



COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA PUBLIC UTILITY COMMISSION  
COMMONWEALTH KEYSTONE BUILDING  
400 NORTH STREET, HARRISBURG, PA 17120

BUREAU OF  
INVESTIGATION  
&  
ENFORCEMENT

December 3, 2019

**Via Electronic Filing**

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

Re: Implementation of Chapter 32 of the Public Utility  
Code Re Pittsburgh Water and Sewer Authority  
Docket No. M-2018-2640802 (Water)  
Docket No. M-2018-2640803 (Wastewater)  
**I&E Reply Exceptions**

Dear Secretary Chiavetta:

Enclosed for filing, please find the Bureau of Investigation and Enforcement's (I&E)  
**Reply Exceptions** for the above captioned proceeding.

Copies are being served on parties as identified in the attached Certificate of Service.  
Should you have any questions or concerns, please do not hesitate to contact me.

Sincerely,

A handwritten signature in dark ink, appearing to read "Gina L. Miller", is positioned above the typed name.

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Enclosure  
GLM/ac

cc: Honorable Mark A. Hoyer (*ALJ Pittsburgh*)  
Honorable Conrad A. Johnson (*ALJ Pittsburgh*)  
Office of Special Assistants (*via email only RA-OSA@pa.gov*)  
Per Certificate of Service

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**Implementation of Chapter 32 of the Public     : M-2018-2640802**  
**Utility Code Regarding Pittsburgh Water     : M-2018-2640803**  
**and Sewer Authority – Stage 1                 :**

**Petition of The Pittsburgh Water and Sewer     : P-2018-3005037**  
**Authority for Approval of Its Long Term       : P-2018-3005039**  
**Infrastructure Improvement Plan               :**

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**REPLY EXCEPTIONS  
OF THE  
BUREAU OF INVESTIGATION AND ENFORCEMENT**

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Dated: December 3, 2019

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## I. INTRODUCTION

On October 29, 2019, Deputy Chief Administrative Law Judge Mark A. Hoyer and Administrative Law Judge Conrad A. Johnson (the “ALJs”) issued their Recommended Decision in this proceeding.<sup>1</sup> On November 18, 2019, the Bureau of Investigation and Enforcement, (“I&E”), the Pittsburgh Water and Sewer Authority (“PWSA”), the Office of Consumer Advocate (“OCA”), the Office of Small Business Advocate and Pittsburgh UNITED, filed various exceptions to the Recommended Decision. I&E files these timely Reply Exceptions in response to all of PWSA’s Exceptions (Nos. 1 – 4), and OCA Exception No. 1.

PWSA asserts the ALJs erred by:

- Rejecting PWSA’s proposed billing plan for unmetered and/or unbilled municipal properties within the City of Pittsburgh;
- Rejecting PWSA’s proposed cost sharing for costs related to metering municipal properties within the City of Pittsburgh;
- Concluding the Municipality Authorities Act no longer governs PWSA’s line extension processes; and
- Concluding that the Commission has jurisdiction regarding water quality.

OCA’s Exception No. 1 asserts PWSA’s billing plan for unmetered and/or unbilled municipal properties within the City of Pittsburgh (“City”) should ramp up in the same manner as proposed meter rates. For reasons discussed in detail below, and as supported in the record, I&E maintains that the ALJs properly decided the above-referenced issues. Accordingly, as they are unsupported and without merit, I&E respectfully requests that the Commission deny PWSA Exception Nos. 1-4 and OCA Exception No. 1.

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<sup>1</sup> A detailed procedural history of this case can be found in I&E’s Main Brief at pp. 15-16 and in the Recommended Decision (“RD”) of the ALJs at pp. 2-8.

## II. REPLY EXCEPTIONS

1. **Reply to PWSA's and OCA's Exception No. 1: The ALJs Properly Rejected PWSA's Unreasonable Proposal To "Step-Bill" Municipal Properties Over A Five-Year Period In Favor Of Introducing a Flat Rate for Unbilled Customers and Charging Full Bills Once Metered**<sup>2</sup>

**A. Introduction**

PWSA's Compliance Plan proposed billing municipal properties so that once municipal properties are metered, 20% of the total bill would be charged in the first year, and each successive year an additional 20% of the total bill would be charged, until 100% of the total bill is charged.<sup>3</sup> The ALJs rejected PWSA's proposal, and recommended that the Commission order PWSA to introduce a flat rate, at minimum the customer charge for the customer's class, for all unbilled customers in its next base rate case, and as customers are metered their metered usage should be billed immediately.<sup>4</sup> I&E agrees with the ALJs, and recommends the Commission reject PWSA's and OCA's Exception No. 1.

**B. PWSA's Exception**

PWSA excepts to the ALJs' recommendation that its "step-billing" plan be rejected, but does not except to the ALJs' recommendation that it introduce a flat rate (i.e., at minimum, the customer charge for the customer's class) as part of its next base rate case.<sup>5</sup> PWSA continues to assert that its "historical relationship" with the City should grant the City special privileges, i.e., the step-billing discount proposal.<sup>6</sup> As the ALJs properly determined, PWSA's arguments in favor of the City fail to overcome the fact that "[e]very day that the City is unbilled for its water

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<sup>2</sup> RD at 127-128.

<sup>3</sup> PWSA Compliance Plan, p. 110.

<sup>4</sup> RD at 128.

<sup>5</sup> PWSA Exceptions, p. 5, fn. 5.

