

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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| Implementation of Chapter 32 of the | : | Docket No. M-2018-2640802 (water) |
| Public Utility Code Re Pittsburgh Water | : | Docket No. M-2018-2640803 (wastewater) |
| And Sewer Authority | : | |

COMMENTS OF THE
OFFICE OF CONSUMER ADVOCATE

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I. INTRODUCTION

On December 21, 2017, Governor Wolf signed Act 65 of 2017 into law. Act 65 amended the Public Utility Code by adding new language to 66 Pa. C.S. § 1301 and creating a new Chapter 32, which has the effect of bringing the Pittsburgh Water and Sewer Authority (PWSA or the Authority) under the jurisdiction of the Pennsylvania Public Utility Commission (Commission). On January 18, 2018, the Commission issued a Tentative Implementation Order laying out a proposed process for implementing Chapter 32, including tariff approval, ratemaking, compliance plan, and assessment provisions.¹

The Office of Consumer Advocate (OCA) appreciates the opportunity to submit comments on the Tentative Implementation Order and PWSA's transition to Commission jurisdiction beginning April 1, 2018. The OCA will actively participate in proceedings involving PWSA and will represent the interests of PWSA's customers before the PUC going forward in order to ensure that customers receive high quality water and wastewater service at reasonable cost. In general, the OCA notes that some of its comments below are preliminary in nature or serve to highlight the OCA's concerns about issues that may arise as part of the implementation process, given the short comment period and the lack of background knowledge about PWSA's operations, finances, etc. The OCA recommends that the Commission convene stakeholder groups to better refine the implementation of Chapter 32, particularly as more information on the Authority becomes available to the stakeholders. The OCA looks forward to working with the Commission, PWSA, and stakeholders as PWSA transitions to Commission jurisdiction.

¹ Implementation of Chapter 32 of the Public Utility Code Re Pittsburgh Water and Sewer Authority, Tentative Implementation Order, Docket Nos. M-2018-2640802 (water) and M-2018-2640803 (wastewater) (Order entered Jan. 18, 2018).

II. COMMENTS

A. 66 Pa. C.S. § 3201 – Definitions

The definition of “Authority” in Section 3201 includes the provision of water, wastewater, and stormwater service. In the Tentative Implementation Order, the Commission states that it will require PWSA to file separate tariffs for water and wastewater service, but seeks comment on whether a separate stormwater tariff should be required. Tentative Implementation Order at 4-5. The OCA submits that a separate stormwater tariff should be required. In the definition of “Authority” included in Section 3201, “[s]torm water collection, conveyance, treatment and disposal” is specifically identified separately from water and wastewater service. 66 Pa. C.S. § 3201. Therefore, as related to PWSA, stormwater is considered its own service separate from wastewater service and should thus receive a separate tariff.² The OCA recognizes that PWSA may need time to implement a separate stormwater tariff, but the OCA submits that the Commission should require PWSA to do so as soon as practicable.

Additionally, the Commission proposes to establish PWSA stormwater service as a tariff-based utility service subject to the Public Utility Code and Commission regulation. Tentative Implementation Order at 5-6. The Commission seeks comment on whether, related to PWSA, Act 65 effectively repeals the jurisdictional exclusion on stormwater collected in a separate storm sewer system. Id. Consistent with the OCA’s position above requiring a separate stormwater tariff, the OCA submits that Act 65 does provide the Commission with jurisdiction to regulate

² For examples of utilities that implemented separate charges for stormwater and wastewater, see, e.g.: Hampden Township, Cumberland County, PA (<http://www.hampdentownship.us/stormwater-utility/>); Derry Township, Dauphin County PA, (<http://www.dtma.com/our-services/stormwater/general-information/>); *Hallowell v. Greater Augusta Utility District*, 2013 Me. Super. LEXIS 34 (Mar. 18, 2013) (upholding a cost allocation methodology used by a municipal utility that separated stormwater and wastewater costs for its combined sewer system); *Vandergriff v. Chattanooga*, 44 F. Supp. 2d (E.D.Tenn), *aff’d per cur.*, 182 F.3d 918 (6th Cir. 1999) (rejecting the argument that a combined sewer overflow is a sewage facility, not a storm water facility). The City of Philadelphia also charges a separate stormwater fee; see <http://www.phila.gov/water/wu/stormwater/Pages/default.aspx>.

