Ed Exhibit 1.

12. This arrearage increase of approximately \$100,000 is due in part to late payment charges assessed in 2016 and 2017 of approximately \$25,000. N.T. 24, 87; Met-Ed Exhibits 2 and 4.

13. NHSC's customer base grew from 253 in 2013 to 274 at the time of the hearing, including 20 residential customers and one commercial customer, and the company's CEO has plans for developing 99 acres of undeveloped land to bring approximately 250 future customers to the system. N.T. 57-58, 61.

14. In 2013, the Commission approved NHSC's Tariff Wastewater – Pa. PUC No. 2, which increased NHSC's annual operating revenue by \$75,000 from July 17, 2013 – July 17, 2017. N.T. 62; Tariff Wastewater – Pa. PUC No. 2.

15. Since July 17, 2013, NHSC and will have collected \$75,000 in increased operating revenues by July 13, 2017. N.T. 47.

16. The \$75,000 revenue increase was approved in part to facilitate a payment arrangement between NHSC and Met-Ed for arrears NHSC owed Met-Ed in 2013 of approximately \$60,000 - \$70,000 at the time. *Pa. Pub. Util. Comm'n, et al. v. North Heidelberg Sewer Company*, R-2012-2330877, Recommended Decision dated June 11, 2013 at 14-15; N.T. 47.

17. With few exceptions, NHSC has only paid the Met-Ed and electric generation supplier monthly billed amounts for current usage each month since June, 2013. N.T. 49, 58-60, 67-69; Met-Ed Exhibit 2.

18. NHSC has a history of paying its current Met-Ed consumption charges relatively consistently on a monthly basis since June 27, 2013; however, during 2011, NHSC made only one payment on October 24, 2011 of \$1,599.46 that year and only three payments totaling \$4,008 for the year of 2012. N.T. 29, 60; Met-Ed Exhibits 2 and 3.

19. Since July 13, 2013, NHSC has not been paying the monthly late payment charges or significant portions of its arrearage on a monthly basis. Met-Ed Exhibits 3 and 4.

20. Met-Ed's Commission-approved Tariff Electric Pa. PUC No. 52 at p. 47 provides in pertinent part, "A Non-Residential Customer's overdue bill shall be subject to a late payment charge of two percent (2.0%) interest per month on the overdue balance of the bill. Interest charges shall be calculated by the Company on the overdue portions of the bill and shall not be charged against any sum that falls due during a current billing period."

21. NHSC has not specifically alleged that there are incorrect charges on NHSC's bills; however, Joseph Aichholz, Jr., Chief Executive Officer (CEO) of NHSC testified that NHSC is being charged late fees upon late fees month after month that NHSC cannot pay. N.T. 56.

22. Because of a poor payment history since 2010, NHSC has accrued a large arrearage which will continue to grow if the company merely pays the current Met-Ed and

electric generation supplier (EGS) consumption charges each month and fails to pay any amount towards late payment charges or the outstanding arrearage balance. N.T. 30, 67; Met-Ed Exhibits 2 and 4.

23. Mr. Aichholz is 83 years old, and claims he sometimes pays NHSC's current consumption charges by borrowing from his personal Social Security income. N.T. 72.

24. NHSC employs three people including Joseph Aichholz, Jr., his son, and a part-time accountant. N.T. 62-63.

25. Mr. Aichholz testified that he "just needs more customers to make it work" and he would like to continue operating and paying the way he is currently. N.T. 63.

26. NHSC sustained damage to its wastewater pumps in 2010 due to a surge in electrical voltage; however, NHSC never filed a complaint at the Commission against Met-Ed regarding the incident. N.T. 64.

27. NHSC has not filed for a rate increase since 2012, and there is a stay-out provision in Ordering Paragraph No. 4 of the Commission's Order entered on July 16, 2013, at R-2012-2330877 *et seq.*, which precludes NHSC from filing a rate increase until after July 13, 2017, unless it seeks extraordinary rate relief pursuant to 66 Pa. C.S. § 1308(e). N.T. 65.

28. Service termination notices began to be regularly and frequently issued beginning on May 20, 2010. N.T. 31-32; Met-Ed Exhibit 5.

29. Met-Ed never terminated service to NHSC because of environmental and customer reasons and because of promises to pay and partial payments made by NHSC. N.T. 34.

30. Some late charges were reversed in 2012. N.T. 33-36.

31. Absent an injunction by a governmental agency such as the Public Utility Commission or the Department of Environmental Protection, Met-Ed has a legal right to terminate service to NHSC due to non-payment. N.T. 12; Met-Ed Exhibits 1-6.

32. A termination of electric service to NHSC would likely result in the wastewater processing equipment to cease operating, which in turn would foreseeably cause untreated sewage to flow into the North Kell Creek and Blue Marsh Lake in Berks County as well as back-up sewage into 273 customers' homes and one commercial customer's country club. N.T. 13-16, 54-55. Met-Ed Exhibit 5.

