



February 8, 2019

VIA E-FILE

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

**Re: Pennsylvania Public Utility Commission v. Hidden Valley Utility Services, L.P.
(Wastewater and Water); Docket Nos. R-2018-3001307 and R-2018-3001306**

REPLIES TO EXCEPTIONS OF HIDDEN VALLEY UTILITY SERVICES, L.P.

Dear Secretary Chiavetta:

Enclosed for filing with the Pennsylvania Public Utility Commission are the Replies to Exceptions of Hidden Valley Utility Services, L.P., in the above-referenced proceeding. Copies of the Replies to Exceptions are being served on the Presiding Officers, Deputy Chief Administrative Law Judge Mark A. Hoyer and Administrative Law Judge Katrina L. Dunderdale, and on all parties, as indicated on the enclosed Certificate of Service.

Thank you for your attention to this filing. Should you have any questions or concerns, please contact me.

Sincerely,

COZEN O'CONNOR

By: Jonathan P. Nase
Counsel for *Hidden Valley Utility Services, L.P.*

JPN:kmg
Enclosure

cc: Honorable Mark A. Hoyer
Honorable Katrina L. Dunderdale
Per Certificate of Service
James M. Kettler
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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission, et al.	:	
	:	Docket No. R-2018-3001306,
v.	:	R-2018-3001307 <i>et al.</i>
	:	
Hidden Valley Utility Services, L.P	:	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing **Replies to Exceptions of Hidden Valley Utility Services, L.P.**, upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

VIA E-MAIL AND FIRST CLASS MAIL:

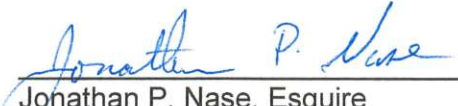
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Dated: February 8, 2019



Jonathan P. Nase, Esquire
Counsel for *Hidden Valley Utility Services, L.P*

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission	:	
	:	
v.	:	Docket No. R-2018-3001307
	:	
Hidden Valley Utility Services, L.P. –	:	
Wastewater	:	
	:	
And	:	
	:	
Pennsylvania Public Utility Commission	:	
	:	
v.	:	Docket No. R-2018-3001306
	:	
Hidden Valley Utility Services, L.P. – Water	:	

**REPLIES TO EXCEPTIONS OF
HIDDEN VALLEY UTILITY SERVICES, L.P.**

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Dated: February 8, 2019

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I. INTRODUCTION AND STATEMENT OF THE CASE

AND NOW COMES Hidden Valley Utility Services, L.P. (“Hidden Valley” or the “Company”), pursuant to 52 Pa. Code § 5.535, to file these Replies to Exceptions. Specifically, Hidden Valley replies to the Exceptions filed by the Office of Consumer Advocate (“OCA”), the Hidden Valley Foundation, Inc. (“Foundation”), and Robert J. Kollar (“Mr. Kollar”).

In these consolidated rate cases, Hidden Valley initially requested an increase of \$150,629 in water rates and an increase of \$185,432 in wastewater rates. Hidden Valley entered into a Non-Unanimous Settlement (“Settlement”) with the Bureau of Investigation and Enforcement (“I&E”), the prosecutory arm of the Pennsylvania Public Utility Commission (“Commission”), reducing the Company’s requested rate increase. Pursuant to the Settlement, Hidden Valley would be permitted to increase water rates by \$65,557 following entry of a Commission final order approving the Settlement. Hidden Valley would also be permitted to implement a two-step increase in wastewater rates. First, Hidden Valley would be permitted to increase wastewater rates by \$82,227 following entry of a Commission final order approving the Settlement. Second, the Company would be permitted to increase wastewater rates again following submission of a report and verification from its engineer stating that all repairs, modifications and improvements to Hidden Valley’s wastewater system have been completed, as required by the Commission’s Orders in *McCloskey v. Hidden Valley Utility Services, L.P.*, Docket Nos. C-2014-2447138 and C-2014-2447169.¹ Together, these two steps would increase wastewater rates by \$145,824.

¹ For ease of reference, the various decisions in *McCloskey* will be referenced as follows: the Initial Decision will be referenced as the “September 2016 I.D.”, the Commission’s Order on Exceptions will be referenced as the “January 2018 Order,” the Commission’s Order on the merits regarding Hidden Valley’s Petition for Clarification, Reconsideration or Amendment will be referenced as the “May 2018 Order,” and the January 2018 Order and the May 2018 Order will be referenced collectively as the “*McCloskey* Decisions.”

On the same date that the Company and I&E entered into the Settlement, those parties also entered into a Joint Stipulation with the OCA and the Foundation. In this document, the parties agreed that the increased revenue requirement stated in the Settlement was a ceiling, but the OCA and the Foundation wished to preserve the right to litigate two other issues: (a) whether the Commission should deny Hidden Valley Utility Services, L.P., any rate increase for water and wastewater, pursuant to 66 Pa. C.S. §§ 523 and 526, due to quality of service; (b) whether the Commission should order Hidden Valley to complete an independent financial audit.