<sup>6</sup> PWSA Exceptions, p. 4.

usage is a day that PWSA is not collecting tariffed revenue and charging discriminatory rates, violating 66 Pa. C.S. §§ 1303 and 1304.”<sup>7</sup> Furthermore, the ALJs correctly concluded that implementation of PWSA’s step-billing proposal would “condone and perpetuate the imbalanced, discriminatory relationship the City has with PWSA for longer than necessary,”<sup>8</sup> and I&E submits that PWSA’s Exceptions do not refute that conclusion.

I&E avers that the record supports the ALJs’ recommendation and the rejection of PWSA’s position that the “historical relationship” with the City is a valid basis in the record or under the Public Utility Code (“Code”) to allow its step-billing proposal. PWSA states it supports operating on a business-like basis with the City, but the step-billing plan balances the “complicated (and long-standing historical) relationship” while providing the City “a measured path forward to payment for full usage.”<sup>9</sup> This assertion should be rejected. PWSA provides no basis or discussion why a “complicated” or “historical” relationship merits a step-billing discount.<sup>10</sup> PWSA also continues to argue the unsupported claim that if it issues bills to the City, they may simply go unpaid,<sup>11</sup> despite the fact that the City elected not to intervene in this proceeding and has made no such claims. This assertion should also be rejected. As stated in I&E’s Reply Brief, there is no evidence in the record that the City will not pay its bills.<sup>12</sup> The Commission should not and cannot be afraid to enforce the Code and its mandates on such

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<sup>7</sup> RD at 127.

<sup>8</sup> Id.

<sup>9</sup> PWSA Exceptions, p. 6.

<sup>10</sup> I&E notes the City may not be *metered* because of its “historical” relationship. However, lack of metering does not equate to clear evidence of lack of ability to pay once metered.

<sup>11</sup> PWSA Exceptions, pp. 6, 9-10. In Exceptions, PWSA repeated assertions it previously made, stating the City has “limited resources” as a governmental entity and recently terminated its status as a “financially distressed city”. PWSA Exceptions, p. 9.

<sup>12</sup> I&E Reply Brief, p. 17.

unsubstantiated and unmerited grounds. To do so would create terrible precedent and invite other unwarranted tests of Commission power rooted in alleged fears of non-compliance as a predicate to circumvent the Code, Commission regulations, and the Commission's authority.

Astonishingly, for the first time in its Exceptions, PWSA asserts that "there is nothing untoward" about the City receiving free water.<sup>13</sup> Had PWSA timely raised this wild assertion, I&E would have vigorously opposed it.<sup>14</sup> However, at this late juncture, PWSA appears to raise this bold, bald assertion simply to buttress its position that its step-billing plan is reasonable. The Commission should reject this framing of the issue, which, notwithstanding being contrary to law, is completely undeveloped in the record and divested from the reality that PWSA is now a regulated entity. Additionally, this claim is contrary to PWSA's Compliance Plan proposal and the consistent position of all parties, including PWSA, that the City must ultimately pay for its full usage.<sup>15</sup> The litigated issue only concerns timing, i.e., when, not if, the City will receive bills.

PWSA alternatively proposes the Commission simply defer this issue to a future Cooperation Agreement proceeding "that will likely be opened in the next few months."<sup>16</sup> PWSA raised this position in briefing,<sup>17</sup> which I&E opposed,<sup>18</sup> and the ALJs rejected.<sup>19</sup> First, it

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<sup>13</sup> PWSA Exceptions, p. 8.

<sup>14</sup> See, e.g., 66 Pa. C.S. § 1303 ("No public utility shall, directly or indirectly, by any device whatsoever, or in anywise, demand or receive from any person, corporation, or municipal corporation a greater or less rate for any service rendered or to be rendered by such public utility than that specified in the tariffs of such public utility applicable thereto..."; *Philadelphia Suburban Water Co. v. Pennsylvania Pub. Util. Commn.*, 808 A.2d 1044, 1061 (Pa. Commw. Ct. 2002) ("Free service is necessarily an illegally low charge").

<sup>15</sup> See, e.g., PWSA Compliance Plan, p. 110; PWSA Main Brief, pp. 26-29; OCA Main Brief, pp. 11-14; I&E Main Brief, pp. 36-43. OSBA and Pittsburgh UNITED did not actively pursue this issue.

<sup>16</sup> PWSA Exceptions, p. 6, 11.

<sup>17</sup> PWSA Main Brief, p. 23.

<sup>18</sup> I&E Reply Brief, pp. 15-16.

<sup>19</sup> RD, pp. 127-128.

is important to recognize that the Commission specifically asked that questions regarding these metering issues be discussed in this proceeding.<sup>20</sup> Second, parties never agreed metering issues would exclusively be determined in a future proceeding regarding any Cooperation Agreement. The Partial Settlement does not state otherwise, and therefore this topic is properly before the Commission as a litigated issue. Third, a Commission decision on these issues as soon as possible is necessary to protect PWSA's operations and its ratepayers. There may be some overlap in proceedings if PWSA files a new Cooperation Agreement for review before a Commission decision in this proceeding is issued.<sup>21</sup> However, this issue of timing should not preclude the Commission from issuing a decision in this proceeding. To the contrary, it is critical that the Commission weigh-in on a contested, on-the-record issue as soon as possible. The question of foregone revenues will continue to be an issue when PWSA files a new rate case, and the parties should receive direction from the Commission as soon as possible. Fourth, as detailed in I&E's Main Brief,<sup>22</sup> PWSA proposed its step-billing proposal as part of its Compliance Plan. Therefore, it is proper that the Commission determine these metering issues in this Compliance Plan proceeding.