33. The electric service provided by Met-Ed serves, among other things, NHSC's wastewater (sewage) treatment plant and is critical for the proper operation of this wastewater treatment facility. N.T. 13-15, 54.

34. The termination of electric service to NHSC's account ending in 808 could pose a serious and immediate health and safety hazard to NHSC's customers because that is the account associated with electricity operating the pumps and processing equipment. N.T. 13-16, 54-55; Met-Ed Exhibit 5 at 5-6.

35. Any sustained loss of electric service has the potential to adversely impact public drinking water supplies downstream of the NHSC treatment plant discharge, critical to the well-being of the public-at-large. N.T. 13-16, 54-55; Met-Ed Exhibit 5 at 5-6.

36. By failing to pay for electric service rendered to it by Met-Ed, NHSC risks termination of its electric service, thereby jeopardizing the environment, the health of its NHSC's customers, and the safety of the public at large. N.T. 13-16, 54-55; Met-Ed Exhibit 5 at 5-6.

37. There have been 32 termination notices regarding NHSC's one account issued by Met-Ed since 2013. Met-Ed Exhibit 5 and 6 at 5-6.

## BACKGROUND

By way of background, on October 24, 2012, North Heidelberg Sewer Company (NHSC) filed with the Pennsylvania Public Utility Commission (Commission) Tariff Wastewater-Pa. P.U.C. No. 2 to become effective January 1, 2013, containing proposed changes in rates, rules and regulations calculated to produce \$106,139 (77.6%) in additional annual revenues based on a test year ended June 30, 2012. A residential customer using 4,144 gallons of water per month would see an increase in their bill from \$43.30 to \$77.64. NHSC in 2013 served approximately 253 customers in portions of North Heidelberg Township and Jefferson Township in Berks County, Pennsylvania. *Pa. Pub. Util. Comm'n, et al. v. North Heidelberg Sewer Company*, R-2012-2330877, (Order entered July 16, 2013). Since June, 2013, the number of customers has increased to 274, including one commercial customer, a country club business. N.T. 72.

A Joint Petition for Settlement in that case was adopted and its pertinent provisions are as follows.

Upon the Commission's approval of this Settlement, North Heidelberg will be permitted to charge the rates for sewer service set forth in the proposed Tariff attached hereto as Appendix A (hereafter, the Settlement Rates). The Settlement Rates are designed to produce additional annual operating revenue of \$75,000, or 54.8%, as shown on the Proof of Revenues attached hereto as Appendix B. North Heidelberg agrees that the rate increase will be phased in over the next four years as follows: \$30,000 the first year, \$18,750 the next year, and \$13,125 each of the next two years, which equates to an annual revenue increase of approximately 40% the first year, 25% the second year, and 17.5% the next two years. The tariff set forth in Appendix A complies with the terms of the Settlement.

\* \* \*

North Heidelberg will not file for another general sewer rate increase under Section 1308(d) of the Public Utility Code prior to four years after the entry date of the Commission Order approving this Joint Petition for Settlement. This stay-out provision has no application to state tax adjustment surcharge filings or other filings required by the PUC. This provision also shall not prohibit the



Company from filing for extraordinary rate relief pursuant to Section 1308(e) of the Public Utility Code.

\* \* \*

North Heidelberg agrees to provide the OCA with a copy of a residential customer bill within thirty days of the beginning of each phase in.

North Heidelberg agrees to provide the OCA with the terms of its repayment agreement with Met-Ed to address North Heidelberg's approximately \$60,000 past-due balance, in writing within 30 days of the Company entering into the repayment agreement or the entry of the Commission Order approving this Settlement, whichever date is later.

The Settlement Rates set forth in Appendix A reflect the Joint Petitioners' agreement with regard to rate structure, rate design and the distribution of the increase in revenues in this case as follows:

The average monthly cost of sewer service to residential customers is currently \$43.30, based on an average usage of 4,144 gallons. As originally proposed by the Company, an average usage residential customer would have received an increase of \$34.34, or a monthly bill of \$77.64. Under this Joint Petition, the monthly cost to an average residential customer would increase by \$25.76 over the next four years, or by 59.49% to \$69.06.

*Id.* Joint Petition at 3-5.

The ALJ found the Joint Petition to be in the public interest because it would assist OCA in ensuring that NHSC meets a significant financial obligation to Met-Ed and ensure that NHSC continues to receive electric service and thereby continues to be able to provide utility service. Specifically, ALJ Cheskis stated:

Without electric service, NHSC will not be able to provide any wastewater service to its own customers. Therefore, it is important and in the public interest that NHSC satisfy this debt with Met-Ed. By requiring that NHSC inform the OCA of the terms of the repayment agreement, the sewer service received by NHSC's customers is protected and this provision of the Joint Petition is in the public interest.