In their Recommended Decision issued January 25, 2019, Deputy Chief Administrative Law Judge Mark A. Hoyer and Administrative Law Judge Katrina L. Dunderdale (together, the “ALJs”) recommended that the Commission approve the Settlement, with modifications. The primary modification that the ALJs recommended was to eliminate the second step of the two-step increase in wastewater rates.

The parties were given eleven days to file Exceptions and four days to file Replies to Exceptions. Exceptions were filed by I&E, the OCA, the Foundation, and Mr. Kollar. In their Exceptions, the OCA, the Foundation, and Mr. Kollar argued that the Commission should deny Hidden Valley any rate increase whatsoever. In its Exceptions, I&E argued that the Commission should modify the Recommended Decision to adopt the Settlement as submitted. In its Exceptions, the Company argued that the Commission should approve the revenue requirement proposal in the Settlement. In the alternative, Hidden Valley recommended that the second step of the wastewater rate increase be triggered by a finding, pursuant to Ordering Paragraph 20 of the May 2018 Order, that Hidden Valley is providing reasonable and adequate wastewater service.

II. REPLIES TO THE EXCEPTIONS OF THE OCA

Relying almost exclusively on *Pa. PUC v. Pa. Gas & Water Co.*, 1986 Pa. PUC LEXIS 113 (April 25, 1986) (“*PG&W I*”) and *Pa. PUC v. Pa. Gas & Water Co.*, 1988 Pa. PUC LEXIS 457 (September 30, 1988) (“*PG&W III*”), the OCA contends that the Commission is *required* to deny Hidden Valley *any* increase in rates. *See e.g.*, OCA Exceptions p. 1. This is a mis-statement of the law. The Public Utility Code (“Code”), 66 Pa. C.S. §§ 523 and 526 clearly give the Commission *discretion* over whether to deny a public utility a rate increase, *in whole or in part*, based on its quality of service.

Section 523(a) of the Code provides:

§ 523. Performance factor consideration.

(a) Considerations.—The commission shall consider, in addition to all other relevant evidence of record, the efficiency, effectiveness and adequacy of service of each utility when determining just and reasonable rates under this title. On the basis of the commission’s consideration of such evidence, it shall give effect to this section by making such adjustments to specific components of the utility’s claimed cost of service as it may determine to be proper and appropriate. Any adjustment made under this section shall be made on the basis of specific findings upon evidence of record, which findings shall be set forth explicitly, together with their underlying rationale, in the final order of the commission.

Section 526(a) of the Code provides:

§ 526. Rejection of rate increase requests due to inadequate quality or quantity of service.

(a) General rule.—The commission may reject, in whole or in part, a public utility’s request to increase its rates where the commission concludes, after hearing, that the service rendered by the public utility is inadequate in that it fails to meet quantity or quality for the type of service provided.

In the Settlement, Hidden Valley agreed to a significant decrease in its request for water and wastewater rate relief. As a result, the question presented in this case is whether Hidden

Valley's requests for rate relief should be reduced further, beyond the reduction agreed-to in the Settlement, based on the Company's quality of service.

The Commission has applied Sections 523 and 526 many times in the thirty years since the Commission entered its decisions in *PG&W I* and *PG&W III*. The Commission should reject the OCA's call to overlook those decisions.

As argued in Hidden Valley's Reply Brief, pp. 11-26, the decisions entered in the last thirty years demonstrate that the Commission considers a variety of factors and standards when deciding whether to decrease a utility's request for rate relief, in part or in whole, pursuant to Sections 523 and 526 of the Code – just as the Commission considers a variety of factors when deciding the amount (if any) of a civil penalty for violating the Code, a Commission regulation or order. 52 Pa. Code § 69.1201 (“Factors and standards for evaluating litigated and settled proceedings involving violations of the Public Utility Code and Commission regulations—statement of policy”). These factors and standards will be discussed below. On balance, those factors and standards demonstrate that the Commission should not reduce the Company's rate increase below the amount agreed-to in the Settlement.

A. Factors and Standards for Determining Whether the Commission Should Deny a Rate Increase, in Whole or in Part, Based on the Utility's Quality of Service

1. Seriousness of the service deficiency

In deciding whether to deny rate relief, in whole or in part, the Commission has considered the seriousness of the service deficiency. The Commission has made clear that a denial of rate relief, in whole or in part, is only warranted where the Commission finds *serious deficiencies* in the utility's service. For example, the Commission stated in *PG&W I* at *30, “Finally, we believe this Commission has the necessary authority, pursuant to its statutory authority to determine the justness and reasonableness of proposed rates, to refuse to consider a rate increase by a utility

which has *seriously failed* to provide adequate service.” *See also, Pa. Pub. Util. Comm’n v. National Utilities, Inc.*, 1997 Pa. PUC LEXIS 100 (January 16, 1997) at *9 and 15 (the Commission adopted Administrative Law Judge Debra Paist’s recommendation to deny a rate increase in its entirety due to “a significant failure” on the part of the company to provide water fit for all household purposes).

