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CITY OF PITTSBURGH  
**DEPARTMENT OF LAW**  
CITY-COUNTY BUILDING

April 9, 2020

**VIA E-FILE**

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

**Re: PA Public Utility Commission v. Pittsburgh Water and Sewer Authority**  
*Docket Nos. M-2018-2640802, M-2018-2640803, P-2018-3005037, P-2018-3005039*

Dear Secretary Chiavetta,

Enclosed for filing, please find the **Petition to Intervene of the City of Pittsburgh** in the above noted proceeding. Copies have been served in accordance with the attached Certificate of Service.

Respectfully submitted,

/s/ Yvonne S. Hilton  
City Solicitor

**BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION**

<b>Implementation of Chapter 32 of the</b>	<b>:</b>	<b>Docket No.</b>	<b>M-2018-2640802</b>
<b>Public Utility Code Re Pittsburgh</b>	<b>:</b>		<b>M-2018-2640803</b>
<b>Water and Sewer Authority—Stage 1</b>	<b>:</b>		

<b>Petition of Pittsburgh Water and Sewer</b>	<b>:</b>	<b>Docket No.</b>	<b>P-2018-3005037</b>
<b>Authority for Approval of Its Long-Term</b>	<b>:</b>		<b>P-2018-3005039</b>
<b>Infrastructure Improvement Plan</b>	<b>:</b>		

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**PETITION TO INTERVENE OF**

**THE CITY OF PITTSBURGH**

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**City of Pittsburgh**

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**April 9, 2020**

Pursuant to the provisions of the Rules of Practice and Procedure of the Pennsylvania Public Utility Commission (the “PUC” or “Commission”), 52 Pa. Code §§ 5.71-.75, the City of Pittsburgh (the “City”) through its undersigned legal counsel, hereby petitions the Commission to intervene in the above-captioned proceeding. In support thereof, the City states as follows:

1. On September 28, 2018, the Pittsburgh Water and Sewer Authority (the “PWSA”) filed a Petition with the Commission for approval of its Compliance Plan at Docket Nos. M-2018-2640802 (water) and M-2018-2640803 (sewage) and its Long-Term Infrastructure Improvement Plan at Docket Nos. P-2018-3005037 (water) and P-2018-3005039 (sewage). The Commission consolidated these proceedings.

2. Eligibility to intervene in Commission proceedings is governed by 52 Pa. Code § 5.72, which provides in relevant part that “[a] petition to intervene may be filed by a person claiming a right to intervene or an interest of such nature that intervention is necessary or appropriate to the administration of the statute under which the proceeding is brought.” 52 Pa. Code § 5.72(a).

3. Section 5.72 further provides that the right or interest may be one “which may be directly affected and which is not adequately represented by existing participants, and as to which the petitioner may be bound by the action of the Commission in the proceeding.” 52 Pa. Code. § 5.72(a)(2).

4. Even though Section 5.72 speaks of the rights of a “person” to intervene, this includes entities in addition to natural born persons. See Lyft, Inc. v. Pa. Public Utility Commission, 145 A.3d 1235, 1246 (Pa. Commw. Ct. 2016) (discussing the Pittsburgh Post-Gazette's ability to intervene in a matter before the Commission).

5. Further, the Commonwealth Court recently announced that intervention in a Commission proceeding is appropriate where intervention “may be in the public interest” and that “the standard for intervention in a proceeding before the [Commission] is easily satisfied.” Allegheny Reproductive Health Ctr. v. Pa. Dept. of Health and Human Servs., \_\_\_ A.3d \_\_\_, 2020 WL 424866 at \*6 (Pa. Commw. Ct. 2020) (emphasis added) (internal quotations omitted).

6. The City, a Home Rule Municipality organized and existing under the Home Rule Charter and Optional Plans Law, 53 Pa.C.S. § 2901, *et seq.*, and city of the second class by statutory designation, is a political subdivision of the Commonwealth of Pennsylvania and maintains its principal place of business at 414 Grant Street, 5th Floor City-County Building, Pittsburgh, PA 15219.