*Id.* Recommended Decision at 14-15, as adopted by Commission Order entered on July 16, 2013.

## DISCUSSION

The Commission has jurisdiction over this matter pursuant to 66 Pa.C.S. § 501, which provides in pertinent part: “In addition to any powers expressly enumerated in this part, the commission shall have full power and authority, and it shall be its duty to enforce, execute and carry out, by its regulations, orders, or otherwise, all and singular, the provisions of this part, and the full intent thereof . . .” (emphasis added). Section 1501 of the Public Utility Code states that every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities and that such service shall be reasonably continuous and without unreasonable interruptions or delay. 66 Pa.C.S. § 1501.

The issue before the Commission is whether the Ex Parte Order as ratified by Ratification Order entered on April 6, 2017, should remain in effect, be modified or rescinded. Also at issue is whether I&E carried its burden of proving by a preponderance of evidence that: 1) its right to relief was clear; 2) the need for relief is immediate; 3) the injury would be irreparable if relief is not granted; and 4) the relief requested is not injurious to the public interest. 52 Pa. Code §§ 3.2. It is I&E’s burden to prove the injunctive relief of precluding Met-Ed from terminating electric service to NHSC for non-payment unless authorized by the Commission is warranted. The purpose of granting injunctive relief is “to maintain things as they are until the rights of the parties can be considered and determined after a full hearing.” *Pa. Publ. Util. Comm’n v. Israel*, 356 Pa. 400, 52 A.2d 317, 321 (1947).

Emergency relief is governed by Chapter 3 of Title 52 of the Pennsylvania Code. An emergency is:

A situation which presents a clear and present danger to life or property or which is uncontested and requires action prior to the next scheduled public meeting.

52 Pa. Code § 3.1.

The burden of proof must be carried by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. PA Public Utility Comm’n*, 578 A.2d 600 (Pa. Cmwlth. Ct.1990), *alloc. den.*, 529 Pa. 654, 602 A.2d 863 (1992). That is, by presenting evidence more convincing, by even the

smallest amount, than that presented by the other party. *Se-Ling Hosiery v. Marquies*, 364 Pa. 45, 70 A.2d 854 (1950).

Additionally, any finding of fact necessary to support the Commission's adjudication must be based upon substantial evidence. *Mill v. Comm'w., Pa. Pub. Util. Comm'n*, 447 A.2d 1100 (Pa. Cmwlth. 1982); *Edan Transportation Corp. v. Pa. Pub. Util. Comm'n*, 623 A.2d 6 (Pa. Cmwlth. 1993), 2 Pa.C.S. §704. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk and Western Ry. v. Pa. Pub. Util. Comm'n*, 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemployment Compensation Bd. of Review*, 166 A.2d 96 (Pa. Super.1960); *Murphy v. Commonwealth, Dept. of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa. Cmwlth.1984).

In order to find that I&E's right to relief is clear, it is not necessary to determine the merits of the controversy, only which in addition to satisfying the other criteria, the Petition raises substantial legal questions. *T.W. Phillips Gas and Oil v. Peoples Natural Gas*, 492 A.2d 776, (Pa. Cmwlth. 1985).

# **1. Whether the Petitioner's Right to Relief is Clear**

I am persuaded to find I&E carried its burden of proving its right to relief is clear by raising substantial legal questions regarding NHSC's decisions to withhold payments for electric service. There is a question regarding whether NHSC is in compliance with 66 Pa. C.S. §1501, which requires it to maintain reasonable and safe service to its customers and the public. It is not necessary to determine the merits of the controversy or dispute in order to find that a petitioner has satisfied the first prong of Section 3.2(b) of the Commission's regulations, 52 Pa. Code 3.2(b), rather, the Commission has found that if a petitioner raises "substantial legal questions," then a petitioner has established that its right to relief is clear. *Core Communications, Inc. v. Verizon Pennsylvania, Inc. and Verizon North LLC*, Docket No. P-2011-2253650 (Order entered September 23, 2011); *Level 3 Communications, LLC v. Marianna & Scenery Hill Telephone Company*, Docket No. C-20028114 (Order entered August 8, 2002); *T.W. Phillips Gas and Oil Company v. The Peoples Natural Gas Company*, 492 A.2d 776 (Pa. Cmwlth. 1985).

