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March 8, 2019

**Via Electronic Filing**

Rosemary Chiavetta, Secretary  
PA Public Utility Commission  
P.O. Box 3265  
Harrisburg, PA 17105-3265

Re: Implementation of Chapter 32 of the Public Utility Code RE: Pittsburgh Water  
and Sewer Authority; Docket Nos. M-2018-2640802 and M-2018-2640803

Dear Secretary Chiavetta:

Enclosed for electronic filing please find Pittsburgh Water and Sewer Authority's Response to Motion of Bureau of Investigation and Enforcement to Challenge Certain Proprietary and Confidential Designations with regard to the above-referenced matter. Copies to be served in accordance with the attached Certificate of Service.

Sincerely,



Karen O. Moury

KOM/lww  
Enclosure

cc: Hon. Conrad Johnson w/enc.  
Hon. Mark Hoyer w/enc.  
Certificate of Service w/enc.

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Implementation of Chapter 32 of the Public	:	Docket Nos. M-2018-2640802
Utility Code Regarding Pittsburgh Water and	:	M-2018-2640803
Sewer Authority	:	

**RESPONSE OF PITTSBURGH WATER AND SEWER AUTHORITY TO MOTION OF  
BUREAU OF INVESTIGATION AND ENFORCEMENT TO CHALLENGE CERTAIN  
PROPRIETARY AND CONFIDENTIAL DESIGNATIONS**

**To Deputy Chief Administrative Law Judge Mark A. Hoyer and Administrative Law  
Judge Conrad A. Johnson:**

The Pittsburgh Water and Sewer Authority (“PWSA” or “Authority”), by its counsel, hereby responds to the Expedited Motion of the Bureau of Investigation and Enforcement (“I&E”) of the Pennsylvania Public Utility Commission (“Commission”) to Challenge PWSA’s Designation of Certain Information as Proprietary and Confidential (“Motion”). The specific material that was marked as proprietary and confidential contains draft cost estimates of services that are provided to the City of Pittsburgh (“City”) by PWSA, and of services that PWSA provides to the City. This information is at the core of active contract negotiations between PWSA and the City to renegotiate a new Services Contract or Cooperation Agreement to replace the existing contract that will expire on May 5, 2019. As making this information public would be disruptive to these negotiations, potentially cause substantial harm to PWSA’s business interests and potentially cause economic damage to PWSA, its disclosure would not serve the public interest. On these bases, PWSA opposes I&E’s Motion.

The Commission’s regulations call for a balancing of the harm to a party seeking to protect information from public disclosure with the public’s interest in free and open access to the administrative hearing process. Importantly, this proceeding is not about the Cooperation

Agreement, but rather is being held to determine whether PWSA is in compliance with the Public Utility Code and Commission regulations. When a new Cooperation Agreement is negotiated, PWSA will file it with the Commission for review and approval, as required by Section 507 of the Public Utility Code, 66 Pa.C.S. §507, at which time its contents will be made public. The transparency and accountability for which I&E's Motion clamors will occur then. Since I&E, as well as other interested parties, will have an opportunity to review and comment on any provisions of the Cooperation Agreement at that time, no need exists for this information to be made publicly available now. Further, the parties to this proceeding already have full access to the information and are free to utilize it as part of their litigation of the Compliance Plan, provided that they maintain its confidentiality consistent with the Proposed Protective Order.

For these reasons, and as further explained below, PWSA respectfully requests that I&E's Motion be denied. In support of this motion, PWSA represents as follows:

1. The provision of water, wastewater and stormwater service by PWSA came under the jurisdiction of the Commission on April 1, 2018 in accordance with Act 65 of 2017, which added Chapter 32 to the Public Utility Code. One of the requirements imposed on PWSA by Chapter 32 is the filing of a Compliance Plan. 66 Pa.C.S. § 3204(b).

2. On September 28, 2018, PWSA filed its Compliance Plan with Commission ("Commission").

3. I&E's Motion accurately describes the procedural history of the Compliance Plan proceeding. Motion, ¶¶ 2-14.

4. Although PWSA's Motion for Protective Order is pending, all parties agreed to the terms of the Proposed Protective Order. On that basis, PWSA has been serving confidential discovery responses on the parties throughout the proceeding.