Relatedly, PWSA claims that because the step-billing plan has been agreed to by the City as part of an alleged future Cooperation Agreement, "it is not reasonable to expect that the City could or would pay something beyond what it has already agreed to pay." This is a meritless position that must be rejected. The entire purpose of this proceeding, as required by the General Assembly, is for PWSA to come into compliance with the Code and Commission rules,

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<sup>20</sup> Pa. P.U.C. Docket Nos. M-2018-2640802 & M-2018-2640803, Corrected Technical Staff Directed Questions (November 28, 2018), pp. 15-16.

<sup>21</sup> Notably, the timeline of the alleged future agreement has continually been extended and has proven to be unreliable in that it is, in part, controlled by the City's Mayor and has been pending with him since July 24, 2019.

<sup>22</sup> I&E Main Brief, pp. 36-44.



regulations, and orders. PWSA and the City cannot circumvent the Code and Commission mandates by making separate arrangements through a Cooperation Agreement, notwithstanding the unreasonableness of requesting that the Commission hinge resolution of this issue upon the unreliable timeline controlled by an unregulated third party.<sup>23</sup> Finally, consideration of the City's interests are not appropriate here, as despite receiving notice of this proceeding and a copy of PWSA's Compliance Plan, which implicated issues of City interest, and despite being advised in writing of the opportunity, the City elected not to participate.<sup>24</sup>

### **C. The OCA's Exception**

The OCA excepts to the ALJs' Recommended Decision, claiming PWSA's step-billing plan should be approved, albeit only if tied to the OCA's flat rate proposal for unmetered properties.<sup>25</sup> For the same reasons discussed above, I&E opposes any step-billing plan, including in the context of OCA's proposal. Additionally, the OCA has not demonstrated how adoption of its flat rate proposal would transform the step-billing plan into a reasonable proposal. The OCA repeats a similar assertion made by PWSA that the City must be allowed time to incorporate the costs of billing into its budgets.<sup>26</sup> However, as discussed above, there is no evidence in the record that the City will not pay its full bills once metered. Therefore, the Commission should reject the OCA's Exception No. 1, and adopt the ALJs' recommendation that the Commission order PWSA to introduce a flat rate, as minimum the customer charge for the customer's class, for all

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<sup>23</sup> I&E Main Brief, p. 24, footnote 50.

<sup>24</sup> *Pa. P.U.C. v. PWSA*, R-2018-3002645 et al., Letter to Solicitor for the City of Pittsburgh (December 13, 2018).

<sup>25</sup> OCA Exceptions, p. 4.

<sup>26</sup> OCA Exceptions, p. 3.

unbilled customers in its next base rate case, and as customers are metered their metered usage should be billed immediately.<sup>27</sup>

**2. Reply to PWSA's Exception No. 2: The ALJs Properly Rejected PWSA's Proposed Cost Sharing For Costs Related To Metering Municipal Properties As Contrary To Commission Regulations With No Basis For Deviation**<sup>28</sup>

PWSA estimates 200-400 municipal (i.e., City) buildings and 300-400 “municipally-owned fountains, pools, etc.” are unmetered.<sup>29</sup> PWSA plans to split the costs of meter installations with the City 50/50.<sup>30</sup> In settlement, parties agreed, for non-municipal properties, PWSA will pay for the meter and the meter installation.<sup>31</sup> However, PWSA believes an alternate arrangement with the City is appropriate, and meter installation costs should be shared 50/50. The ALJs rejected PWSA's proposal, stating PWSA had not provided a good basis for deviating from 52 Pa. Code § 65.7. I&E agrees and recommends the Commission reject PWSA's Exception No. 2.

PWSA offers four reasons why its cost-sharing arrangement with the City should be approved. I&E avers none of these reasons provide adequate basis to deviate from Commission regulations. First, 52 Pa. Code 65.7 states a utility is responsible for metering costs, “unless otherwise authorized by the Commission...”.<sup>32</sup> I&E agrees that Section 65.7(b) includes the provision that a Commission may authorize a departure from the rules under subsection (b). As

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<sup>27</sup> RD, p. 128.

<sup>28</sup> RD at 114.

<sup>29</sup> PWSA Compliance Plan, p. 56; PWSA St. No. C-1R, p. 18.

<sup>30</sup> PWSA St. No. C-1R, p. 18.

<sup>31</sup> *Implementation of Chapter 32 of the Public Utility Code Regarding Pittsburgh Water and Sewer Authority, Stage 1*, M-2018-2640802 et al, *Joint Petition for Partial Settlement*, p. 22, ¶¶ III(G)(3) (September 13, 2019). Applicants will be required to pay for plumbing changes, including service lines in accordance with Part III, Section B.13 of PWSA's approved Tariff, and other related appurtenances required to make the installation comply with applicable PWSA requirements and county and local plumbing codes.

<sup>32</sup> PWSA Exceptions, p. 13.

a general matter, the Commission may authorize a departure from any of its regulations, not just Section 65.7(b).<sup>33</sup> However, the Commission has not authorized any such departure. Nor has PWSA appropriately petitioned for waiver of Commission regulations.