7. The PWSA is a body corporate and politic organized and existing under the Pennsylvania Municipality Authorities Act, 53 Pa. C.S. § 5601 *et seq.* (the “Act”). It was created pursuant to Resolution No. 36 of the Council of the City of Pittsburgh (“City Council”) on February 6, 1984, approved by Mayor Richard Caliguiri on February 8, 1984, and effective on February 16, 1984. The Secretary of the Commonwealth of Pennsylvania approved the PWSA’s Articles of Incorporation on February 17, 1984.

8. The City established the PWSA in 1984 to assume responsibility for operating the City’s water supply and distribution and wastewater collection systems (the “Water and Sewer System”).

9. The Pennsylvania Department of State approved Articles of Amendment and issued a Certificate of Amendment on May 9, 2008, extending the PWSA’s term of existence to May 21, 2045.

10. The PWSA's Articles of Incorporation specifically authorize it to acquire, hold, construct, finance, improve, maintain, operate, own and lease, either as lessor or lessee, projects of the following kinds and character: sewers, sewer systems or parts thereof, waterworks, water supply works, and water distribution systems, low head dams and facilities for generating surplus power.

11. The PWSA operates and maintains the City's Water and Sewer System, which provides these services to a majority of the residential, business, educational facilities, and other types of structures within the City's corporate limits. Within the City, there are 80,569 water and sewer accounts and 30,728 sewer-only accounts. Millvale, a municipal customer of PWSA services, has 1,678 water-only accounts.

12. Pursuant to a lease and management agreement dated March 29, 1984 (the "1984 Agreement") between the PWSA and the City, the City leased its Water and Sewer System to the PWSA, with the City continuing to provide services necessary to operate the system, acting as an agent of the PWSA. In 1995, the parties terminated the 1984 Lease Agreement and entered into a 1995 Capital Lease Agreement dated July 15, 1995, which remains in effect today.

13. In addition to executing the 1995 Capital Lease Agreement, the PWSA and the City entered into a cooperation agreement with an effective date of January 1, 1995 (the "1995 Cooperation Agreement") pursuant to which the parties agreed to, *inter alia*:

- 1) the termination of certain administrative activities performed by the PWSA;
- 2) the immediate transfer of certain City employees to the PWSA;
- 3) the retention of certain services to be provided by the City to the PWSA until they could accomplish the transfer of other City employees to PWSA;

- 4) the documentation of other services the City would continue to provide to the PWSA;
- 5) the identification of the ongoing responsibility of each party for various capital projects; and
- 6) the identification of payments and services the PWSA would provide to the City. These payments and services included, but were not limited to a reimbursement for the equalization payments the City paid to the Pennsylvania American Water Company (“PAWC”) for those City residents serviced by PAWC and not the PWSA. The reimbursement for workers compensation benefits that the City paid on behalf of the transferred employees. The City’s right to an annual receipt of up to 600,000,000.00 gallons of water—water for the City’s use and the use of its instrumentalities (e.g. the Pittsburgh Zoo and Phipps Conservatory), each benefitting City residents and the general public.

14. Thereafter, the City and the PWSA amended the 1995 Cooperation Agreement in a First Amendment dated March 21, 2011.

15. The 1995 Agreement, as amended, remained in effect until October 3, 2019, when the PWSA terminated it because the parties negotiated a new cooperation agreement, the 2019 Cooperation Agreement.

16. The 2019 Cooperation Agreement is effective October 3, 2019.

17. The City believes it negotiated an arms-length transaction resulting in the 2019 Cooperation Agreement and if the PUC intends to review, comment, or revise the agreement pursuant to Section 507 and 508 of the Public Utility Code, it should address all of those matters in a proceeding filed pursuant to Section 1308(d). 66 Pa.C.S.A. §§ 507, 508 and 1308.

18. Therefore, the March 26, 2020 PUC Order prejudices the City because it did not receive formal notice that the PUC would address the 2019 Cooperation Agreement in the Compliance Case and therefore, this omission has deprived it of appropriate due process to support its position.

19. Had it received notice, the City would have identified its position on the record and introduced legal and factual evidence to support it.

