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VIA E-FILING

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

**Re: Pennsylvania Public Utility Commission, Bureau of Investigation
and Enforcement v. Metropolitan Edison Company and North
Heidelberg Sewer Company; Docket No. P-2017-2594688**

Dear Secretary Chiavetta:

Attached please find the Reply Brief on Behalf of Metropolitan Edison Company in the above-referenced matter. This document has been served on the all parties as shown in the Certificate of Service. Please timestamp and return one copy of the filing to me in the self-addressed stamped envelope provided.

Please contact me if you have any questions.

Very truly yours,

Tori L. Giesler

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Enclosures

c: As Per Certificate of Service

**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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Docket No. P-2017-2594688

**REPLY BRIEF
ON BEHALF OF
METROPOLITAN EDISON COMPANY**

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Dated: August 24, 2017

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I. INTRODUCTION

Metropolitan Edison Company (“Met-Ed”) submits this Reply Brief in response to North Heidelberg Sewer Company’s (“NHSC”) Main Brief relating to the issue of whether a payment arrangement of any kind should be directed by the Pennsylvania Public Utility Commission (“Commission”) associated with the significant arrearage owed by NHSC to Met-Ed tied to electric service previously rendered to NHSC and, if so, what the terms of any such arrangement should be. NHSC contends that the public interest and the interests of parties to this proceeding would be best served by the Commission directing a payment arrangement that deviates from Met-Ed policies and which account for NHSC’s financial situation. NHSC also argues that the Commission should direct NHSC to cooperate with all Commission orders and requests within a specific period of time in order to address concerns raised by the parties to this proceeding.¹

The principal issues at this stage of this proceeding are related to payment of the arrearage owed to Met-Ed, including terms such as duration, initial lump sum payments, and application of late payment charges (“LPCs”), as well as the present financial condition of NHSC. Specifically, those portions of the Commission’s May 4, 2017 Opinion and Order, which directed a payment plan designed to address the arrearage at issue (“May 4 Order”), were to be reviewed through this proceeding and are at issue for revision before the Commission.

NHSC is the only party contesting the payment terms established by the May 4 Order. To a very large extent, the arguments advanced by NHSC were fully addressed in Met-Ed’s Main Brief, and an extensive reanalysis is, therefore, not necessary. Consequently, this Reply Brief will address the principal errors in legal conclusion and omissions in NHSC’s Main Brief, with references to the expanded discussion in the appropriate portions of Met-Ed’s Main Brief.

¹ Other parties to this proceeding include the Commission’s Bureau of Investigation and Enforcement (“BIE”), the Office of Consumer Advocate (“OCA”), and Aqua Pennsylvania Wastewater, Inc. (“Aqua”).

II. ARGUMENT

NHSC, who even admits as much, is not legally entitled to the grant of any payment arrangement of its outstanding arrearage in this or any other proceeding under the law in Pennsylvania. Nonetheless, Met-Ed previously offered, and continues to offer, an arrangement which matches that which was outlined and directed upon NHSC in the Commission's May 4 Order. This directed arrangement was the product of an offer made by Met-Ed on the record in this proceeding, not through the Commission's unilateral determination to direct Met-Ed to enter into an arrangement – an important point to clarify when considering the arguments advanced by NHSC. As such, the Commission is without the jurisdiction to direct Met-Ed to enter into any arrangement which deviates from that offer, despite the assertions made in NHSC's Main Brief. Furthermore, a deviation from that offer in the manner suggested by NHSC's Main Brief would be inappropriate as a violation of Section 1502 of the Code. Finally, NHSC continues to fail to demonstrate any basis in actual fact that it cannot afford the amounts directed by the May 4 Order. To direct a smaller down payment or longer amortization period would unjustifiably lead to this particular customer being treated more favorably than its peers (a fact tacitly acknowledged by NHSC), unnecessarily delay Met-Ed's recovery of amounts billed which are already long overdue, and continue to prolong the timeline over which public utility (which may not be viable) is permitted to continue creating a risk to its own and other utility customers, as well as the public health. Accordingly, the payback proposal offered by NHSC should be rejected and the Commission should not modify the arrangement directed by its May 4 Order.

A. NHSC's Argument That The Commission May Direct An Alternative Payment Arrangement Upon Met-Ed In This Case Because It Would Be Equitable And Thus Within The Scope Of The Commission's Authority Is Legally Incorrect.

NHSC acknowledges that neither the Public Utility Code, the Commission's regulations, nor precedent establish any basis through which NHSC would be legally entitled to a payment arrangement, nor that the Commission has the authority to direct Met-Ed to enter into any arrangement it does not itself offer.² However, NHSC goes on to cobble together a series of statutory provisions that it concludes, when taken together, give the Commission the authority to direct two utilities to enter into a payment arrangement if it meets a standard of being in the "best interests of the public."³ Setting aside the factual question of whether the public interest would in fact be best served as NHSC suggests, which Met-Ed would argue to the contrary, NHSC's legal conclusion is flawed in a number of ways.