separate stormwater systems specifically related to PWSA. The definition of “Authority” discussed above does not differentiate between separate and combined wastewater and storm sewer systems, and as such Act 65 allows the Commission to regulate both combined and separate systems as it relates to PWSA specifically. It is the OCA’s understanding that PWSA’s system includes both separate and combined wastewater and storm sewer systems, and Act 65 appears to give the Commission authority to regulate PWSA’s entire stormwater system.

B. 66 Pa. C.S. § 3203 – Application of Provisions of Title

The OCA does not have specific comments on this section at this time.

C. 66 Pa. C.S. § 3203 – Prior Tariffs

Per Section 3203, the Tentative Implementation Order states that PWSA’s prior tariffs and rates will remain in effect as of April 1, 2018 and will continue to be in effect until modifications are approved by the Commission. Tentative Implementation Order at 8. The Order notes, however, that this is not “a statutory carte blanche to violate the Public Utility Code or Commission regulations.” Id. As of April 1, 2018, if parts of the Prior Tariff conflict with the Public Utility Code, or if the Prior Tariff is silent on an issue that is covered by the Public Utility Code, then the Commission will not strictly enforce the Prior Tariff but rather the Prior Tariff “will be subject to the same reasonableness analysis applied to all utility tariffs under the Public Utility Code.” Id.

The Commission requests comment on how to address formal or informal complaints that arose when “the Prior Tariff was controlling at the time of events, but no longer does so, and where the application of the Public Utility Code, Commission Regulations, or precedent may produce results that would conflict with the Prior Tariff.” Tentative Implementation Order at 11. The OCA submits that, as of April 1, 2018, this type of situation should be resolved by applying the Public Utility Code and Commission regulations. Pursuant to 52 Pa. Code § 56.223, “a tariff provision inconsistent with this chapter is deemed nonoperative and superseded by this chapter.” While the

OCA recognizes the unique issues raised by PWSA's transition to Commission jurisdiction, Chapter 14 of the Public Utility Code and Chapter 56 of the Commission's regulations will apply to PWSA as of April 1, 2018, and PWSA cannot be permitted to violate the applicable law and regulations. As of that date, if applying the Prior Tariff would create a conflict, then the Public Utility Code and Commission regulations should apply. Similarly, in a situation where the Prior Tariff is silent as to substance or procedure, as of April 1, 2018 the Commission should apply the applicable regulation or statutory provision.

Additionally, the OCA supports the Commission's statement that "[b]eginning April 2, 2018, the Commission will entertain requests for payment arrangements and resolve those requests consistent with Chapter 14 of the Public Utility Code and Commission regulations." Tentative Implementation Order at 11. The Commission will also require PWSA to follow the Commission's termination procedures at 52 Pa. Code §§ 56.81 – 56.131 as of April 1, 2018. The OCA submits that it may be necessary for PWSA to delay sending termination notices to customers until its notices are fully compliant with the Chapter 56 requirements. The OCA notes its concern regarding PWSA's recent issuance of termination notices to 2,500 residential wastewater customers during January 2018, just as the transition to Commission jurisdiction is quickly approaching.³ Regarding the Exoneration Hearing Board, the OCA submits that as of April 1, 2018, the Public Utility Code and Commission regulations should be applied in cases currently pending before the Exoneration Hearing Board as well as cases recently decided by the Exoneration Hearing Board but that are subject to appeal.

³ See *PWSA has sent about 5,500 customers water shut-off warnings over unpaid sewage bills*, Pittsburgh Post-Gazette, Jan. 31, 2018, available at <http://www.post-gazette.com/local/city/2018/01/31/PWSA-billing-shut-off-notices-Theresa-Kail-Smith-Deborah-Gross-Pittsburgh/stories/201801310195>.