20. For example, the 2019 Cooperation Agreement is significant because it recognizes transitions in the relationship between two distinct governmental entities, allowing each party the opportunity to implement these significant changes in a reasonable period of time to benefit and protect the taxpayers and ratepayers, respectively, many of whom are the same residents of the City.

21. More specifically, the 2019 Agreement confirms the City's commitment to change a thirty-six (36) year relationship over the course of five (5) years, which coincides with the time remaining on the 1995 Capital Lease Agreement, which expires on September 1, 2025. Following the expiration of the 1995 Capital Lease Agreement, the PWSA may then exercise the option to purchase the Water and Sewer System from the City for one dollar (\$1.00).

22. On the one hand, the 2019 Cooperation Agreement recognizes the PWSA, an independent municipal authority, is transitioning from a municipal authority that is not subject to the PUC's authority and oversight to a municipal authority that is subject to the PUC's authority and oversight. It is assuming an identity that is more akin to a traditional public utility rather than an independent authority.

23. On the other hand, the City, the current owner of the water and sewer system, is transitioning from a Water and Sewer System owner—allowing it an agreed upon access to *its own* water and sewer system—to a customer, paying for its access to water and sewer services.

24. Next, the City negotiated the 2019 Cooperation Agreement, in part, to balance the significant change, understanding each party must take specific positions: one to protect its

customers and the other to protect its residents. Therefore, the 2019 Cooperation Agreement includes provisions that:

- 1) reflect changes in the rights and obligations of each party;
- 2) reflect the division of the services related to the Water and Sewer System;
- 3) provide for payments by the City and the PWSA, one to the other, respectively, based upon action, verifiable, direct expenses, and in accordance with customary utility practices under the Public Utility Code;
- 4) confirm PWSA's payments to the City will remain subordinate to all debt obligations of the PWSA;
- 5) provide for cooperation, by the City and the PWSA respectively, with respect to their capital projects and the impact that one entity may have on the other entity;
- 6) provide for the clarification of the responsibilities of the PWSA with respect to City-owned parks larger than 50 acres as well as other City properties;
- 7) confirm the Water and Sewer System will remain under public ownership; and
- 8) identify the roles and responsibilities of the City and the PWSA with respect to the Water and Sewer System.

25. The March 26, 2020, Order, leads the City to believe that the PWSA integrated a number of the provisions of the 2019 Cooperation Agreement into its Compliance Plan and Long-Term Infrastructure Improvement Plan because the 1995 Agreement, as amended, remained in effect until October 3, 2019, which is the same day the 2019 Cooperation Agreement came into effect.

26. However, the ALJ did not agree, and the PUC's Order affirming the ALJ's decision deprives the City and its taxpayers, who are also the PWSA's customers, of the opportunity to



address the issues. For example, it could have identified terms of the 2019 Cooperation Agreement that are not related to the provision of water and sewage as well as those that are related to the provision of water and sewage.

27. Therefore, the City believes the PUC should have evaluated the 2019 Cooperation Agreement and the PWSA's Compliance Plan and Long-Term Infrastructure Improvement Plan in *toto* and not considered them piecemeal and therefore, out of context.

28. Moreover, the failure to consider and address the totality of the circumstances with respect to the cessation of the 1995 Agreement and the commencement of the 2019 Cooperation Agreement prejudices the City, the current owner of the water and sewer system. It fails to consider the position of the parties (i.e., the City and the PWSA) and the above-noted factors leading to the overall terms of the current agreement.

29. Because of the PUC's failure to consider the totality of the circumstances, it has prejudiced the City and therefore, the City's intervention is not only proper, it is necessary to address these factors, including the PUC's omissions.

30. Additionally, the City recognizes that, pursuant to its current position and until such point in time where the PWSA assumes full ownership of the water and sewer system, they each receive a certain grant of general immunity to claims and lawsuits. *See* the Political Subdivision Tort Claims Act, 42 Pa. C.S. § 8541 *et seq.*

31. However, this general grant of immunity is subject to limited exceptions that include claims and suits arising from alleged dangerous conditions of the facilities of sewer and water owned by the local agency and located within rights-of-way. See 42 Pa. C.S. § 8542(b)(5).<sup>1</sup>

32. The City believes its exposure to liability and damages is germane to the overall discussions because statutory and decisional law states that neither the City nor the PWSA can expand or restrict the legislative grant of immunity or the exceptions to the general grant of immunity in a manner that is inconsistent with the Tort Claims Act.