5. Also, consistent with the Proposed Protective Order, in serving direct testimony and exhibits on the parties and the presiding officers on February 14, 2019, PWSA designated certain information as confidential. Specifically, on page 10 of the Direct Testimony of Debbie M. Lestitian (PWSA Statement No. C-2), PWSA designated cost estimates of services being provided to PWSA by the City, as well as cost estimates of services being furnished to the City by PWSA, as confidential. In addition, draft documents which contain cost categories and cost estimates were attached to Ms. Lestitian's Direct Testimony as PWSA Confidential Exhibits DML/C-1 and DML/C-2.

6. PWSA marked this information as confidential because it is at the core of active contract negotiations between the City and PWSA as part of their efforts to negotiate a new Cooperation Agreement to replace the existing contract that PWSA terminated on February 4, 2019, on 90 days' notice to the City, with the termination effective May 5, 2019. Importantly, this information consists of draft documents and cost estimates that have been unilaterally and separately developed by each of the two parties engaged in arms-length contract negotiations.

7. Under the Commission's regulations, information may be designated as confidential if the party so marking the material "demonstrates that the potential harm to the party of providing the information would be substantial and that the harm to the party if the information is disclosed without restriction outweighs the public's interest in free and open access to the administrative hearing process." 52 Pa. Code § 5.365(a). A factor that is

considered in applying this standard is the extent to which it would cause unfair economic or competitive damage. 52 Pa. Code § 5.365(a)(1).

8. Similarly, in the Proposed Protective Order, the standard for marking a document as confidential is “where the potential harm to a participant would be substantial and outweighs the public’s interest in having access to the Proprietary Information.” Proposed Protective Order, ¶ 3. Further, the Proposed Protective Order, as agreed upon by all parties including I&E, is designed to “protect Proprietary Information while allowing the parties to use such information for purposes of the instant litigation.” Proposed Protective Order, ¶ 4.

9. The items sought to be publicly disclosed by I&E were properly marked by PWSA as confidential consistent with the Proposed Protective Order and the Commission’s regulations. Public disclosure of cost estimates and draft documents that are central to ongoing contract negotiations between PWSA and the City for a new Cooperation Agreement would have the potential for substantial harm to PWSA’s business interests and to cause economic damage to PWSA by adversely affecting its ability to negotiate a fair set of terms and conditions.

10. Depending on a particular view held by a member of the public, other public officials or the media, pressure could be placed on PWSA to charge the City less for certain services or for the City to charge PWSA more for other services. Also, to the extent that public pressure is placed on either entity, favorable terms that PWSA has already tentatively negotiated may be in jeopardy. In short, public involvement in the contract negotiation process has the potential to cause a kerfuffle, which would be disruptive and not conducive to productive negotiations. Having conflicting views about the cost of certain services debated in the media is not in PWSA’s interest, its customers’ interest or the public interest.

11. If I&E prevails on its Motion, its demand could also potentially be extended to discovery requests that could require PWSA to release other documents that reflect confidential contract positions of PWSA. If those were made public, they could severely damage PWSA's ability to negotiate a new agreement that is reasonable to PWSA customers and in the public interest.

12. PWSA is not aware of a situation with any other public utility where sensitive material involved in contract negotiations have been required by the Commission to be disclosed to the public.<sup>1</sup> Moreover, I&E has pointed to no precedent supporting the public disclosure of material being used in contract negotiations between a public utility and another entity. Indeed, contract negotiations are akin to settlement discussions, which the Commission's regulations protect as confidential. 52 Pa. Code § 5.231(d).

13. It is also noteworthy that Chapter 32 expressly protects proprietary information of PWSA from mandatory public disclosure under the Right-to-Know Law, 65 P.S. §§ 67.101, *et seq.* 66 Pa.C.S. § 3209 (“[p]roprietary information, trade secrets and competitively sensitive information of an authority shall not be public records under the act of February 14, 2008 (P.L. 6. No.3), known as the Right-to-Know Law, and shall not be subject to mandatory public disclosure”).