The OCA also submits that PWSA needs to develop and undertake a consumer education program to begin informing customers as soon as possible about the transition to Commission jurisdiction. PWSA should work collaboratively with the Commission, the OCA and other stakeholders to develop these materials and to ensure that they clearly and effectively provide all necessary information to customers. This should include information about consumer complaint processes, when and for what purposes customers can begin calling the Commission, and other changes to billing, collections, and termination processes that will occur as a result of the transition, as well as information about the OCA and its role.

D. 66 Pa. C.S. § 3204 – Tariff Filing and Compliance Plan

1. *Timing of Filings Required by Section 3204*

The OCA does not oppose the Commission’s proposed interpretation that Chapter 32 will take effect as of April 1, 2018 and that PWSA is required to make its tariff filings no later than July 2, 2018 and its Compliance Plan filing no later than September 28, 2018.⁴

2. *Tariff Filings Under 66 Pa. C.S. § 3204(a)*

Section 3204(a), as interpreted by the Commission, requires PWSA to file proposed tariffs by July 2, 2018 and for the Commission to then conduct a rate proceeding. Tentative Implementation Order at 15. In bringing its tariffs into compliance with Commission regulations, the Commission suggests that PWSA look to its model tariffs as examples. Id. The OCA notes that it is unclear whether the model tariffs have been updated to reflect all current provisions contained in Chapter 14 of the Public Utility Code and Chapter 56 of the Commission’s

⁴ The OCA recognizes that the statutory provisions addressing distribution system improvement charges (DSIC) require that a utility submit a LTIP for Commission approval in order to qualify for DSIC recovery. 66 Pa. C.S. §§ 1352, 1353. As discussed below in Section E of the OCA’s Comments, the OCA does not object to PWSA proposing to implement a DSIC as part of its tariff filing under Section 3204. To comply with Sections 1352 and 1353 of the Public Utility Code, however, the OCA submits that PWSA should not be permitted to charge a positive DSIC until the LTIP is approved.

regulations. As such, the OCA suggests that PWSA also review the provisions of Chapter 14 (66 Pa. C.S. §§ 1401 – 1419) and Chapter 56 (52 Pa. Code §§ 56.1 – 56.461) and the tariffs of other large water and wastewater utilities under the Commission’s jurisdiction to ensure that it files fully compliant tariffs on July 2, 2018.

Regarding the rate proceeding that will follow PWSA’s tariff filing, the OCA notes that PWSA is currently in the process of implementing a series of rate increases over three years with the first increase having become effective on January 1, 2018, the second increase scheduled for January 1, 2019, and a third increase scheduled for January 1, 2020.⁵ If PWSA files its proposed tariffs on July 2, 2018, the rate proceeding will not have concluded before the January 1, 2019 rate increase is currently scheduled to take effect. Pursuant to the nine-month suspension period provided for at 66 Pa. C.S. § 1308, a Commission Order might not be entered until March 1, 2019. While the OCA is concerned about allowing the currently scheduled 2019 rate increase to go into effect without thorough review by the Commission, under Section 3203 relating to Prior Tariffs, this may be the result. This interpretation, however, could result in the untenable situation where a rate increase is imposed on January 1, 2019, only to be changed on March 1, 2019 by Commission Order. These timing issues around the January 1, 2019 rate increase and the support for those rates may require further discussion and consideration in the base rate case. If, for example, PWSA could accelerate the tariff filing with support for the January 1, 2019 rate increase, this may alleviate some of the timing issues. The OCA submits that as to the currently scheduled January 1, 2020 rate increase, that increase would fall after the first Commission Order and may only go into effect with Commission approval.

⁵ See Pittsburgh Water and Sewer Authority 2018 Rates, available at <http://www.pgh2o.com/rates>.