Second, PWSA claims the 50/50 sharing approach is reasonable because it is limited to metering previously unmetered City properties.<sup>34</sup> PWSA states the ALJs appear not to recognize this limitation. The ALJs may not have recognized this limitation, because this is the first time PWSA has claimed such limitation.<sup>35</sup> Because PWSA is now claiming this limitation for the first time in exceptions, this argument should be rejected by the Commission outright. Even were this claim properly raised, PWSA provides no basis why this “limited” exception is reasonable and merits an exception. To the contrary, PWSA’s Compliance Plan contradicts its claim, since it estimates metering 200-400 municipal buildings as well as 500 flat rate customers will cost approximately \$35 million over five years.<sup>36</sup> Importantly, even assuming that the alleged “limitation” is valid, it still fails to address the defect noted by the ALJs, which is that PWSA failed to demonstrate how the cost-sharing is a better pathway to compliance.<sup>37</sup>

Third, PWSA states its proposed approach is “a reasonable balance of its historical practices and Commission practices.”<sup>38</sup> Specifically, PWSA cites the MAA for support that customers should pay for the costs of meter installation.<sup>39</sup> PWSA is again essentially introducing a new claim in exceptions. Nowhere in testimony or briefing did PWSA claim the MAA’s rules

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<sup>33</sup> 52 Pa. Code §§ 1.91, 5.43.

<sup>34</sup> PWSA Exceptions, p. 13.

<sup>35</sup> PWSA first introduced its 50/50 proposal into the record in rebuttal testimony. PWSA St. No. C-1R, p. 18. Nowhere in rebuttal, supplemental, or rejoinder testimony, or even in briefing, did PWSA claim this limitation.

<sup>36</sup> Compliance Plan, p. 56.

<sup>37</sup> RD at 115.

<sup>38</sup> PWSA Exceptions, p. 13.

<sup>39</sup> PWSA Exceptions, p. 14, citing 53 Pa. C.S. § 5607(d)(24)(i).

regarding meter installation should impact its compliance with 52 Pa. Code 65.7.<sup>40</sup> Therefore neither parties nor the ALJs gave any consideration to this argument, and it should be rejected by the Commission outright. Had this claim been properly raised, I&E likely would have performed the same analysis it did regarding line extensions, the subject of PWSA's Exception No. 3. However, because parties were not provided notice of PWSA's claim, I&E now cannot substantively respond; therefore, it must be disregarded.

Last, PWSA states the cost sharing proposal is consistent with its new agreement with the City and therefore "it makes no practical sense to deny PWSA the opportunity to receive half of the City meter installation costs from the City while being critical of its failure to secure full and immediate payment of City usage as new meters are installed."<sup>41</sup> This statement misses the entire point of the Compliance Plan proceeding. The goal of this proceeding is for PWSA to comply with the Code and Commission regulations. Commission regulations clearly state a utility must be responsible for metering costs. Although enforcement of the Code here will benefit the City rather PWSA, that is what Commission regulations dictate. The fact that PWSA's relationship is imbalanced with the City in other areas does not merit violating Commission regulations. The goal instead should be consistent, indiscriminate enforcement of the Code and Commission regulations.

PWSA again alternatively suggests the Commission defer this matter to a future City Cooperation Agreement proceeding.<sup>42</sup> I&E opposes this suggestion for the same reasons explained above with regard to PWSA's Exception No. 1: the Commission specifically asked

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<sup>40</sup> Possibly aware of its late-raised claim, PWSA stops short of definitively stating the MAA controls to the exclusion of 52 Pa. Code 65.7.

<sup>41</sup> PWSA Exceptions, p. 14.

<sup>42</sup> PWSA Exceptions, p. 15.

that questions regarding these metering issues be discussed in this proceeding;<sup>43</sup> this topic is properly before the Commission as a litigated issue; Commission direction on these issues as soon as possible is necessary; and PWSA explained its cost-sharing proposal as part of its Compliance Plan generally.<sup>44</sup> Therefore, it is proper that the Commission consider this issue now and determine PWSA is responsible for the costs of meter installation in accordance with 52 Pa. Code § 65.7.

**3. Reply to PWSA's Exception No. 3: The ALJs Properly Found that Rules of Statutory Construction Dictate that Chapter 32 of the Code Supersedes Conflicting Sections of the Municipality Authorities Act**<sup>45</sup>

**A. Statutory Construction Analysis**

PWSA proposes to follow the Municipality Authorities Act ("MAA") instead of 52 Pa. Code §§ 65.21-65.23 regarding line extensions. The ALJs rejected PWSA's proposal, and correctly stated Chapter 32 of the Code requires PWSA to follow Commission regulations, not the MAA, regarding line extensions.<sup>46</sup> PWSA's Exceptions fail to establish a viable argument against the ALJs' well-reasoned analysis; therefore, the Commission should reject PWSA's Exception No. 3.

PWSA again confirms that PWSA cannot be in compliance with the MAA and Commission regulations regarding line extensions at the same time.<sup>47</sup> Therefore, the conflict here primarily involves statutory construction analysis. PWSA again misstates the statutory construction analysis as simply a regulation versus a statute, isolated from the context of Chapter

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<sup>43</sup> Pa. P.U.C. Docket Nos. M-2018-2640802 & M-2018-2640803, Corrected Technical Staff Directed Questions (November 28, 2018), p. 6.

<sup>44</sup> See I&E Main Brief, pp. 32-36.

<sup>45</sup> RD at 152-155.

<sup>46</sup> Id. at 155.

<sup>47</sup> PWSA Exceptions, p. 15.