14. Importantly, any concerns about transparency will be addressed upon the filing by PWSA of the new Cooperation Agreement with the Commission, as required by Section 507 of

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<sup>1</sup> To the contrary, PWSA has identified instances where the Commission endorsed the concept that contract negotiations are confidential. Specifically, in adopting a proposed rulemaking regarding competitive bidding regulations, 1994 Pa. PUC LEXIS 54; 52 Pa. PUC 4091, the Commission addressed contract negotiations between electric utilities and qualifying facilities and proposed only to require the filing of such contracts with the Commission, with no mention of any involvement in or awareness of the actual contract negotiations. Similarly, in *Pa. P.U.C. v. Peoples TWP LLC*, 2015 Pa. PUC LEXIS 250, the Commission recognized the confidentiality of contract negotiations. 2015 Pa. PUC LEXIS 250, \*19-20.

the Public Utility Code, 66 Pa.C.S. § 507. Under Section 507, PWSA is obligated to file the contract at least 30 days prior to its effective date. The Commission may, prior to the effective date of the contract, institute proceedings to determine the reasonableness or legality or any other matter affecting the validity thereof. If such proceedings are instituted, the contract cannot – by law – go into effect until the Commission approves it. Therefore, I&E’s argument that “PWSA should not commit ratepayer funds to questionable expenses without public disclosure” (Motion, ¶ 32) has no validity. Similarly, the filing of the contract with the Commission for review and approval eliminates any concerns I&E has about just and reasonable rates and PWSA accountability to ratepayers. Motion, ¶¶ 32-33.

15. I&E claims that an expedited resolution of the Motion is necessary to provide I&E with certainty about the status of the information that is designated as confidential because its direct testimony is due to be served by April 5, 2019. Motion, ¶ 22. PWSA disagrees. If the Motion is not ruled on before that time, I&E simply needs to mark any references to this confidential information as proprietary. If it is later determined that the information should be made public, PWSA and I&E could remove confidential designations and recirculate their respective testimonies. It is customary at the Commission for testimony to be revised, supplemented and corrected throughout the proceeding until it is admitted into the record during an evidentiary proceeding.

16. With respect to any impact the confidential designations have on the content and structure of I&E’s direct testimony, or its litigation strategy, I&E has not provided any examples. Motion, ¶ 22. To the extent that occurs, the same remedy noted above is available to allow I&E to modify its testimony or make adjustments in its litigation strategy. Rather than rush to direct PWSA to remove confidential designations from its testimony and exhibits during active contract

negotiations with the City, which will culminate in the filing of a contract with the Commission for review and approval, the presiding officers should carefully consider PWSA's arguments and rationale, including the potential for substantial harm resulting to PWSA's ratepayers if the contract terms are debated in the media, and deny the Motion.

17. In clamoring for the immediate removal of confidential designations (Motion, ¶ 33), I&E offers no explanation for how the public would even obtain access to the testimony at this time. As the testimony has only been circulated among the parties and the presiding officers, it cannot be accessed in the Secretary's Bureau because it will not be filed unless and until after it is admitted during the evidentiary hearings in this proceeding, which are scheduled to occur in May 2019 after the expiration of the current Cooperation Agreement.

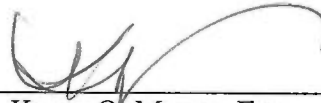
18. I&E's Motion contains a discussion of the importance of PWSA compliance with the Public Utility Code and Commission regulations and points to directed questions posed by the Commission related to the costs of services provided to the City by PWSA, and vice versa. Motion, ¶¶ 27-29. However, nothing about PWSA's confidential designations affects its compliance with the applicable laws. Moreover, PWSA has provided all of the information regarding these costs, as they are being currently estimated, to the parties and presiding officers in this proceeding and it will be fully available for the Commission's review during its disposition of the Compliance Plan. Importantly, PWSA has not shielded confidential information from any party; it only seeks to avoid having its contract negotiations disrupted by public opinion. The interests of PWSA's captive ratepayers and the public interest referred to by I&E's Motion (¶ 32) are sufficiently represented by parties in this proceeding, including I&E, who have access to this information.



19. I&E refers to PWSA's confidential designations as "self-imposed." Motion, ¶ 33. However, that is precisely how this process works. Under Paragraphs 13 and 14 of the Proposed Protective Order, to which I&E agreed, parties designate their information as confidential and other parties have the opportunity to compel disclosure of the information. Therefore, PWSA's designations were consistent with the terms of the Proposed Protective Order, and any implication that PWSA acted improperly in making the confidential designations in the first instance should be disregarded.

WHEREFORE, for all the foregoing reasons, PWSA requests that Your Honors deny I&E's Expedited Motion to Challenge PWSA's Designation of Certain Information as Proprietary and Confidential.

Respectfully submitted,



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Dated: March 8, 2019

Counsel for  
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## CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of the PWSA's Response to Motion of Bureau of Investigation and Enforcement upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

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Dated: March 8, 2019



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