First, NHSC's argument ignores the fact that Sections 501 and 508 of the Code,⁴ which it relies upon in making this argument, both existed well before the time that any of the cases setting well-established precedent on this topic were decided - precedent which NHSC itself explicitly cites and acknowledges in its Main Brief.⁵ In fact, those sections were enacted in 1978. Surely, if it were as simple as relying upon the combination of these two provisions, the Commission itself would have reached a different conclusion in one of the many instances that it has addressed the issue of its authority to direct a payment arrangement for a non-residential customer. However, Met-Ed is aware of no instance in which the Commission has reached such a conclusion, nor has NHSC identified any such instance.

² NHSC Main Brief at 6.

³ *Id* at 7.

⁴ 66 Pa.C.S. §§ 501, 508.

⁵ NHSC Main Brief at 6.

The second fundamental flaw in NHSC's argument is based in its interpretation of the authority granted to the Commission through Section 508 and its role in giving the Commission the authority to direct public utilities to enter into contracts. However, this ignores the explicit language of Section 508, which bestows upon the Commission the "power and authority to vary, reform, or revise" any contract entered into by a public utility.⁶ That is, there is nothing in Section 508 which gives the Commission the authority to order a public utility to *enter into* a contract in the first place, which is exactly what NHSC is asking the Commission to do here.

Finally, NHSC asserts that permitting NHSC to enter into a payment arrangement would be "equitable." Notably, nothing has prevented NHSC from entering into a payment arrangement. The issue really results because NHSC doesn't *like* the arrangement offered to it. No other customer, including low-income residential customers, is given the opportunity to demonstrate that it should be given special treatment outside the bounds of the law simply because it doesn't like the terms offered, or because its individual financial circumstances do not make such an arrangement viable. Furthermore, the Commission has been specifically found to not have jurisdiction in equity. The Commonwealth Court has explained that "[a]dministrative agencies do not have the authority to order a regulated company to change lawful conduct on the theory that it is in the best interest of their customers."⁷ Additionally, the Commission itself has recognized that it lacks jurisdiction to consider equitable remedies.⁸ Therefore, the Commission cannot direct Met-Ed to enter into an alternative arrangement simply on the basis that it is "equitable".

⁶ 66 Pa.C.S. § 508.

⁷ *Phila. Suburban Water Co. v. Pa. PUC*, 808 A.2d 1044, 1056 (Pa. Cmwlth. 2002) (citing *Aetna Casualty and Surety Insurance Co. v. Insurance Department*, 536 Pa. 105, 638 A.2d 194 (1994)).

⁸ See *Commonwealth of Pennsylvania, et al. v. IDT Energy, Inc.*, Docket Number C-2014-2427657, 2015 Pa. PUC LEXIS 274 (June 8, 2015) ("the Commission lacks jurisdiction to consider the equitable remedy of restitution"); *Commonwealth of Pennsylvania, et al. v. IDT Energy, Inc.*, Docket Number C-2014-2427657, 2014 Pa. PUC LEXIS 715 (Opinion and Order entered December 18, 2014).

The fact remains that NHSC, as a commercial customer, has absolutely no legal entitlement to, nor does the Commission have the authority to direct Met-Ed to enter into, a payment arrangement for the account in question. Similarly, the Commission cannot direct Met-Ed to modify the terms of its offer to NHSC with regard to the arrangement already offered, which NHSC was directed to comply with. This conclusion must be reached based on long-standing and well-accepted Commission precedent,⁹ and without regard to any fact in this matter – even the fact that NHSC is a public utility.

Met-Ed has presented clear evidence of its policies and procedures as they relate to voluntarily offering payment arrangements to its commercial customers. Met-Ed also described in its Main Brief its obligations with respect to not discriminating in its provision of service under Section 1502 of the Code.¹⁰ To force Met-Ed to deviate from statutory protections for all customers would not only create a conflict of law; it would create a precedent of fundamentally unfair treatment for a particular segment of commercial customers strictly by virtue of the type of business they have chosen to enter into – the utility business. While the Commission has authority over public utilities with an eye towards ensuring their long-term viability and sustained safe and reliable operations, the key to this authority is in that it is to be applied to the regulated entity – not another entity who simply happens to be providing a service to that public utility as a public utility itself (here, Met-Ed). To create that type of precedent would unfairly single out and impair the business of a sole vendor (Met-Ed) to the regulated public utility (NHSC) in a way that deviates from the operations of every other vendor, simply because in this case, the vendor (Met-Ed) simply

⁹ *Bio/Data Corporation v. PECO Energy Co.*, Docket No. C-20026698 (Order entered July 30, 2002); *Lebanon Valley Enterprises, Inc. v. Metropolitan Edison Co.*, Docket No. C-00015522 (Order entered October 15, 2001); *Kayla's Place Inc. v. Duquesne Light Co.*, Docket No. C-00981711 (Order entered May 24, 1999); *Kenny d/b/a Flower and Flag Depot v. Duquesne Light Co.*, Docket No. C-00967789 (Order entered November 27, 1996).