Additionally, the Commission provides a detailed list of items that must be included in PWSA's tariff filings. Tentative Implementation Order at 17-18. The OCA does not have an issue with the proposed list of items. However, there may be additional information that should be provided. For example, the OCA is aware of a cooperation agreement between PWSA and the City of Pittsburgh. The OCA notes that it has significant concerns about a number of items related to PWSA's cooperation agreement with the City of Pittsburgh, such as payments made by PWSA to the City in exchange for specific services, subsidies to customers of Pennsylvania American Water Company, and provision of free water service to the City of Pittsburgh. The OCA submits that as part of the documentation provided in support of PWSA's tariff filings, the Authority should provide a detailed explanation for each of these items and an estimation of the costs associated with each item if billed or paid for by PWSA to allow the Commission and stakeholders to fully investigate the impact of the agreement and whether these practices should be allowed in the future.

The Commission also seeks comment regarding the ratemaking method that would be best suited for PWSA. Tentative Implementation Order at 15-16. Given the current information available about PWSA's finances, the OCA submits that the cashflow ratemaking method would be appropriate for PWSA to employ in its initial July 2, 2018 tariff filings. However, the OCA submits that in the future, the Commission may wish to revisit this issue to determine whether PWSA should continue to use the cashflow method or whether it should transition to another ratemaking method in the future.

3. *Compliance Plan Filing Under 66 Pa. C.S. § 3204(b)*

Section 3204(b) requires PWSA to file a compliance plan no later than September 28, 2018 which will include plans to achieve full compliance with all regulatory requirements. See Tentative Implementation Order at 18. As an initial matter, the OCA notes that there is no statutory

deadline associated with the Commission's review of the compliance plan. While there may be overlap between issues addressed in PWSA's tariff filings and its compliance plan, the review of the compliance plan should not be artificially constrained by the nine-month time period associated with the rate proceeding. The OCA submits that achieving full regulatory compliance for PWSA will be an ongoing process, and sufficient time should be provided for all stakeholders to review and provide meaningful input on the compliance plan.

The Tentative Implementation Order requested comment on whether PWSA should adopt a system of accounts per 52 Pa. Code § 65.16(a). Tentative Implementation Order at 19. The OCA submits that PWSA should keep its books in accordance with the National Association of Regulatory Utility Commissioners (NARUC) Uniform System of Accounts (USoA) for water and wastewater as required for other utilities with annual operating revenue of \$750,000 or more by 52 Pa. Code § 65.16(a).⁶ The use of the NARUC USoA will allow PWSA's books, records, and filings to be consistent with existing PUC-regulated utilities, and will permit an easier transition to PUC regulation.⁷ This will also allow PWSA to file Annual Reports that are consistent with other regulated water and wastewater utilities. The OCA appreciates that PWSA may require a period of time to transition its books to the USoA but submits that this will be useful for the reasons discussed above.

The Commission also requested comment on whether PWSA must comply with the required Self-Certification Form for Security Planning and Readiness that all regulated utility must file with the Commission. Tentative Implementation Order at 19. The OCA submits that, absent

⁶ It should be noted that there is no NARUC USoA for stormwater-only utilities.

⁷ Philadelphia Gas Works (PGW) uses the Federal Energy Regulatory Commission (FERC) Uniform System of Accounts and files Annual Reports with the Pa. PUC that are consistent with reports filed by other regulated natural gas utilities.

a showing that it is currently unable to do so, PWSA should comply with the Self-Certification Form for Security Planning and Readiness requirement per 52 Pa. Code §§ 101.1 – 101.7.

Additionally, the Tentative Implementation Order seeks comment on how the Commission should handle non-compliance with Commission regulations pending review of the compliance plan. Tentative Implementation Order at 19. The OCA understands that there will need to be a transition period as the Commission reviews PWSA's filings and as PWSA moves to conform its operations to the Commission's requirements. The OCA recommends that the Commission apply the same "reasonableness analysis" discussed above in addressing any non-compliance with PUC regulations during review of the compliance plan and enter orders addressing the issues and compliance expectations if necessary. See Tentative Implementation Order at 8.