33. As municipal entities, the law limits the ability of the City and the PWSA to shift exposure (liability and damages) in the same manner as a private entity, and neither statutory law nor decisional law empower the PUC to alter or amend the Tort Claims Act.

34. Therefore, the City's continuing ownership exposes it to ongoing claims even though the PWSA now operates and maintains the water and sewer system pursuant to the edicts announced by the PUC.

35. Consequently, the March 26, 2020 Opinion and Order of the Commission (the "Decision") effects the City, *inter alia*, with regard to:

- a. The 1995 Cooperation Agreement and the 2019 Cooperation Agreement;
- b. Payment responsibility for metering City-owned properties;
- c. Billing for unmetered or unbilled City-owned properties; and
- d. Billing plan for fire hydrants in the City.

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<sup>1</sup> 42 Pa. C.S. 8542(b)(5) **Utility service facilities.**--A dangerous condition of the facilities of steam, sewer, water, gas or electric systems owned by the local agency and located within rights-of-way, except that the claimant to recover must establish that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred and that the local agency had actual notice or could reasonably be charged with notice under the circumstances of the dangerous condition at a sufficient time prior to the event to have taken measures to protect against the dangerous condition.

36. Finally, by and through the presentation of this petition, the City reserves its right to seek legal or equitable relief in an appropriate forum of its choosing because it believes the PUC may not have full and complete jurisdiction over all of the issues.

37. In conclusion, the City is entitled as a matter of law to intervene because it will suffer immediate and irreparable harm if the PUC denies this petition to intervene.

38. The City has a business address at the City-County Building, 414 Grant Street, Pittsburgh, PA 15219.

39. The City is represented in this proceeding by the City of Pittsburgh Department of Law:

Yvonne S. Hilton, Solicitor;  
John F. Doherty, Associate City Solicitor;  
Lawrence H. Baumiller, Assistant City Solicitor; and  
John V. DeMarco, Assistant City Solicitor.

40. The City consents to the service of documents by electronic mail, as provided in 52 Pa. Code § 1.54(b)(3).

WHEREFORE, the City respectfully requests that the Commission enter an order granting the City full status as an intervener in this proceeding with active party status.

Respectfully submitted,

/s/ Yvonne S. Hilton, Esquire  
City Solicitor

**City of Pittsburgh**  
City of Pittsburgh Department of Law  
City-County Building, Suite 313  
414 Grant Street  
Pittsburgh, PA 15219

Date: April 9, 2020

## VERIFICATION

I, Kevin Pawlos, on behalf of the City of Pittsburgh, hereby state that the facts contained in the foregoing *Petition to Intervene of the City of Pittsburgh* are true and correct to the best of my knowledge, information and belief, that I am duly authorized to make this Verification, and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 (relating to unsworn falsification to authorities).

Date: April 9, 2020

/s/ Kevin Pawlos

**BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION**

<b>Implementation of Chapter 32 of the</b>	<b>:</b>	<b>Docket No.</b>	<b>M-2018-2640802</b>
<b>Public Utility Code Re Pittsburgh</b>	<b>:</b>		<b>M-2018-2640803</b>
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<b>Authority for Approval of Its Long-Term</b>	<b>:</b>		<b>P-2018-3005039</b>
<b>Infrastructure Improvement Plan</b>	<b>:</b>		

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**Certificate of Service**

I hereby certify that I have this day served copies of the **Petition to Intervene of the City of Pittsburgh** upon the parties and interested stakeholders in the above captioned proceeding in accordance with the requirements of 52 Pa. Code § 1.54 in the manner and upon the persons listed below.

**VIA EMAIL**

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Respectfully submitted,

*/s/Yvonne S. Hilton, Esquire*  
City Solicitor