As Hidden Valley argued in its Main Brief pp. 30-33, and its Reply Brief pp. 11-13, this factor supports approval of the Settlement, rather than a further reduction in the Company’s rate relief. In view of the Commission’s holding in *McCloskey*, the Settlement provides for a significant reduction in the Company’s rate relief. The Settlement reduces the rate request for the water system by more than one-half. The Settlement also reduces the rate request for the wastewater system by more than one-half, until such time as the Company demonstrates that it has made the improvements mandated by the *McCloskey* Decisions. When the Company complies with those decisions, Section 523 and 526 provide no basis for any reduction in the Company’s requested rate relief. As a result, the Settlement would permit the Company to implement a second step increase in wastewater rates when the wastewater system comes into compliance with the *McCloskey* case.

As noted in I&E’s Exceptions, the Settlement appropriately permits a second step increase for the wastewater system, but not the water system, because the “customer testimony detailing service concerns overwhelmingly point[s] to inadequate water service rather than inadequate wastewater service.” I&E Exceptions p. 5.

The ALJs correctly found that the quality of Hidden Valley’s water service does not warrant a further reduction in rate relief. The ALJs, however, incorrectly found that the quality of Hidden Valley’s wastewater service warrants a further reduction in rate relief. There is no basis

in the record for further reducing Hidden Valley's wastewater rate relief below what was agreed-to in the Settlement, based on this factor.

2. Seriousness of the consequences for customers

In deciding whether to deny rate relief, in whole or in part, the Commission has also considered the consequences for customers of the deficient service. For example, *PG&WI* denied a rate increase, in whole, for a water system that had experienced a giardiasis outbreak. *PG&WI* at *8. In *Pa. Pub. Util. Comm'n v. Clean Treatment Sewage Company*, Docket Nos. R-2009-2121928 *et al.* (Opinion and Order entered April 22, 2010), the Commission denied a rate increase, in whole, for a wastewater system that had experienced repeated sewage overflows and was subject to a moratorium, such that some customers were being charged an availability fee when service was not, in fact, available.

This factor supports approval of the Settlement, rather than a further reduction in the Company's rate relief. The service issues have impacted customers. The Settlement significantly reduces both the Company's water and wastewater rate relief, as discussed above, but appropriately differentiates between the water and wastewater system for the reasons previously discussed.

The ALJs correctly found that the quality of Hidden Valley's water service does not warrant a further reduction in rate relief. The ALJs, however, incorrectly found that the quality of Hidden Valley's wastewater service warrants a further reduction in rate relief. There is no basis in the record for further reducing Hidden Valley's wastewater rate relief below what was agreed-to in the Settlement, based on this factor.

3. Company's compliance history

The ALJs stated "Hidden Valley has been given over thirteen years in which to correct the issues with its water and wastewater quality – and its failure to do so is deemed to be a refusal."

R.D. p. 33. As demonstrated by Hidden Valley's Reply Brief, pp. 14-17, and its Exceptions, pp. 11-14, this statement is not supported by the record.

The Commission can take judicial notice of its own records. In *Application of Hidden Valley Utility Services, L.P.*, Docket Nos. A-210117 and A-230101 (Final Order entered July 15, 2005) ("2005 Application Proceeding"), the Commission approved a settlement agreement in which the Company agreed to make certain improvements in its water system, but there was no finding that the Company's water or wastewater service was inadequate. According to the Commission's website, the OCA's Petition for the Issuance of an Emergency Order, Docket No. P-2014-2424858, and the two complaint cases in *McCloskey*, are the only proceedings ever filed at the Commission against the Company since it received its certificate of public convenience in 2005. The only Commission decision finding that Hidden Valley violated the Code was the *McCloskey* Decisions, which were entered about one year ago. This compliance history does not warrant a further reduction in rates, below what was agreed-to in the Settlement.

Additionally, the record in both the *McCloskey* case and this case demonstrate that the Company has continually made improvements in both its water and wastewater systems. The ALJ in *McCloskey* specifically noted the efforts that Hidden Valley has made to improve its water and wastewater systems since 2005. September 2016 I.D. Findings of Fact 14-17 and 51. In addition, the Company has tried several different techniques of improving water quality, including sequestration, flushing the mains, installing automatic operating blow-off valves, OCA Statement 3 (Water), Direct Testimony of Terry L. Fought, pp. 3-4, and constructing loops to eliminate dead ends in the system. HVUS Statement No. 1-R (Water), Rebuttal Testimony of James M. Kettler, p. 17. *See also* Hidden Valley's Reply Brief pp. 13-17. As discussed more fully below, the Company has also made a good faith effort to make the improvements mandated by the *McCloskey*

Decisions. The record clearly refutes the ALJs' suggestion that the Company's service deficiencies were intentional (to use the terms of 52 Pa. Code § 69.1201(c)(3)). As a result, this factor does not warrant a further reduction in the Company's water and wastewater rate relief, below the amounts agreed-to in the Settlement.