The Tentative Implementation Order also seeks comment related to compliance with meter installation at all service locations, replacement, and testing. Tentative Implementation Order at 19. The OCA submits that PWSA should develop and file a metering plan that will identify its unmetered customers and set forth its plan to meter all of its customers and the time frame in which it will complete the metering plan. The OCA recommends that the metering plan be filed as part of the compliance plan. The plan should also identify the age of the existing meters and include plans for any necessary replacements.

The Tentative Implementation Order seeks comment on whether Chapter 56 compliance, including issues related to billing, collection, and termination procedures, should be addressed in PWSA's tariff filings or in its compliance plan. Tentative Implementation Order at 19. The OCA submits that items related to Chapter 56 compliance must be included in both the tariff filings and the compliance plan. In its July 2, 2018 tariff filings, PWSA will need to ensure that the rules included in its proposed tariffs are compliant with Chapter 14 of the Public Utility Code and

Chapter 56 of the Commission's regulations as necessary for items included in the tariffs. Subsequently in its September 28, 2018 compliance plan, PWSA should include a plan to fully comply with all Chapter 14 and Chapter 56 requirements.

The OCA submits that a number of items should be addressed as part of PWSA's compliance plan that are not specifically raised in the Tentative Implementation Order. The OCA expects PWSA's compliance plan to be comprehensive and to cover items such as: plan and projected costs related to infrastructure improvements; plan and projected costs related to billing systems; discussion of billing relationship with the Allegheny County Sanitary Authority (ALCOSAN); plans and projected costs related to lead service line replacements; and plans and projected costs to address provision of free water to the City of Pittsburgh.

Regarding PWSA's long-term infrastructure improvement plan (LTIIP) that is required to be filed as part of the compliance plan, the Commission states that the time period for its review of the LTIIP will be 120 days per the Commission's Final Implementation Order regarding Act 11 of 2012. Tentative Implementation Order at 19-20, citing Implementation of Act 11 of 2012, Final Implementation Order, Docket No. M-2012-2293611 (entered Aug. 2, 2012). The OCA submits that, given the unique situation here and the multitude of items that need to be considered, the Commission should suspend the 120-day review period for PWSA's LTIIP and instead consider the LTIIP as part of the comprehensive compliance plan that PWSA will be submitting. This will allow all parties to fully review the LTIIP in the context of the compliance plan, and to consider the compliance plan as a complete package with other transition items that must be addressed.

E. 66 Pa. C.S. § 3205 – Maintenance, Repair and Replacement of Facilities and Equipment

Section 3205 allows PWSA to petition the Commission to establish a distribution system improvement charge (DSIC). In the Tentative Implementation Order, the Commission seeks

comment on how the DSIC should be implemented given PWSA's unique situation. See Tentative Implementation Order at 23-24.

First, the Commission seeks comment on whether the tariff filing required under Section 3204 satisfies the requirement that a utility has filed a base rate case within five years prior to filing a DSIC petition. Tentative Implementation Order at 23. The OCA submits that, provided that PWSA includes all of the information listed on pages 17-18 of the Tentative Implementation Order as part of its tariff filing, then the requirements of 66 Pa. C.S. § 1353(b)(5) have been met and PWSA should be deemed to have filed a base rate case for purposes of its DSIC petition. Additionally, the OCA recognizes that the statutory provisions addressing the DSIC require that a utility submit an LTIP for Commission approval in order to qualify for DSIC recovery. 66 Pa. C.S. §§ 1352, 1353. The OCA does not object to PWSA proposing to implement a DSIC as part of its tariff filing pursuant to Section 3204. To comply with Sections 1352 and 1353 of the Public Utility Code, however, the OCA submits that PWSA should not be permitted to charge a positive DSIC until the LTIP is approved.

