**PENNSYLVANIA**

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17120**

Public Meeting held June 18, 2020

Commissioners Present:

Gladys Brown Dutrieuille, Chairman

David W. Sweet, Vice Chairman

John F. Coleman, Jr.

Ralph V. Yanora

|  |  |
| --- | --- |
| Implementation of Chapter 32 of the Public Utility Code Regarding Pittsburgh Water and Sewer Authority – Stage 1    Petition of Pittsburgh Water and Sewer Authority for Approval of Its Long-Term Infrastructure Improvement Plan | M-2018-2640802  M-2018-2640803  P-2018-3005037  P-2018-3005039 |

**OPINION AND ORDER**

**Table of Contents**

[I. Background 3](#_Toc42522625)

[II. History of the Proceeding 5](#_Toc42522626)

[III. Discussion 10](#_Toc42522627)

[A. Legal Standards 10](#_Toc42522628)

[B. March 2020 Order 15](#_Toc42522629)

[1. Joint Petition for Partial Settlement 15](#_Toc42522630)

[2. Litigated Issues other than Lead Infrastructure 16](#_Toc42522631)

[a. Cooperation Agreement between the PWSA and the City of Pittsburgh 17](#_Toc42522632)

[b. Payment Responsibility of Metering Costs for Municipal Properties within the City of Pittsburgh 21](#_Toc42522633)

[c. Billing Plan for Unmetered and/or Unbilled Municipal Properties within the City of Pittsburgh 24](#_Toc42522634)

[d. Billing Plan for Public Fire Hydrants within the City of Pittsburgh 29](#_Toc42522635)

[e. Line Extensions 30](#_Toc42522636)

[f. Residency Requirement for PWSA’s Employees 33](#_Toc42522637)

[3. Lead Infrastructure Issues 39](#_Toc42522638)

[a. Partial Settlement on Lead Service Lines 39](#_Toc42522639)

[b. Modification of Settlement Terms Relating to Partial Replacements 41](#_Toc42522640)

[c. Litigated Issues 43](#_Toc42522641)

[C. Petition to Intervene, Answers and Disposition 48](#_Toc42522642)

[D. Petitions for Reconsideration, Answers and Dispositions 60](#_Toc42522643)

[1. Residency Requirement 60](#_Toc42522644)

[a. Petition and Answers 60](#_Toc42522645)

[b. Disposition 66](#_Toc42522646)

[2. City Meter Issues 72](#_Toc42522647)

[a. Petition and Answers 72](#_Toc42522648)

[b. Disposition 78](#_Toc42522649)

[3. Lead Service Line Remediation Issues: Commission’s Modifications to Partial Settlement 82](#_Toc42522650)

[a. Jurisdictional Questions 89](#_Toc42522651)

[i. Petitions and Answers 89](#_Toc42522652)

[ii. Disposition 91](#_Toc42522653)

[b. Due Process 101](#_Toc42522654)

[i. Petitions and Answers 101](#_Toc42522655)

[ii. Disposition 102](#_Toc42522656)

[c. Subsection (vi) to Paragraph III.VV.1.b of the Partial Settlement 105](#_Toc42522657)

[i. Pre-Termination Notice Requirements 105](#_Toc42522658)

[1.) Petitions and Answer 105](#_Toc42522659)

[2.) Disposition 115](#_Toc42522660)

[ii. Requested Exception Situations to Subsection (vi) of Paragraph III.VV.1.b. 119](#_Toc42522661)

[1.) Petitions and Answer 119](#_Toc42522662)

[2.) Disposition 130](#_Toc42522663)

[iii. PWSA’s Requested Distinctions Between the SDWMR Program and the Neighborhood LSLR Program 142](#_Toc42522664)

[1.) Petitions and Answers 142](#_Toc42522665)

[2.) Disposition 143](#_Toc42522666)

[d. Subsection (v) to Paragraph III.VV.1.b of the Partial Settlement 147](#_Toc42522667)

[i. Petitions and Answer 147](#_Toc42522668)

[ii. Disposition 150](#_Toc42522669)

[4. Lead Service Line Remediation Issues: Income-Based Reimbursement Program 152](#_Toc42522670)

[a. Petition and Answer 152](#_Toc42522671)

[b. Disposition 156](#_Toc42522672)

[IV. Conclusion 157](#_Toc42522673)

### BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Petition for Reconsideration, Clarification and/or Amendment of the Pittsburgh Water and Sewer Authority (PWSA or Authority) filed on April 10, 2020 (PWSA Petition), and the Petition for Reconsideration and Clarification of Pittsburgh UNITED (UNITED) filed on April 10, 2020 (UNITED Petition), seeking reconsideration of our Opinion and Order entered on March 26, 2020 (*March 2020 Order*), relative to the above-captioned proceeding. On April 20, 2020, the Commission’s Bureau of Investigation and Enforcement (I&E), the Office of Small Business Advocate (OSBA), and UNITED, each filed an Answer to the PWSA Petition. PWSA filed an Answer to the UNITED Petition on April 20, 2020.