4. Efforts to address the conduct at issue and prevent similar conduct in the future

In *Clean Treatment*, the Commission denied a utility's rate request, in its entirety, but allowed the Company to re-file for a rate increase, so long as the subsequent filing included a plan for bringing the system into compliance with the Code. The Commission stated: "We fully realize that improvements to the Company's service and facilities will require a rate increase, but we have seen nothing in this filing that indicates that any improvements will be forthcoming." *Clean Treatment* p. 20.

In this case, in contrast, the Company has a plan for improvements. This plan was not just approved by the Commission – it was authored by the Commission. As argued in Hidden Valley's Main Brief pp. 9-10, the Company is making a good faith effort to comply with that plan for improvements. Although it has not yet completed all of the tasks required by the *McCloskey* Decisions, it has completed many of them, and the Company continues to work toward compliance with the improvement plan. Consequently, this factor weighs in favor of approving the Settlement rather than further reducing the amount of the Company's rate relief.

5. Consequences of the Commission's Decision

In several prior cases, the Commission has permitted modest rate relief, even though a company was not providing reasonable and adequate service, because the Commission recognized that the utility must provide service to customers and must incur expenses to provide that service.

For example, in *Pa. Pub. Util. Comm'n, et al. v. Delaware Sewer Company*, Docket No. R-2014-2452705 (Opinion and Order entered July 30, 2018), the Commission stated:

[Delaware Sewer Company] is not providing adequate service, has not presented plans to address the service issues raised in this proceeding, and has not sought funds to make necessary changes. Moreover, other than including a claim for [cash working capital], the Company has not claimed any rate base or debt. Therefore, we shall provide sufficient revenue to cover reasonable expenses, addressed, *supra*, and allow a modest operating income.

Delaware Sewer Company p. 36.

In *Pa. Pub. Util. Comm'n v. Deer Haven, LLC d/b/a Deer Haven Sewer Company*, 2011 Pa. PUC LEXIS 1864 (Opinion and Order entered May 19, 2011), a utility filed for a rate increase, but included no claim for rate base, return on equity or overall rate of return. “The ALJ pointed out that revenues are needed to provide quality service, and when revenues are diminished and the rate base of customers is constant, then increased rates are needed to increase revenue or quality of service will suffer.” 2011 Pa. PUC LEXIS 1864 at *53. Although Administrative Law Judge Angela T. Jones concluded that the Company had deficiencies in its service, she recommended a rate increase sufficient to cover the costs of providing service. In its decision on Exceptions, the Commission agreed with the ALJ that the evidence of record demonstrated that the Company violated Section 1501 of the Code, and agreed that “the ALJ has proposed a reasonable solution to the crucial issue presented herein in her recommendation that the Company be granted a rate increase of a level to cover its total allowable expenses.” 2011 Pa. PUC LEXIS 1864 at *64.²

In *Pa. Pub. Util. Comm'n, et al. v. Lake Latonka Water Company*, 1989 Pa. PUC LEXIS 231 (Recommended Decision issued November 28, 1989, Final Order entered October 28, 1989), the Commission adopted the Recommended Decision of Administrative Law Judge Richard S.

² *Cf.*, *UGI Corp. v. Pa. Pub. Util. Comm'n*, 410 A.2d 923 (Pa. Cmwlth. 1980) (the law is clear that a utility is entitled to recover its reasonably incurred expenses).

Herskovitz. That Recommended Decision approved, as modified, a non-unanimous settlement in a rate case, despite a property owners association's argument that the rate increase should be completely denied pursuant to Section 526. The ALJ stated:

Thus, we are in a Catch 22 situation – the Company is not entitled to a rate increase until it improves the quality of its water, but the Company can't improve the quality of its water unless it has a rate increase. I can deny the proposed rate increase as requested by [the property owners association], in which case there would be very little if any hope of water improvement, or I can grant at least some rate relief with conditions that the proceeds be used by the Company to clean up its system.