I am persuaded by the testimony of I&E Witness John Van Zant and Met-Ed's Witnesses Robin Delp and Brian Lowe that despite a Commission directive to provide OCA with the terms of its repayment agreement with Met-Ed to address NHSC's \$60,000 arrearage, no repayment agreement ever occurred due to a refusal on the part of NHSC to enter into one. NHSC's refusal to pay for electric service rendered by Met-Ed, and Met-Ed's clear and imminent threat of termination of electric service to NHSC leads me to conclude that I&E's right to the following relief is clear: 1) that Met-Ed shall immediately cease and desist from terminating electric service to NHSC without prior authorization from the Commission; 2) that NHSC shall ensure its customers by way of written correspondence, that said NHSC customers will continue to be provided safe, adequate and reasonable wastewater services; and 3) that NHSC shall pay its current and past due amounts due and owing to Met-Ed as deemed appropriate by the Commission.

Moreover, should NHSC fail to abide by the terms of the Ex Parte Order, including but not limited to: 1) notifying its customers; 2) filing an affidavit regarding said notice; and 3) making payments of current and past due amounts to Met-Ed as set forth therein, the Commission has the authority to utilize the power granted to it by the Legislature of this Commonwealth regarding the acquisition of small water or sewer entities by a capable public utility as set forth at Section 529 of the Public Utility Code, 66 Pa.C.S. § 529.

## **2. Whether the need for relief is immediate**

The second prong is to determine whether the need for relief is immediate. The Petitioner has presented sufficient evidence regarding the nexus between the poor payment history of NHSC, the lack of payment arrangement between the two utility Respondents, the numerous termination notices issued by Metropolitan Edison, and a growing arrearage. I am persuaded by I&E Witness John Van Zant's testimony that catastrophic results could occur if the NHSC sewage treatment plant fails to operate due to lack of electric service. N.T. 13-14. It is foreseeable that a sustained electric outage to this account will cause wastewater to back up into customers' homes and a country club business and untreated wastewater will probably flow into a neighboring creek and lake. The need for relief is immediate. This prong is met.

**3. Whether the injury would be irreparable if relief is not granted.**

Economic detriment alone does not constitute the existence of an emergency for purposes of issuing a temporary interim emergency order. *Peoples Natural Gas v. Pennsylvania Pub. Util. Comm'n*, 555 A.2d 288 (Pa. Cmwlt. 1989). However, in addition to injury, monetary losses can satisfy the irreparable injury requirement of 52 Pa. Code § 3.7(a). *West Penn Power Co. v. Pa. Publ. Util. Comm'n*, 615 A.2d 951 (Pa. Cmwlt. Ct. 1992), alloc. denied 637 A.2d 291 (Pa. Supreme Ct. 1993), U.S. Cert. Den. 513 U.S. 925 (1994).

The termination of electric service to NHSC's account ending in 808 could cause irreparable injury as it poses a serious and immediate health and safety hazard to NHSC's customers in addition to economic detriment. Said account provides electric service to the pumps and processing equipment. N.T. 13-16, 54-55; Met-Ed Exhibit 5 at 5-6. Any sustained outage has the potential to adversely impact public drinking water supplies downstream of the NHSC treatment plant discharge, critical to the well-being of the public-at-large. N.T. 13-16, 54-55; Met-Ed Exhibit 5 at 5-6. Such an outage could potentially cause a back up of sewage in 273 customers' residential homes and in one country club commercial business. A back-up of sewage into these homes and country club could cause property damage and economic detriment to those customers. Thus, I find the third prong is met.

**4. Whether the relief requested is not injurious to the public interest.**

The relief requested does not appear to be injurious to the public interest as it requires payments be made by NHSC and prevents termination of service. The relief requested is beneficial to the public. N.T. 15.

Payment Dispute between NHSC and Met-Ed

Although I&E witness John Van Zant testified that there appears to be a payment dispute between Met-Ed and NHSC, there is no pending formal complaint regarding disputed charges currently at the Commission. N.T. 12. Further, although NHSC may have sustained damage to its wastewater pumps in 2010 due to a surge in electrical voltage, NHSC never filed a

formal complaint at the Commission against Met-Ed regarding the incident. N.T. 64; Met-Ed Exhibit 6.

No evidence was presented as to whether a cause of action may have been filed in a court of common pleas by NHSC against Met-Ed for compensatory damages. However, to the extent that NHSC may now be seeking a reduction in its arrearage because it believes it is entitled to compensatory damages, this Commission lacks jurisdiction to award compensatory damages. *See Feingold v. Bell of Pennsylvania*, 477 Pa. 1, 383 A.2d 791 (1977). 52 Pa. Code §5.101(a)(4). Although the Commission has general jurisdiction over the rates and services of public utilities operating in Pennsylvania, it has only the powers and authority granted to it by the General Assembly in the Public Utility Code which does not grant the Commission authority to award damages. *See In Re: Melograne*, 812 A.2d 1164 (Pa. 2002); *Terminato v. Pa. National Insurance Company*, 645 A. 2d 1287 (Pa. 1994).