32.<sup>48</sup> PWSA goes even further and boldly states the Recommended Decision “does not describe any conflict between [the MAA and Code].”<sup>49</sup> This claim is false, and the ALJs correctly stated, the conflict is between Chapter 32 of the Public Utility Code and the MAA, not the conflict between 52 Pa. Code §§ 65.21-65.23 and the MAA in a vacuum.<sup>50</sup> PWSA does not squarely address this argument of statute versus statute. The ALJs thoroughly and correctly addressed this analysis in the Recommended Decision.<sup>51</sup>

PWSA claims the requirements of the MAA and Code can be read together to give both effect.<sup>52</sup> Relatedly, PWSA claims the General Assembly did not demonstrate clear intent that the Commission’s line extension regulations must prevail over MAA line extension provisions.<sup>53</sup> Again, this claim completely ignores that the conflict is between Chapter 32 and the MAA, not Commission regulations and the MAA in isolation. Specifically, as stated by the ALJs, and evidencing the legislature’s intent, Chapter 32 “mandates PWSA comply with the Code generally. Compliance with the Code generally includes compliance with Commission regulations, and Commission regulations include specific rules regarding line extensions.”<sup>54</sup>

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<sup>48</sup> PWSA Exceptions, p. 16.

<sup>49</sup> PWSA Exceptions, p. 18.

<sup>50</sup> RD, p. 152. PWSA incorrectly summarizes the ALJs analysis by claiming the ALJs elevate Commission regulations to a statute. PWSA Exceptions, p. 18, 21.

<sup>51</sup> RD, pp. 152-155.

<sup>52</sup> PWSA Exceptions, pp. 18, 20, 22.

<sup>53</sup> PWSA Exceptions, pp. 18, 21-23. PWSA claims a “deeper analysis” reveals the General Assembly saw no conflict between the MAA and the Code, without explaining what exactly its deeper analysis is. PWSA Exceptions, p. 21. To the contrary, the General Assembly demonstrated its willingness to provide express limitations to the Code’s applicability at 66 Pa. C.S. § 3208 (regarding establishment of authorities, audits, and compliance with certain financial obligations).

<sup>54</sup> RD, p. 152 (citations omitted).

Public utilities are clearly required to follow Commission regulations per the Code.<sup>55</sup> It is unclear what further affirmance PWSA seeks, but it would be absurd to believe the legislature must enumerate every regulation accompanying compliance with the Code.<sup>56</sup> PWSA then attempts to characterize 52 Pa. Code §§ 65.21-65.23 as simply one method “to achieve reasonable rates and services” under the Code.<sup>57</sup> To the contrary, Sections 65.21 and 65.22 are mandatory directives, stating a water utility “shall” take certain actions related to line extensions.<sup>58</sup>

PWSA again points to language in the MAA (i.e., 53 Pa. C.S. § 5607(d)(24)(iii)) that supposedly prohibits PWSA from following Commission regulations regarding line extensions.<sup>59</sup> PWSA’s continued reliance on paragraph (24) is incorrect for several reasons. The MAA’s rules regarding “line extensions” are found not only at paragraph (24), but also 53 Pa. C.S. §§

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<sup>55</sup> See, e.g., 66 Pa.C.S. § 501(c) (“Every public utility...subject to the provisions of this part, affected by or subject to any regulations or orders of the commission or of any court, made, issued, or entered under the provisions of this part, shall observe, obey, and comply with such regulations or orders, and the terms and conditions thereof”); 66 Pa.C.S. § 1501 (“[A public utility’s] service and facilities shall be in conformity with the regulations and orders of the commission”).

<sup>56</sup> I&E does not dispute the MAA still applies to PWSA when not in conflict with Chapter 32. Chapter 32 did not change PWSA’s status as a municipal authority. However, Chapter 32 clearly mandates PWSA’s compliance with the Code and Commission rules, regulations, and orders, including 52 Pa. Code §§ 65.21 through 65.23, in the same manner as a public utility. Relatedly, and importantly, Pennsylvania Courts have long held that the General Assembly’s intention is that the Code and Commission regulations should exclusively control regulation of public utilities. *PPL Electric Utilities Corp. v. City of Lancaster*, 2019 WL 3926456 (Pa. 2019) (“[T]he General Assembly long has intended, and continues to intend, that its comprehensive statutory framework for utility regulation, as complemented by the PUC’s voluminous complementary regulations, reflect its general intention wholly to occupy the field of utility regulation at the state level”); *PECO Energy Co. v. Township of Upper Dublin*, 922 A.2d 996 (Pa. Commw. 2007) (“[T]he Public Utility Code is intended to be the supreme law of the Commonwealth in the regulation and supervision of public utilities”); *Newtown Twp. v. Philadelphia Elec. Co.*, 140 Pa. Cmwlth 635 (Pa. Commw. 1991) (“[A]ll laws inconsistent with the powers thus conferred [by the Public Utility Code] must be held to be repealed” (quoting *York Water Co. v. York*, 250 Pa. 115 (Pa. 1915))). There is no reason to think the legislature’s intention was different here.

<sup>57</sup> PWSA Exceptions, p. 21. PWSA also claims the Commission’s line extension regulations are only “interpretive”. PWSA Exceptions, p. 21, fn. 40. PWSA devotes no discussion or analysis to this characterization, raised for the first time in Exceptions, and therefore this claim should be disregarded.

<sup>58</sup> Section 65.23 simply states that Sections 65.21 and 65.22(a) and (c) do not apply to special utility service.

<sup>59</sup> PWSA Exceptions, pp. 15, 19, citing 53 Pa. C.S. § 5607(d)(24)(iii).

5601(d)(21) – (23), (30) – (31).<sup>60</sup> Paragraph (24)<sup>61</sup> only applies to connection fees, customer facilities fees, tapping fees, or similar fees. 53 Pa. C.S. §§ 5607(d)(21) and (22) address what costs a municipal authority can charge for construction of water and sewer mains, and paragraph (23) discusses financing of line extensions. Any doubt whether 53 Pa. C.S. § 5607(d)(24)(iii) does not apply to paragraphs (21) and (22) is also dispelled by paragraph (24) itself. Specifically, “[Paragraph 24] fees shall be *in addition to* any charges assessed against the property in the construction of a sewer or water main by the authority under paragraphs (21) and (22).”<sup>62</sup> Therefore, any limiting provisions of paragraph (24) are inapplicable to paragraphs (21) and (22). Even if 53 Pa. C.S. § 5607(d)(24)(iii) was relevant, the purpose of 53 Pa. C.S. § 5607(d)(24)(iii) is to limit what fees can be charged under the MAA, not to supplant any subsequent legislative directives to the contrary.