1989 Pa. PUC LEXIS 231 at *17.

The settlement agreement in that case gave the company modest rate relief, coupled with conditions designed to improve service. The ALJ stated:

As admitted to by the [property owners association] in its Main Brief, the suggested improvements will be very costly to [Lake Lotanka Water Company (“LLWC”)]. Such improvements certainly cannot be pursued by a financially crippled utility or one not permitted rates sufficient to produce a reasonable return. As pointed out by LLWC in its Reply Brief, the New Jersey Court of Errors and Appeals in *City of Elizabeth v. Board of Public Utility Commissioners*, P.U.R. 1924C 524, 527, 123 A. 358 (1924), recognized:

The policy of the law is and should be to aid utilities to properly function and to render adequate service to the public by permitting rates to be charged for the service rendered, which will yield an adequate return upon the capital invested, maintain the property, and attract capital. The policy should never be one of destruction. *O'Brien v. Public Utility Comm'rs*, 92 N.J.L. 44, P.U.R. 1919B, 865, 105 Atl. 132. A starved utility is in no better position to render proper service [than] a starved horse or a motor car without fuel. (Emphasis added.)

This principle was likewise recognized by the Florida Public Service Commission in *The General Telephone Company of Florida*, 81 PUR 3rd 498, 505-506 (1970):

In fixing public utility rates, this commission has a duty to consider the quality of service being rendered by the utility in question. At the same time, it has a responsibility to give a public utility an opportunity to meet its service obligations through necessary plant additions. This requires constantly increasing capital expenditures which cannot be financed if the return is unreasonably low . . . The granting of too much relief would, of course, be unfair to the public. At the same time, the granting of insufficient relief would not only penalize a utility that is making every effort to improve its service, but would prolong the poor service through the company's inability to finance further improvement. Our power to withhold rate relief in appropriate circumstances, where the quality of service justifies such action, is a powerful tool that is bringing about a steady and substantial improvement in public utility services, as is evident in this particular case which has not been before the commission for more than two years. The purpose of the law is to achieve good service and its reasonable use will accomplish that purpose. At the same time, we must be careful that we do not jeopardize the ability of a public utility to accomplish the purpose of the law. (Emphasis added.)

1989 Pa. PUC LEXIS 231 *46-49.

The OCA places great weight on the Commission's decision in *PG&W I*. In that case, the Commission denied a rate increase to a large company that had the financial wherewithal to make the necessary improvements in service without a rate increase. *Pa. Pub. Util. Comm'n v. Pennsylvania Gas and Water*, 1986 Pa. PUC LEXIS 104 (May 22, 1986) p. *23 (Comments of Chairman Linda C. Taliaferro) ("*PG&W I*"). The instant case is more like *Delaware Sewer, Deer Haven, and Lake Lotanka*, in that a complete denial of rate relief would not allow the Company to even cover the costs of providing service. Hidden Valley's Main Brief pp. 36-38. In 2017, the net operating income available for return for the water system was (\$51,736), HVUS Statement No. 2 (Water), Direct Testimony of Paul R. Herbert, Exhibit PRH-2, p. 6, and the net operating income available for return for the wastewater system was (\$105,045), HVUS Statement No. 2

(Wastewater), Direct Testimony of Paul R. Herbert, Exhibit PRH-2, p. 6, for a total (loss) of (\$156,781). These figures, of course, do not include the expense of complying with the *McCloskey* Decisions. As a result, a complete denial of rate relief would virtually ensure that customers receive no improvement in service in the foreseeable future.

In its Main Brief, the Company argued that approving the Settlement would assist the Company in complying with *McCloskey*. Hidden Valley's Main Brief pp. 26-30. In contrast, denying any rate relief, while simultaneously requiring the Company to make the extensive improvements required by the *McCloskey* Decisions, would destroy the Company. Hidden Valley's Main Brief pp. 33-36.

In its Exceptions, the OCA continues to deny that the additional revenues will be used to comply with the *McCloskey* case. OCA's Exceptions, p. 4. The ALJs correctly rejected this argument, adopting the common-sense logic that allowing a utility to increase rates will give it greater financial resources, which can be used to improve service.

The "consequences" factor is particularly important in the instant proceeding because the OCA argues that Hidden Valley should not be permitted to increase rates at all until the Company has completed all of the improvements required by the *McCloskey* Decisions. If the Commission agrees with that position, the consequence will be that the Company cannot increase rates at all for several years. This is because the engineer's report for the water system estimates that the Company will need four years to build a new water treatment plant or to construct a pipeline to an alternative water source. HVUS Statement No. 1-R (Water), Rebuttal Testimony of James M. Kettler, HVUS Exhibit JMK-2 pp. 2-3. OCA witness Terry L. Fought testified that the Company currently has a DEP permit requiring that water be treated by sequestration; obtaining a new permit from DEP to switch to an alternative approach will take two years. Tr. 312-313.

The Company has already gone more than 13 years since setting its rates. Adopting the OCA's theory of the case would have the consequence of preventing the Company from increasing rates for several more years.