The Commission also requested comment as to how PWSA should implement a DSIC if it uses a ratemaking methodology that does not utilize depreciation and pretax return. Tentative Implementation Order at 24; see also 66 Pa. C.S. § 1357(a)(3) (requiring that DSIC recovery shall be based on the fixed costs of eligible property, i.e., depreciation and pretax return). The OCA submits that it may be appropriate for PWSA to use a cashflow basis for purposes of the DSIC that would be based on PWSA's historic spending on DSIC eligible property. This will allow actual spending in one quarter to be recovered in the following quarter. While the OCA acknowledges that PWSA has plans to begin aggressive infrastructure improvements, the OCA lacks information on whether the Authority will be able to fully complete the planned improvements in the projected

timeframes. This approach would initially allow PWSA to implement a DSIC and allow the Commission and stakeholders to gain additional experience with the Authority and its operations. If necessary, this approach could then be revisited and evaluated in future proceedings.

Additionally, the Commission requested comment on the structure of PWSA's LTIIP and DSIC filings, specifically regarding whether PWSA should be permitted to file a unified LTIIP while making the best attempt to separate water, wastewater, and stormwater infrastructure improvement activities and operations, and whether future DSIC mechanisms should similarly follow distinct segments of PWSA's operations and related eligible property. Tentative Implementation Order at 24. The OCA submits that PWSA should not be permitted to file a combined LTIIP, but should file separate LTIIPs for water, wastewater, and stormwater infrastructure improvements activities and operations. Not all of PWSA's customers are both water and wastewater customers, so the costs should not be combined for purposes of applying the DSIC.⁸

F. 66 Pa. C.S. § 3206 – Duties of Office of Consumer Advocate and Office of Small Business Advocate

The OCA does not have specific comments on Section 3206 beyond noting that the OCA will participate in proceedings related to PWSA in order to represent the Authority's consumers. The OCA also wishes to emphasize the importance of the Commission, PWSA, statutory advocates, and other stakeholders working collaboratively to ensure a positive outcome for the Authority's water and wastewater customers.

G. 66 Pa. C.S. § 3207 – Commission Assessment

The OCA does not have specific comments on the Commission's proposed interpretation of Section 3207 at this time. The OCA notes, however, that the Commission has not addressed

⁸ The OCA notes that there is currently no provision for a stormwater-only DSIC.

the possibility of a separate assessment for stormwater service. If PWSA establishes a separate stormwater tariff and rate as discussed above, then there should be a separate stormwater assessment by the Commission, the Office of Consumer Advocate, and the Office of Small Business Advocate so that each agency's costs are properly allocated to PWSA's stormwater customers.

H. 66 Pa. C.S. § 3208 – Power of Authority

Relating to Section 3208, the Commission requests comment on whether its Bureau of Audits should be directed to perform a baseline performance analysis to review PWSA's financial operations, processes, and billing systems, and similarly whether its Bureau of Consumer Services should conduct an audit of PWSA's customer service operations and complaint handling processes. Tentative Implementation Order at 28. The OCA submits that the Commission should conduct a baseline financial and operational audit of PWSA. While the OCA understands that a number of other entities have audited PWSA recently, these previous audits were conducted from a different perspective than would be the focus of a Commission audit. The Bureau of Audits and/or the Bureau of Consumer services would be auditing PWSA to establish a baseline with an eye toward future compliance with the Public Utility Code and Commission regulations. The OCA does not have a specific recommendation for exact timing and focus of the audit, but believes that such an audit is a necessary step as PWSA transitions to Commission jurisdiction.

I. 66 Pa. C.S. § 3209 – Proprietary Information of Authority

The OCA does not have specific comments regarding Section 3209 at this time.

III. CONCLUSION

The Office of Consumer Advocate appreciates the opportunity to provide comments as the Commission begins the process of bringing the Pittsburgh Water and Sewer Authority under its jurisdiction. The OCA respectfully submits that the above comments will help to ensure that PWSA's transition to Commission jurisdiction results in full regulatory compliance and ensures that customers receive high quality water and wastewater service at reasonable cost.

Respectfully Submitted,

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