#### **B. PWSA’s Waiver Request Is Untimely and Unsupported**

In their Recommended Decision, the ALJs appropriately recommended that PWSA’s request for a waiver of the Commission’s line extension regulations be denied because it was untimely and deprived parties of the opportunity to develop a record regarding the prudence of PWSA’s request.<sup>63</sup> The ALJs’ determination is well-supported, as demonstrated by the fact PWSA never indicated in its Compliance Plan, nor in any portion of the record in this case, that it would seek such a waiver, although this case was pending for almost an entire year.<sup>64</sup> While

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<sup>60</sup> Although the MAA does not actually use the term “line extension,” I&E avers 53 Pa. C.S. §§ 5607(d)(21) through (23) are the closest corollaries to Commission regulations regarding line extensions, i.e., these sections apply to main construction and their financing. As defined by Commission regulations, “line extension” refers to the “addition to the utility’s *main* line which is necessary to serve the premises of a customer.” 52 Pa. Code § 65.1 (emphasis added).

<sup>61</sup> Including, by extension, 53 Pa. C.S. § 5607(d)(24)(iii).

<sup>62</sup> 53 Pa. C.S. § 5607(d)(24).

<sup>63</sup> RD at 155.

<sup>64</sup> I&E Reply Brief, pp. 26-27.



the record was open, PWSA presented the line extension issue as a pure legal conflict question, rather than the prudence of waiving regulations.<sup>65</sup> However, soon after the record closed, PWSA raised its waiver request for the first time in its Main Brief.<sup>66</sup> To that end, and as explained more thoroughly below, PWSA's Exception No. 3 is without merit and it must be denied.

I&E submits that PWSA's request is, on its face, untimely, unsupported, and procedurally inappropriate not only for the reasons explained above, but also because it completely disregards the Commission's regulatory mandates for waiver requests. Specifically, pursuant to 52 Pa. Code. § 5.43, *Petitions for issuance, amendment, repeal, or waiver of Commission regulations*, PWSA's request must have been made by way of a petition served upon all parties directly affected, not raised for the first time in the Main Brief of a litigated proceeding after the record had closed. Because PWSA deviated from the prescribed process, it is unclear whether all affected parties have received notice. Furthermore, PWSA's waiver petition was required to set forth the facts claimed to constitute grounds warranting the waiver.<sup>67</sup> While the ALJs did not specifically reference this regulatory requirement in their Recommended Decision, they essentially summarized it by way of determining that the parties had no opportunity to develop a record of the prudence of PWSA's request.<sup>68</sup> In its Exceptions, PWSA does not appear to deny that parties were denied an opportunity to develop a record on the prudence of its request; instead, PWSA alleges that it provided the "factual record necessary" for the Commission to grant its waiver.<sup>69</sup> I&E submits that the record does not support PWSA's claim.

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<sup>65</sup> I&E Main Brief, pp. 27.

<sup>66</sup> PWSA Main Brief, pp. 45-47.

<sup>67</sup> 52 Pa. Code § 5.43(a).

<sup>68</sup> RD at 155.

<sup>69</sup> PWSA Exceptions, pp. 25-26.

The sole support for PWSA's position that it should be granted a perpetual waiver of the Commission's line extension regulations is testimony by PWSA witness Quigley which (1) explained the differences between the MAA and Code provisions for line extensions and concluded that the MAA provisions controlled<sup>70</sup> and (2) in less than one full page of testimony, alleged generalized concerns of hardship associated with changing PWSA's policies, procedures, systems, and other processes.<sup>71</sup> At no point did PWSA attempt to provide even an estimate of the potential costs and timeline necessary for its compliance with the Commission's line extension regulations, as witness Quigley simply concluded that she did not support "going down [the] path" of doing anything different than following the MAA provisions.<sup>72</sup> Although PWSA attempted to argue in its Main Brief, and now reasserts the allegation that converting to the Commission's line extension regulations could subject it to complex and costly litigation,<sup>73</sup> that speculative and unsupported claim was never made in the record in this case. In any event, the limited and generalized claims of hardship that PWSA now attempts to convert into support for a waiver of the Commission's regulations are not a valid basis to abandon compliance with Chapter 32. Nor are they now a sufficient basis to support the prudence of PWSA's untimely and procedurally inappropriate waiver request. Accordingly, I&E recommends that the Commission deny PWSA's waiver request in this proceeding.<sup>74</sup>

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<sup>70</sup> PWSA St. No. C-4, pp. 31-34

<sup>71</sup> PWSA St. No. C-4R, p. 37.

<sup>72</sup> Id. at p. 38.

<sup>73</sup> PWSA Main Brief, p. 32; PWSA Exceptions, pp. 25-26.

<sup>74</sup> Without commenting on the merits of any future request, I&E submits a denial in this proceeding should not prejudice PWSA's ability to submit a formal waiver request in the appropriate manner with the appropriate support.