The OCA, the Foundation, and Mr. Kollar, are all trying to drive Hidden Valley out of the public utility business. Foundation's Exceptions p. 5, Mr. Kollar's Exceptions p. 5. The cases cited in *Lake Lotanka* wisely advocate that regulators should be reluctant to adopt the strategy of starving a utility of the resources necessary to provide adequate service to customers. That approach does not facilitate improving service to customers in a timely manner.³

The "consequences" factor weighs in favor of approval of the Settlement. While that Settlement significantly reduces the Company's rate request based on the factors discussed above, it nevertheless provides the Company with the resources necessary for it to improve service.

6. Constitutional Rights of the Utility

In its Main Brief, Hidden Valley argued that, if the Commission would deny *any* rate relief, the resulting rates would be so low as to violate the Company's constitutional rights. The Company has not raised rates since it obtained a certificate of public convenience in 2005. As a result, the Company is presently losing money. In addition, the Commission has ordered the Company to implement an extensive and costly improvement plan. Denying the Company *any* rate relief, under these circumstances, would destroy the Company. Rates that are so low as to destroy the Company, by definition, are unconstitutional. Hidden Valley Main Brief, pp. 41-44.

³ It is worth noting, in this regard, that Delaware Sewer Company filed a Petition on February 6, 2014, asking the Commission to open an investigation into whether the Commission should order a capable public utility to acquire its wastewater system. *Petition of Delaware Sewer Company for the Opening of an Investigation into Whether the Public Utility Commission Should Order a Capable Public Utility Acquire the Company Pursuant to 66 Pa. C.S. § 529*, Docket No. P-2014-2404341. Although that case involved a willing seller, the system has yet to be sold. *Investigation Instituted per Section 529 into Whether the Commission Shall Order a Capable Public Utility to Acquire Delaware Sewer Company*, Docket No. I-2016-2526085. The customers of Hidden Valley should not be forced to wait another five years to receive improved service.

In the seminal case of *Bluefield Water Works and Improvement Co. v. Public Service Commission of West Virginia*, 262 U.S. 679 (1923) (“*Bluefield*”), the United States Supreme Court stated:

A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties. A rate of return may be too high or too low by changes affecting opportunities for investment, the money market and business conditions generally.

Bluefield, 262 U.S. at 692-93.

In *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), the United States Supreme Court stated:

From the investor or company point of view, it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.

Hope, 320 U.S. at 603 (citations omitted).

This is not a case in which investors are seeking an excessive rate of return. Rather, the Settlement simply proposes that the Company be able to recover its costs upon the entry of the Commission’s Order. It is only after the Company’s wastewater system complies with the mandates of *McCloskey* that the Company will receive a return on equity. If, in contrast, the Commission grants the relief requested by the OCA and the Foundation, investors will continue to

lose money because the Company is not currently covering costs. Completely denying rate relief would violate the Fifth Amendment's prohibition against confiscation, U.S. Const. Am. V, the Fourteenth Amendment's guarantee of due process, U.S. Const. Am. XIV, and the Excessive Fines Clauses of the Pennsylvania and United States Constitutions.⁴

On the specific facts of this case, a complete denial of rate relief would produce a result that violates Hidden Valley's constitutional rights. Consequently, this factor weighs in favor of approving the Settlement, rather than further reducing the Company's rate relief.

7. Need for Deterrence

In *McCloskey*, the Commission considered whether the need for deterrence weighed in favor of imposing a civil penalty on Hidden Valley. The Commission answered that question in the negative, in part, because the *McCloskey* Decisions included other enforcement mechanisms (including the possible institution of a Section 529 proceeding). January 2018 Order, pp. 55-56. Those enforcement mechanisms remain in effect; the Commission has not amended the *McCloskey* Decisions.

It should be noted that the second step of the wastewater rate increase supplements, rather than undermines, the enforcement mechanisms in the *McCloskey* Decisions. Those enforcement mechanisms use a "stick" to punish Hidden Valley in the event that it fails to comply with the order. The second step of the wastewater rate increase, in contrast, uses a "carrot" to encourage the Company to complete the tasks specified in the order as quickly as possible.

Considering the continued existence of the *McCloskey* order's enforcement mechanisms, a complete denial of rate relief is not required in order to further deter Hidden Valley (or any other

⁴ The Excessive Fines Clauses, Art. I, § 13 of the Pennsylvania Constitution and the Eighth Amendment to the United States Constitution, U.S. Const. Am. VIII, prohibit penalties that are not reasonably proportionate to the violations.

utility) from violating the Code, Commission regulations or orders. As a result, this factor weighs in favor of approving the Settlement, as submitted.

8. Consistency with Prior Commission decisions

All parties to this proceeding agree that the Commission should consider past decisions in similar cases when deciding whether to reduce, in whole or in part, a utility's request for rate relief pursuant to Sections 523 and 526 of the Code. I&E, the Company, the OCA, and the Foundation all cite numerous decisions supporting their positions. They disagree, however, on the cases that are most similar to the instant case.