I find Mr. Aichholtz's testimony to be credible that NHSC's pumps were damaged by a surge in electric voltage in 2010; however, NHSC is not permitted by law to withhold payment following the damage in 2010 for current undisputed portions of its bills. NHSC cannot withhold as much in payments as it believes it sustained in compensatory damages due to some action or omission on the part of Met-Ed. *Third Avenue Realty Limited Partners v. Pennsylvania-American Water Company*, C-2010-2167286, (Opinion and Order entered August 16, 2010); citing *LTV Steel Company, Inc. v. Duquesne Light Company*, C-850288; C-850289 (Final Order entered January 23, 1986).

NHSC is not entitled to implementing a self-help mechanism to recover either damages or late payment charges, which it may believe it has been overcharged and for which it may seek a refund. The recourse for all ratepayers to recover past alleged overcharges is provided by Section 1312 of the Public Utility Code, 66 Pa. C.S. § 1312, wherein the Commission has the power and authority to order refunds only as to excessive charges paid within four years preceding the filing of a complaint.

### Late Payment Charges

A public utility's Commission-approved tariff is prima facie reasonable, has the full force of law, and is binding on the utility and customer. 66 Pa. C.S. § 316; *Kossmann v. Pa. Pub. Util. Comm'n*, 694 A.2d 1147 (Pa.Cmwlth. 1997). Mr. Aichholz testified NHSC is being charged late fees upon late fees that NHSC cannot afford to pay. N.T. 56. To the extent that Respondent NHSC is raising a defense that there are incorrect charges on its account, as there is an existing, Commission-approved tariff, the burden falls upon the customer to prove that the charge or rule is no longer reasonable or that the application of the existing tariff at issue is applied unreasonably. *Brockway Glass Co. v. Pa. Pub. Util. Comm'n*, 437 A.2d 1067 (Pa.Cmwlth. 1981).

Since Met-Ed provided bills in Met-Ed Exhibit 4, and an account summary in Met-Ed Exhibit 2, a review of these exhibits leads me to believe Met-Ed is correctly applying and compounding its Late Payment Charges (LPCs) in accordance with its Commission-approved tariff, which provides in pertinent part as follows.

A Non-Residential Customer's overdue bill shall be subject to a late payment charge of two percent (2.0%) interest per month on the overdue balance of the bill. Interest charges shall be calculated by the Company on the overdue portions of the bill and shall not be charged against any sum that falls due during a current billing period.

Met-Ed Tariff Electric Pa. PUC No. 52, at page 47.

### Ordering Paragraph No. 6 of the Ex Parte Emergency Order

Ordering Paragraph No. 6 directs that North Heidelberg Sewer Company shall pay all current monthly bills issued to it by Metropolitan Edison Company on or before the due date specified on the bill unless the Commission or a court of competent jurisdiction directs otherwise.

During closing arguments at the April 3, 2017 hearing, I&E requested the Ex Parte Order remain in effect unmodified, although I&E expected the Ex Parte Order to suggest

some kind of payment arrangement of current and past due charges. N.T. 78-79, 88. I&E did not advocate a specific payment amount. I&E deferred to Met-Ed and NHSC regarding what is meant by “current monthly bills” in Ordering Paragraph No. 6 of the Ex Parte Order. N.T. 78-79.

Met-Ed argued “current bills” includes: Met-Ed consumption charge, miscellaneous charge and late payment charges as well as all current late payment charges that have been assessed during the month of the billing as well as charges. N.T. 80. Met-Ed contends it is permitted under its Commission-approved tariff to charge those late payment charges and does so for each and every one of its customers, including residential customers who typically are afforded more protections than a customer in a commercial class would be. N.T. 80-81.

For that reason, absent an aggressive payback arrangement, Met-Ed is not recommending late payment charges be withheld from the account. N.T. 81. Met-Ed requests the Ex Parte Order be modified such that it is clarified to mean late payment charges are included in the term “current bills” and such that the order should address the outstanding arrearage which exceeds \$160,000 as of the date of the hearing. N.T. 82. Alternatively, Met-Ed is amenable to entering into a payment arrangement with NHSC and offered to refund/reverse all late fee charges assessed during 2016 and 2017 as NHSC was making partial monthly payments during that time period. In exchange for withholding late fees assessed going forward on the remaining outstanding arrearage less waived late fees, Met-Ed requested NHSC be directed to pay 50 percent up front, then the remaining 50 percent over a period of 24 months at a rate of 1/24<sup>th</sup> per month in addition to current monthly bills with this docket remaining open so the parties may monitor in the event of non-payment. N.T. 82-89. Met-Ed proposed to reduce the arrearage; however, given NHSC’s refusal to enter into a payment arrangement in 2013, Met-Ed did not request the Commission direct the parties to negotiate a payment arrangement. N.T. 81-83. Rather, Met-Ed requests the Commission direct reduction of the arrearage as part of its Ex Parte Order. N.T. 88.