### **C. PWSA Failed to Support its Requested Extension of Time**

In its Exceptions, as an alternative to its waiver request, PWSA for the first time makes a request that neither the ALJs nor the parties in this case have had an opportunity to evaluate. Specifically, PWSA asks that the Commission allow it to continue to apply the MAA line extension provisions in lieu of the Code while it is granted a one-year extension to either (1) file a formal waiver request; or (2) file a compliance plan detailing how it will revise its operations.<sup>75</sup> The crux of PWSA's request is that it needs time to understand the Commission's expectations and to formulate an approach while it deals with complicated and significant transitional issues.<sup>76</sup> However, because of the untimeliness and lack of support for PWSA's alternate request, I&E does not have the appropriate facts necessary to support it. For instance, it is unclear why PWSA requires an entire year to file for a waiver, and I&E cannot support that request without any meaningful opportunity to evaluate its basis. As this brand new request is untimely and unsupported, I&E respectfully recommends that the Commission deny it.

#### **4. Reply to PWSA Exception No. 4: The ALJs Properly Determined that the Commission Has Jurisdiction Over PWSA's Lead Service Lines Pursuant to Sections 3205 and 1501 of the Code**<sup>77</sup>

##### **A. Introduction**

In their Recommended Decision, the ALJs rejected PWSA's "novel" argument that its lead service lines presented a "water quality issue" outside of the Commission's jurisdiction and within the sole purview of the Pennsylvania Department of Environmental Protection ("PA DEP").<sup>78</sup> In rejecting PWSA's position, the ALJs acknowledged that under Sections 3205 and

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<sup>75</sup> PWSA Exceptions, pp. 26-27.

<sup>76</sup> Id. at 26.

<sup>77</sup> RD at 208.

<sup>78</sup> Id. at 207.

1501 of the Code, the Commission has authority over PWSA's service lines as a service issue if the water quality is not safe.<sup>79</sup> In its Exceptions, PWSA fails to acknowledge Section 3205, and it acknowledges but fails to refute the applicability of Section 1501. Instead, PWSA attempts to deprive the Commission of its clear jurisdiction over lead service lines by characterizing lead infrastructure issues as "water quality issues" and by relying upon demonstrably inapplicable and irrelevant case law. Finally, PWSA makes unsupported and contradictory claims that recognizing the Commission's authority will implicitly give rise to conflicts with PA DEP and divert its resources. As I&E demonstrates below, each of these arguments are without merit and operate as ineffective attempts to repudiate the Commission's clear jurisdiction over PWSA's lead service lines. Accordingly, the Commission should reject them by dismissing PWSA's Exception No. 4.

**B. The Commission's Authority Under §§ 3205 and 1501 of the Code**

While I&E agrees with PWSA's position that "jurisdiction may not be conferred where none exists"<sup>80</sup> there can be no viable dispute that the General Assembly has granted the Commission clear authority over PWSA's lead service lines. In this case, as the ALJs properly recognized, the operative statutes are Sections 3205 and 1501 of the Code. First, although PWSA fails to address it, to the extent that the persuasive legislative intent of Chapter 32 leaves any doubt that the legislature empowered the Commission to address PWSA's lead service lines,<sup>81</sup> Section 3205 resolves the doubt in favor of the Commission. More specifically, through

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<sup>79</sup> Id. at 208.

<sup>80</sup> PWSA Exceptions, p. 31.

<sup>81</sup> I&E Main Brief, pp. 5-6; House Co-Sponsorship Memoranda for HB 1490, PA House of Representatives, Session of 2017-2018 Regular Session, May 24, 2017.

Section 3205, “Maintenance, repair and replacement of facilities and equipment”<sup>82</sup> the General Assembly provided express authorization for the Commission to address PWSA’s service lines:

The commission may require an **authority to maintain, repair and replace facilities and equipment used to provide services** under this chapter to ensure that the equipment and facilities comply with section 1501 (relating to character of service and facilities).<sup>83</sup>

I&E notes that Section 3205 incorporates Section 1501, which requires PWSA to:

furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public.<sup>84</sup>

Accordingly, the clear language of Section 1501<sup>85</sup> imposes an obligation upon PWSA to make repairs and changes to facilities necessary to ensure safe service and public safety. I&E submits that Sections 3205 and 1501 work in tandem to provide the Commission with authority over PWSA’s lead service lines. Specifically, Section 3205<sup>86</sup> provides the Commission with authority to require PWSA to replace facilities used to provide service, as necessary to effectuate Section 1501. In turn, Section 1501 requires PWSA to make repairs and changes necessary for the safety of its patrons and the public. PWSA fails to recognize these authorities, but that failure does not make them any less operative.

### **C. Lead Service Lines Implicate a Service Issue**

As the ALJs correctly noted in their Recommended Decision, PWSA’s semantical

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<sup>82</sup> 66 Pa. C.S. § 3205.

<sup>83</sup> 66 Pa. C.S. § 3205(a) (emphasis added).

<sup>84</sup> 66 Pa. C.S. § 1501.

<sup>85</sup> Id.

<sup>86</sup> 66 Pa. C.S. § 3205.

argument that elevated lead levels represent a water quality issue “fails to recognize that water quality and water service are inseparable in this proceeding.”<sup>87</sup> To be sure, while elevated lead levels in PWSA’s water now present a water quality issue, the evidence in this case proves that the genesis of those elevated levels is a direct result of water service that is provided through lead infrastructure.<sup>88</sup> In its Exceptions, PWSA reinforces this point by admitting that while there is no detectable lead in its water when it leaves the treatment plant, “lead can enter the water **through lead service lines**.”<sup>89</sup> Thus, while PWSA’s provision of service through lead lines ultimately produces a water quality issue, making the service and quality issues inextricably linked, there is no dispute that the provision of service through lead service lines is the root cause.