This case is distinguishable from *PG&W I* and *II* because the Company is presently losing money and lacks the financial wherewithal to make the required improvements in service. This case is much more similar to cases such as *Delaware Sewer Company* and *Deer Haven* in that the Settlement provides for an increase in water rates, and an initial increase in wastewater rates, sufficient to allow the Company to cover the costs of providing service. This case is also similar to *Clean Treatment*, in that the Company had an improvement plan at the time it filed its rate case. This case is also similar to *Lake Latonka*, in that the Settlement promotes the public policy of enabling the Company to comply with the law, rather than destroying the Company. Finally, this case is similar to *Hope* in that the Settlement appropriately balances the interests of the utility and the ratepayers.

For these reasons, this factor supports approval of the Settlement as submitted, rather than a further reduction in rates below the agreed-to amounts.

9. Other relevant factors

In deciding whether to reject a rate increase, in whole or in part, the Commission considers "other relevant factors," just as it considers "other relevant factors" in determining whether to impose a civil penalty on a utility. 52 Pa. Code § 69.1201(c)(10). This factor gives the

Commission the flexibility to consider any facts or circumstances that may not have been considered under any of the preceding factors.

One “other factor” that the Commission should consider in this proceeding is the simple fact that the Company has not increased rates since it received its certificate of public convenience in 2005. Inflation alone calls for a significant increase in rates. It is worth noting that Douglas Henley, a customer of Hidden Valley, testified at the hearing that the rate of inflation from January 2005 to May 2018 was 132 percent. Tr. 60. The Company’s current water rate, for the average customer using 2,100 gallons, is \$26.64 per quarter. Using Mr. Henley’s data, inflation alone would justify an increase in rates to \$35.16 per quarter. The Settlement would increase the water rate for the average customer using 2,100 gallons to \$38.70 per quarter. Additionally, the Company’s wastewater rate is \$59.76 per quarter for the average customer using 2,100 gallons. Using Mr. Henley’s data, inflation alone would justify an increase in rates to \$78.88. Under the Settlement, in Phase I of the wastewater rate increase, the rate for the average customer using 2,100 gallons would increase to \$75.58. In short, Phase I of the Settlement would increase water and wastewater rates (combined) by a mere 20 cents per quarter more than the rate of inflation.

Another factor the Commission should consider is that the 2005 Application Proceeding provided an opportunity for the Company to collect “annual revenues not in excess of \$182,500 for water operations and \$392,000 for wastewater operations, or \$575,000 in total annual revenues.” 2005 Application Proceeding, Recommended Decision, pp. 16-17. In 2017, the Company actually collected \$143,194 in water revenues, HVUS Statement No. 2 (Water), Direct Testimony of Paul R. Herbert, Exhibit PRH-2 p. 6, and \$290,724 in wastewater revenues, HVUS Statement No. 2 (Wastewater), Direct Testimony of Paul R. Herbert, Exhibit PRH-2 p. 6, for a

total of \$433,918. Clearly, circumstances have changed since 2005. The Company should be permitted to re-set rates to reflect the new reality.

B. On Balance, the Above Factors and Standards Demonstrate that the Commission Should Not Further Reduce the Company's Rate Relief

As the Commission stated in *PG&W I p. 38*:

... we must not lose sight of the cardinal principle enunciated in [*Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944)], which requires the Commission to balance the interests of the investors and the consumers. In this regard, we note that the ultimate goal of our actions here is to protect the public interest and to ensure that adequate service is provided to the customers of PG&W.

By balancing the nine factors discussed above, the Commission balances the interest of investors and customers when considering whether to reduce a company's rate request, in part or in whole, pursuant to 66 Pa. C.S. §§ 523 and 526.

In this case, balancing the nine factors leads to the conclusion that the Settlement should be approved, as submitted. The Settlement appropriately balances the interests of customers and the Company. Hidden Valley's Main Brief pp 16-21. The Settlement reduces the water and wastewater rate increases, appropriately reflecting the Commission's findings in *McCloskey*. The Settlement nevertheless allows the Company to cover the cost of providing service until its wastewater system comes into compliance with the *McCloskey* Decisions. The Settlement gives the Company additional financial resources necessary to comply with the *McCloskey* Decisions, but maintains the enforcement mechanisms contained in those decisions that deter continued violations of Section 1501. The Settlement appropriately differentiates between the rates that can be charged for water service as compared to wastewater service, based on the quality of each type of service being provided. Once the Company complies with the *McCloskey* Decisions'

requirements for the wastewater system, the Settlement presumes that the Company will be providing reasonable and adequate service in compliance with the Code. As a result, Section 523 and 526 would provide no basis for reducing wastewater rates.

For all of the above reasons, the Commission should deny the OCA's Exception requesting that the Commission deny the Company any rate relief. Instead, the Commission should modify the ALJs' order to approve the Settlement, as submitted.