NHSC argued the parties should be directed to reach an agreement on the late charges and the remaining balance to split out separately in the order the current charges. NHSC



is prepared to continue making payments for consumption on a monthly basis as it has been doing excluding late fees, and requests the parties be directed to reach an agreement regarding the late payment charges and arrearage on the account. N.T. 84-87. However, NHSC did not have a specific proposal with regard to the late fees or arrearage. N.T. 85-87. Although the parties were given an opportunity to recess in order to reach a payment arrangement at the hearing, this did not occur. N.T. 88. NHSC did not outright reject Met-Ed's proposal; however, it was considered. N.T. 88.

OCA and Aqua Pennsylvania, Inc. took no position and offered no argument at the close of the hearing.

#### Ordering Paragraph Nos. 4 and 5 of the Ex Parte Emergency Order

Ordering Paragraph No. 4 of the Ex Parte Order directs NHSC to provide written notice to all of its customers informing them that they are under no threat of losing wastewater service as a result of electric termination. Specific language is directed. Ordering Paragraph No. 5 directs NHSC to file with the Commission at P-2017-2594688 an affidavit that it has complied with Ordering Paragraph No. 4 within five days of compliance as well as a copy of the customer notice. To date, NHSC has not filed any such affidavit or notice as directed. NHSC is not compliant with Ordering Paragraph No. 5 of the Ex Parte Order.

#### Section 529 Relief

Section 529 of the Public Utility Code, 66 Pa.C.S. § 529, creates a process whereby the Commission can direct a "capable public utility" with 4,000 or more customer connections to acquire a "small sewer utility" with 1,200 or fewer customer connections. The Commission has exercised its authority under Section 529 of the Code to direct a "capable public utility" to acquire a "small sewer utility." *See also, Investigation Instituted into Whether the Commission Should Order a Capable Public Utility to Acquire Clean Treatment Sewage*, Docket No. I-2009-2109324.

NHSC has less than 1,200 customers. As part of its request for relief, I&E advocates for the institution of a Section 529 proceeding forcing the acquisition of NHSC to a capable public utility in the event that NHSC fails to pay its current monthly charges and its past due arrearage. There is substantial evidence that instead of entering into a payment arrangement, NHSC's management did consciously and intentionally not pay the bills in full on this one account, which was servicing equipment. If that equipment fails due to lack of electricity, the customers would not receive reasonable and safe wastewater service. This pattern of non-payment extends over a number of years, at least over the past 4 years. Met-Ed Exhibits 3 and 4. Additionally, NHSC has not complied with Ordering Paragraph Nos. 4 and 5 of the Ex Parte Order directing NHSC to notify its customers with specific language regarding the continuation of service, and provide the Commission with an affidavit attesting that its customers have been notified. NHSC is non-compliant with the Ex Parte Order. For all of these reasons, there is *prima facie* evidence that NHSC cannot reasonably be expected to furnish and maintain adequate, efficient, safe and reasonable service and facilities to its customers in the future. 66 Pa.C.S. § 529(a)(3). Therefore, in the event that NHSC does not comply with the Commission's final order in this matter, the Commission may elect to initiate a Section 529 proceeding.

### Recommendation

I am persuaded to agree with Met-Ed that the Ex Parte Order as ratified appears to be a temporary fix to a systemic problem of nonpayment as it stays termination indefinitely as long as NHSC pays "all current monthly bills issued to it by Metropolitan Edison Company." Ex Parte Order, Ordering Paragraph No. 6. I interpret the phrase "all current monthly bills" to mean only the monthly Met-Ed and EGS consumption charges exclusive of nearly an equal amount of monthly late payment charges. Additionally, as there is no ordering paragraph directing NHSC to also pay specific amounts towards reducing the \$160,000 arrearage, the arrearage will continue to grow at an alarming rate as 2% interest late payment charges are being compounded per Met-Ed's tariff. Finding of Fact No. 20.

Met-Ed proposed and offered a payment arrangement to NHSC in exchange for a 50% deposit on the outstanding balance, it would be willing to waive all late payment charges assessed in 2016 and 2017, which counsel estimated to exceed \$24,000. N.T. 87. This assertion

is supported by the late payment charges depicted in Met-Ed Exhibit 2. This appears to be a reasonable offer to a commercial customer. There was no evidence offered to suggest NHSC had not been implementing its graduated tariffed rate increases since July, 2013; therefore, I presume the company has collected to date at least \$68,000 of the allowed \$75,000 afforded by its rate case settlement in increased additional operating revenues, which were intended for payment of the arrearage. N.T. 66 - 68. Presumably, by July 13, 2017, the full \$75,000 will have been collected. There is no evidence to suggest NHSC's ratepayers have not been paying their bills. N.T. 66.