Semantical characterizations aside, PWSA’s attempts to couch this issue as one of water quality also relies upon two cases<sup>90</sup> that are so factually distinguishable from the situation here that are demonstrably inapplicable. By way of further context, in *Rovin*, the question pending before the Commonwealth Court was “Does the PUC have authority to decide a complaint wherein a water company customer alleges that the practices of the company regarding fluoridation of the water it supplies its customers are not “adequate, ... safe and reasonable” as required by [Section 1501 of the Code]?”<sup>91</sup> Similarly, in *Pickford*, the central issue was whether it was more prudent for the utility to use an alternate decontaminant additive to water than the additives used and that PA DEP permitted, chloramines.<sup>92</sup> In *Rovin* and *Pickford*, the focal point

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<sup>87</sup> RD at 207.

<sup>88</sup> I&E Main Brief, p. 69; PWSA Compliance Plan, p. 119.

<sup>89</sup> PWSA Exceptions, p. 28 (emphasis added).

<sup>90</sup> Id. at 32-33.

<sup>91</sup> *Rovin v. Pa P.U.C.*, 94 Pa. Cmwlth. 71, 73, 502 A.2d 785, 786 (1986).

<sup>92</sup> *Pickford v. Pa. PUC*, 4 A.3d 707, 714 (Pa. Cmwlth. 2010).

of the jurisdictional determination was whether chemicals that a public utility directly and intentionally added into its water supply failed to provide the utility's customer with adequate, safe, and reasonable water service. Intentional chemical additives are not relevant here. Instead, what is relevant and determinative here is that PWSA is not providing adequate, safe, and reasonable water service to its customers because the lead service lines now providing service to its customers are comprised of a dangerous material.

**D. PWSA's Unsupported and Contradictory Claims of PA DEP Conflicts**

Nothing in the record supports PWSA's newfound conjecture that recognizing the Commission's jurisdiction over its lead infrastructure, or replacing more service lines than the minimum threshold that PA DEP requires, will result in conflicting directives.<sup>93</sup> Lack of such support is, on its own, an additional basis upon which to reject PWSA's position. However, PWSA's conflict argument extends beyond unsupported conjecture into a position of complete contradiction. Specifically, PWSA touts that the LSLR Program it is offering for approval in this case already contemplates replacement above and beyond what is required by environmental regulations or any federal or state mandates, including, minimum PA DEP standards.<sup>94</sup> Accordingly, it appears that PWSA perceives no PA DEP conflict when it voluntarily elects to exceed floor-level environmental standards, but it selectively anticipates conflicts arising if it exceeds those minimum standards at the Commission's direction. The Commission should reject this contradictory claim.

Finally, the Commission must reject PWSA's false-choice argument that by requiring PWSA to replace private-side lead service lines, it would "divert resources away from public-

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<sup>93</sup> PWSA Exceptions, pp. 33-36.

<sup>94</sup> PWSA Exceptions, p. 29.

side lead service line replacements.”<sup>95</sup> While PWSA has not identified the resources of concern, assuming that financial resources are at issue, this argument is not persuasive because PWSA is raising it in the same proceeding in which it simultaneously asks this Commission to permit it to continue depriving itself of revenue in favor of the City.<sup>96</sup> Further, if financial resources are at issue, PWSA also ignores its clear authority to seek cost recovery under Section 1311(b) of the Code, despite the fact that the General Assembly provided a recovery option to guard against the service issues underlying this case.<sup>97</sup>

If PWSA has concerns about use of non-financial resources, it is unclear why those unidentified concerns have not translated to its proposed LSLR Program. As mentioned above, PWSA is requesting that the Commission approve its proposed LSLR Program, which contemplates replacement of both public and private side lead service lines; however, PWSA raised no diversion of resource concerns in that context. As explained above, there is no basis available to suggest that by merely asserting its express authority over PWSA’s lead service lines, PWSA’s resources will be diverted and conflicts will arise. On the other hand, there is clear evidence to support the conclusion that the Commission is empowered with both the authority and the obligation to ensure that PWSA’s customers are not served through dangerous infrastructure. Accordingly, the Commission should deny PWSA Exception No. 4.

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<sup>95</sup> PWSA Exceptions, pp. 35-36. I&E also submits that PWSA’s argument on this basis was not ripe for Exception, since PWSA purports to agree with the ALJs’ determination that it may not be ordered to replace customer-owned lead lines (PWSA Exceptions, p. 30). I&E has addressed its position on this issue in its Exceptions, but now responds solely to the procedurally-inappropriate claims that PWSA now makes here for the first time.

<sup>96</sup> PWSA Exceptions, pp. 7-11.

<sup>97</sup> I&E Main Brief, pp. 88-93.



### III. CONCLUSION

For the reasons stated herein, I&E respectfully requests that the Commission deny PWSA and OCA Exception No. 1, as well as PWSA Exception Nos. 2 through 4. Accordingly, the Commission should adopt the Recommended Decision of the Administrative Law Judges to (1) reject PWSA's and OCA's proposed billing plan for unmetered and/or unbilled municipal properties within the City of Pittsburgh; (2) reject PWSA's proposed cost sharing for costs related to metering municipal properties within the City of Pittsburgh; (3) conclude the Municipality Authorities Act no longer governs PWSA's line extension processes; and (4) conclude that the Commission has jurisdiction over PWSA's lead service lines.

Respectfully submitted,



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Dated: December 3, 2019

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**CERTIFICATE OF SERVICE**

I hereby certify that I am serving the foregoing **Reply Exceptions** dated December 3, 2019, in the manner and upon the persons listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party):

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