III. REPLIES TO THE EXCEPTIONS OF THE FOUNDATION

The Foundation excepts to the Recommended Decision to the extent that the ALJs recommend any rate relief for Hidden Valley. The Commission should deny those exceptions for the reasons set forth above in response to the OCA's Exceptions.

The Foundation, however, attempts to raise other issues. For example, it calls on the Commission to commence a proceeding pursuant to 66 Pa. C.S. § 529 ("power of commission to order acquisition of small water and sewer utilities"). Foundation's Exceptions p. 5. To the extent that the Foundation attempts to raise any issue other than the two issues preserved for litigation in the Joint Stipulation, the Foundation is in violation of that Joint Stipulation. The Joint Stipulation is a legally binding and enforceable agreement specifically executed for this proceeding, and the Commission should enforce it. If the Foundation is not bound by the Joint Stipulation, the Company should not be bound by it either, and should be permitted to renew its request for the full amount of its rate request. However, considering that the parties did not introduce live testimony at the hearing regarding revenue requirement, rate structure and similar issues, and the suspension date for the proposed rate increases (April 1, 2019) is rapidly approaching, Hidden Valley submits that the better approach is for the Commission to enforce the Joint Stipulation for all parties, and refuse to consider the additional issues raised in the Foundation's Exceptions.

Even if the Commission considers the issues raised by the Foundation, the Commission should reject the relief requested. An order of the Commission – the ultimate adjudicator of public utility cases – directing its prosecutor to institute a proceeding pursuant to Section 529, would clearly be an unconstitutional commingling of adjudicatory and prosecutory functions. *Lyness v. State Board of Medicine*, 529 Pa. 535 (1992). Additionally, since the possibility of a Section 529 proceeding was never raised before the ALJs, Hidden Valley had no notice of or opportunity to respond to this issue. Under these circumstances, a Commission order directing the commencement of a Section 529 proceeding would violate Hidden Valley’s due process rights. *Pocono Water Co. v. Pa. Pub. Util. Comm’n*, 630 A.2d 971 (Pa. Cmwlth. 1993).

Finally, to the extent that the Foundation’s Exceptions adopt the positions espoused by Mr. Kollar, those Exceptions should be denied for the reasons set forth below, regarding the Exceptions of Mr. Kollar.

IV. REPLIES TO THE EXCEPTIONS OF MR. KOLLAR

Mr. Kollar purports to be a *pro se* complainant, with all the protections afforded to such litigants under 52 Pa. Code § 1.2. Mr. Kollar, however, is a member of the Board of the Foundation, which is represented by counsel in this proceeding. His cooperation with the Foundation’s counsel in this matter is evident by the Foundation’s Replies, which adopt some of Mr. Kollar’s positions, even though the Foundation’s Replies were filed before Mr. Kollar’s.

Mr. Kollar requests that the Commission consider his Exceptions, which are explicitly based on his personal opinions and observations. Mr. Kollar’s Exceptions p. 2. Commission decisions, however, must be based on the law and the evidence in the record. Hidden Valley, the Foundation, and the other active participants in this litigation have developed an extensive record

in this proceeding. The Commission should rely on that record in rendering a decision in this matter.

Mr. Kollar was included on the full service list in these proceedings, with notice and an opportunity to participate in the proceedings. He chose not to participate until filing Exceptions. While he has a right to file Exceptions, he does not have the right to introduce new issues into this proceeding in his Exceptions. Issues not raised in testimony or briefs before the Administrative Law Judge are waived. *Application of Apollo Gas Company for approval to offer, render, furnish or supply natural gas service to the general public in Allegheny, Armstrong, Clarion, Indiana, Jefferson and Westmoreland Counties, and Buffalo Township, Butler County*, 1994 Pa. PUC LEXIS 94 (March 18, 1994). As a result, the Commission should not consider any of the new issues raised by Mr. Kollar (including but not limited to his requests for: the appointment of a receiver, the prohibition of any payments to Hidden Valley's owners, and the imposition of special reporting requirements). Mr. Kollar's Exceptions at pp. 5-6.

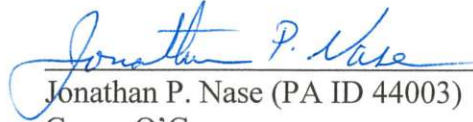
V. REQUEST FOR RELIEF

For the reasons set forth above, Hidden Valley Utility Services, L.P., respectfully requests that the Commission:

- (1) deny the Exceptions of the Office of Consumer Advocate;
- (2) deny the Exceptions of the Hidden Valley Foundation, Inc.;
- (3) deny the Exceptions of Robert J. Kollar;
- (4) grant the Exceptions of the Bureau of Investigation and Enforcement; and

(5) grant the Exceptions of Hidden Valley Utility Services, L.P.

Respectfully submitted,



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Date: February 8, 2019