The likelihood of success in directing Met-Ed and NHSC to enter into a mutually agreeable payment arrangement seems small given that numerous prior attempts to encourage NHSC to enter into a payment arrangement have failed up to this point. As it stands, there appears to be a breakdown in the relationship between Met-Ed and NHSC and Met-Ed considers the relationship to be "unsustainable." N.T. 80. Therefore, I do not recommend the Commission modify its Ex Parte Order to direct the parties to negotiate a payment arrangement. Rather, I believe it is more appropriate to direct payment amounts at this juncture designed to reduce the arrearage since Met-Ed appears to be willing to waive, refund or reverse a large sum of late payment charges accrued during 2016 and 2017 in an effort to collect a lump-sum payment up front. Since NHSC has received at least \$68,000 since 2013 in additional revenues, the company ought to be able to pay an amount of \$67,500 within 60 days of the date of entry of a Commission order.

Met-Ed made an offer, which was neither accepted nor expressly rejected by NHSC at the hearing, and one which I think is reasonable enough to recommend the Commission adopt as a directive to the Respondents as it concerns the safety, adequacy, efficiency and reasonableness of service provided by NHSC to not only NHSC's customers, presumably also Met-Ed's customers and the public at large.

Thus, I am persuaded to recommend the Commission direct Met-Ed to refund/reverse \$25,000 in late payment charges from the current arrearage of \$160,000; thus, reducing the outstanding arrearage balance to \$135,000, conditioned upon NHSC paying 50% of that remaining balance, \$67,500, within 60 days of the date of final entry of a Commission order.

At the same time Metropolitan Edison receives said payment, it should reverse/refund to NHSC \$25,000 in late fees and withhold charging late payment charges on the remaining outstanding balance of \$67,500 as long as NHSC continues to pay its current monthly EDC and EGS billing amounts plus 1/24<sup>th</sup> the remainder of the outstanding balance, or \$2,812.50. Recognizing NHSC's poor payment history, I recommend that in the event NHSC fails to comply with this directive that the Commission initiates a Section 529 proceeding under a separate docket. 66 Pa. C.S. § 529. In the meantime, I see no reason to delay an investigation by the Bureau of Audits, Bureau of Technical Utility Services, and Law Bureau into the business practices of NHSC so that the Commission could get a clearer picture of the circumstances surrounding NHSC's historical failure to timely pay its electric bills.

Although Mr. Aichholz testified he is operating the wastewater company on a shoe-string budget and occasionally uses his Social Security income to make NHSC's payments for electric service, there was no physical evidence offered to support his assertion. This is a bald assertion, which does not constitute evidence. *Pennsylvania Bureau of Corrections v. City of Pittsburgh*, 532 A.2d. 12 (Pa. 1987). There is little explanation offered as to why the payment history in 2011 going forward is so poor. Although there is a correlation between the timing of an outage and equipment failure and subsequent lack of timely payments, it is unclear whether payments were being withheld due to self-help reasons, or because NHSC suddenly and unexpectedly incurred a large cost in repairing or replacing the broken pumps, and used its revenues to pay for that instead of electric service.

Neither was there any satisfactory explanation as to why the increased revenues from customers after July 17, 2013 were not applied to a payment arrangement with Met-Ed envisioned by the Commission in its July 13, 2013 Order. These assertions on the part of the CEO that he is having a difficult time paying the electric service bills are credible; however, some of the financial distress appears to be due to managerial decisions to only pay current monthly charges until more unbuilt homes are eventually added to the system. It was unclear to me from the testimony whether Mr. Aichholz, NHSC, or another business entity owned by Mr. Aichholz owns the land that he intends to develop. For all of these above-mentioned reasons, I recommend modifications to the Ex Parte Order.

## CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and subject matter of this proceeding. 66 Pa. C.S. §§ 501 and 701.

2. Petitioner carries the burden of showing by a preponderance of evidence that (1) the petitioners' right to relief is clear; (2) the need for relief is immediate; (3) the injury would be irreparable if relief is not granted; and (4) the relief requested is not injurious to the public interest. 52 Pa. Code § 3.2. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600 (Pa. Cmwlth. 1990), alloc. den., 602 A.2d 863 (Pa. 1992). That is, by presenting evidence more convincing, by even the smallest amount, than that presented by the other party. *Se-Ling Hosiery v. Marquilies*, 70 A.2d 854 (Pa. 1950).

3. In order to find that joint petitioners' right to relief is clear, it is not necessary to determine the merits of the controversy, only that in addition to satisfying the other criteria, the Petition raises substantial legal questions. *T.W. Phillips Gas and Oil v. Peoples Natural Gas*, 492 A.2d 776 (Pa. Cmwlth. 1985).

4. Additionally, any finding of fact necessary to support the Commission's adjudication must be based upon substantial evidence. *Mill v. Comm'w., Pa. Pub. Util. Comm'n*, 447 A.2d 1100 (Pa. Cmwlth. 1982); *Edan Transportation Corp. v. Pa. Pub. Util. Comm'n*, 623 A.2d 6 (Pa. Cmwlth. 1993), 2 Pa.C.S. §704.

5. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk and Western Ry. v. PA Public Utility Comm'n*, 413 A.2d 1037 (Pa. 1980); *Erie Resistor Corp. v. Unemployment Compensation Bd. of Review*, 166 A.2d 96 (Pa. Super. 1960); *Murphy v. Commonwealth, Dep't. of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa. Cmwlth. 1984).

6. Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be

necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. . . . 66 Pa. C.S. § 1501.

7. The purpose of granting injunctive relief is “to maintain things as they are until the rights of the parties can be considered and determined after a full hearing.” *Pa. Pub. Util. Comm’n v. Israel*, 52 A.2d 317, 321 (Pa. 1947).

8. Petitioner’s right to emergency relief is clear as the pending termination of electric service to NHSC would impair NHSC’s ability to furnish and maintain adequate, efficient, safe and reasonable service that is reasonably continuous and without unreasonable interruptions or delay pursuant to Section 1501 of the Public Utility Code. 66 Pa. C.S. § 1501; 52 Pa. Code § 3.2.

9. The need for I&E’s relief requested is immediate. 52 Pa. Code § 3.2.

10. The injury would be irreparable if relief is not granted. 52 Pa. Code § 3.2.

11. The relief requested is not injurious to the public interest. 52 Pa. Code §3.2.

### ORDER

THEREFORE,

IT IS RECOMMENDED:

1. That the Ex Parte Emergency Order signed by Chairman Gladys M. Brown on March 22, 2017 and ratified by the Commission at its public meeting on April 6, 2017, be amended as provided in the Ordering paragraphs below.

2. That Metropolitan Edison Company is enjoined from terminating electric service to North Heidelberg Sewer Company without prior authorization from the Pennsylvania Public Utility Commission.

3. That North Heidelberg Sewer Company is directed to pay a lump-sum amount of \$67,500 in arrearage owed to Metropolitan Edison Company within sixty (60) days of the date of entry of a final Commission Order at Docket No. P-2017-2594688.

4. That upon receipt of \$67,500, Metropolitan Edison Company is directed to withhold assessing late payment charges on the remaining arrearage of North Heidelberg Sewer Company's account going forward, and to reverse/refund \$25,000 late payment charges out of the current outstanding arrearage balance of approximately \$160,000, as long as North Heidelberg Sewer Company continues to pay its current monthly EDC and EGS bills plus \$2,812.50 each month towards arrearage until the remaining outstanding balance of \$67,500 is paid in full over a two-year period.

5. That in the event North Heidelberg Sewer Company fails to make timely payments as directed in Ordering Paragraphs 3 and 4, Metropolitan Edison Company shall notify the Commission, the Director of the Commission's Bureau of Investigation and Enforcement, the Office of Consumer Advocate, the Office of Small Business Advocate, and Aqua Pennsylvania Wastewater, Inc. within thirty (30) days of the missed deadline that such failure has occurred.

6. That in the event a Notice of North Heidelberg Sewer Company's failure to pay is received by the Commission, a separate proceeding shall be initiated pursuant to 66 Pa. C.S. § 529 (relating to directing a competent utility to operate or acquire a small sewer utility that has jeopardized public safety by failing to provide reasonable and adequate service).

7. That in the event that no affidavit or notice of compliance with Ordering Paragraph Nos. 4 and 5 of the Ex Parte Emergency Order is filed at Docket No. P-2017-2594688 within five (5) days from date of entry of a further Commission Order, a separate proceeding shall be initiated pursuant to 66 Pa. C.S. § 529 (relating to directing a competent utility to operate

or acquire a small sewer utility that has jeopardized public safety by failing to provide reasonable and adequate service).

8. That North Heidelberg Sewer Company is precluded from filing another general sewer rate increase under Section 1308(d) of the Public Utility Code until July 13, 2017, except for filings pertaining to the state tax adjustment surcharge, other filings required by the Commission or filings seeking extraordinary rate relief pursuant to Section 1308(e).

9. That the Bureau of Audits, Bureau of Technical Utility Services and Bureau of Investigation shall conduct an expedited investigation into the continued viability of North Heidelberg Sewer Company as a going concern and its ability to provide safe and reliable service at reasonable rates.

10. That in all other respects, the Ex Parte Emergency Order dated March 22, 2017, as ratified by Ratification Order entered on April 6, 2017, remains in full force and effect.

11. That the Secretary shall serve a copy of this Order on the Office of Small Business Advocate, the Department of Environmental Protection, Bureau of Audits, Bureau of Technical Utility Services, and Bureau of Investigation and Enforcement.

Date: April 11, 2017

/s/  
Elizabeth H. Barnes  
Administrative Law Judge