¹⁰ Met-Ed Main Brief at 5-6.

happens to be a jurisdictional public utility itself. In any other business relationship where NHSC may not be fulfilling its financial obligations, the Commission is likely to be without any jurisdiction to interfere and its jurisdiction to ensure the continuation of safe, reliable service is limited to NHSC itself. For instance, the Commission could not direct a payment arrangement against a vendor of chemicals necessary in the processing of sewage where delivery has been stopped due to NHSC's failure to pay its bills. If the Commission were to take any action, it must be against NHSC in the form of enforcement actions, up to and including the institution of a Section 529 proceeding. The suggestion that Met-Ed should be forced into an arrangement it does not itself agree to and which is outside the bounds of the law in this particular situation simply because it has the misfortune of serving a customer which just also happens to be a public utility is entirely inappropriate and should be rejected.

B. Even If The Commission Had Authority To Modify Met-Ed's Payment Arrangement Offer, NHSC Has Not Justified A More Lenient Payment Arrangement As Being In The Public Interest

Interestingly, NHSC has itself suggested that the Commission establish timeframes for compliance and direct any other measures as it sees fit that NHSC must comply with as part of the outcome from this proceeding. In fact, even setting aside the disputed payment arrangement directed by the May 4 Order, the Commission has already done that. However, NSHC continues to this day to consistently show disregard for the Commission's directives. For instance, NHSC was directed by the Commission's March 22, 2017 *Ex Parte* Emergency Order ("March 22 Order") in this proceeding to issue notice to its customers regarding the continuation of their sewer service within five days,¹¹ or by March 27, 2017, and to file confirmation of having done so within five days subsequent,¹² or no later than April 1. In fact, NHSC failed to file such notice until April 13,

¹¹ March 22 Order, Ordering Para. 4.

¹² *Id.*, para. 5.

2017. Another example is demonstrated by the fact that the Commission issued a secretarial letter, dated May 25, 2017, notifying NHSC of its failure to comply with the terms of ordering paragraph 10 of the March 22 Order, which required NHSC to produce its customer list within thirty days of the ratification of the March 22 Order, which occurred on April 6, 2017. Similarly, the Commission's Bureau of Technical Utility Staff issued secretarial letters on each of May 26, 2017 and June 1, 2017, which contained data requests directed to NHSC which were to be answered within twenty days of each respective service date. As of the date of this Reply Brief, responses to those requests still have not been filed by the Commission. Finally, when this matter was remanded for further hearings on the issues addressed by this Reply Brief, the parties agreed to, and the Administrative Law Judge adopted, a procedural schedule which set certain discovery deadlines leading up to the expedited further hearing which was held on August 2, 2017. Of particular note, responses to discovery were required to be provided by NHSC no later than August 28, 2017. In fact, NHSC did not respond to any portions discovery served by Met-Ed until the end of the day on August 31, 2017. Significant portions of that discovery were never responded to at all, despite no objections having been filed.

Viability as a public utility aside, NHSC's consistent pattern of ignoring Commission directives, as outlined above, paired with the dubious financial activity that seemingly cannot be explained by NHSC's own leadership, as discussed at further length in Met-Ed's Main Brief at 6-8, simply does not support the argument that NHSC can be trusted to meet the terms of any agreement it would be directed to enter into with regard to the arrearage at issue. Furthermore, these facts clearly draw into question whether it really is in the best interests of the parties to this proceeding, the customers of NHSC, or the public at large that NHSC be given the chance at a

“sustainable” payment arrangement so that it can continue its operations as they exist today, which is NHSC’s primary justification for its position.

III. CONCLUSION

NHSC is not legally entitled to the grant of any payment arrangement of its outstanding arrearage in this or any other proceeding. Nonetheless, Met-Ed previously offered, and continues to offer, an arrangement which matches that which was outlined and directed upon NHSC in the Commission’s May 4 Order. The Commission is without the jurisdiction to direct Met-Ed to enter into any arrangement which deviates from that offer. The fact that NHSC is a customer that simply happens to be a public utility should not be a relevant factor in that outcome. Even if it were relevant, Met-Ed fundamentally disagrees that the continuation of NHSC as it exists and is owned today has been proven as being in the public interest, nor should be the determinant in whether the Commission would take the extraordinary step of acting outside its statutory authority to direct a commercial payment arrangement upon Met-Ed that Met-Ed itself has not offered. As such, the

payback proposal offered by NHSC should be rejected, and the Commission should not modify the arrangement directed by its May 4 Order in any way which reduces the amount to be paid to Met-Ed or timeline over which such payment would be fully resolved.

Respectfully submitted,

Dated: August 24, 2017



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Metropolitan Edison Company and North	:	
Heidelberg Sewer Company	:	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the Interrogatories, Requests for Production of Documents and Requests for Admissions upon the individuals listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

Service by email and first class mail, as follows:

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