Also, before the Commission are the Petition to Intervene of the City of Pittsburgh (City or Pittsburgh) filed on April 10, 2020 (Intervention Petition), and the City’s Petition for Reconsideration and/or for Supersedeas filed on April 10, 2020 (City Reconsideration Petition). On April 20, 2020, I&E, UNITED and the OSBA each filed an Answer to the City Reconsideration Petition, and the PWSA filed a letter stating it does not oppose the City Reconsideration Petition. On April 29, 2019, the OSBA filed an Answer to the Intervention Petition.

For the reasons stated below, we shall: (1) deny the Intervention Petition, (2) grant in part, and deny, in part the PWSA Petition; and (3) grant, in part, and deny, in part, the UNITED Petition, all consistent with this Opinion and Order.

# Background

The PWSA is a municipal authority, organized and existing under the Pennsylvania Municipality Authorities Act (Authorities Act or MAA), 53 Pa. C.S. § 5601, *et seq*. The PWSA provides water service to approximately 80,000 residential, commercial, and industrial customers in: (1) portions of the City of Pittsburgh (Pittsburgh or City); (2) the Borough of Millvale; and, (3) portions of Reserve, O’Hara, and Blawnox Townships, all in Allegheny County. The Authority also provides wastewater conveyance service to customers located in the City and conveys wastewater for portions of twenty-four (24) neighboring communities.

On December 21, 2017, Governor Wolf signed Act 65 of 2017 into law whereby the Pennsylvania Public Utility Code (Code) was amended to add new language to 66 Pa. C.S. § 1301 and to add a new Chapter 32 consisting of Sections 3201 through 3209, 66 Pa. C.S. § 3201, *et seq.* (Act 65 or Chapter 32). Chapter 32 addresses Commission jurisdiction over the utility service of water, wastewater, and storm water provided by Pennsylvania cities of the second class under the MAA. Pittsburgh is the only Pennsylvania city of the second class. Pursuant to 66 Pa. C.S. § 3202(a)(1), the provisions of the Code (except Chapters 11 and 21) apply to the PWSA in the same manner as a public utility effective April 1, 2018.

On January 18, 2018, the Commission requested comments from any interested entities on its proposals to implement Chapter 32. *Implementation of Chapter 32 of the Public Utility Code Re Pittsburgh Water and Sewer Authority, Tentative Implementation Order*, Docket Nos. M-2018-2640802 (water) and M‑2018‑2640803 (wastewater) (Order entered January 18, 2018) (*TIO*). Comments in response to the *TIO* were submitted by PWSA, I&E, the Office of Consumer Advocate (OCA), the OSBA, the Pennsylvania-American Water Company (PAWC) and UNITED.[[1]](#footnote-2)

In response to the comments, the Commission entered a Final Implementation Order laying out a process for implementation of Chapter 32, including tariff approval, ratemaking, compliance plan, and assessment provisions. *Implementation of Chapter 32 of the Public Utility Code Re Pittsburgh Water and Sewer Authority, Final Implementation Order*, Docket Nos. M-2018-2640802 and M-2018-2640803 (Order entered January 18, 2018) (*FIO*). In the *FIO*, the Commission established the due date of September 28, 2018, for the PWSA to file a Compliance Plan. *FIO* at 8.

On April 1, 2018, the PWSA’s water and wastewater operations became subject to regulation of the Commission pursuant to Section 3202(a)(1) of the Code, 66 Pa. C.S. § 3202(a)(1). On September 26, 2018, the Commission issued a Secretarial Letter (*September 2018 Secretarial Letter*) explaining, among other things, that the Commission would publish notice of the PWSA’s Compliance Plan, and the procedures related thereto in the *Pennsylvania Bulletin* on October 13, 2018. The Commission further established a comment period of twenty days from the date of publication in the *Pennsylvania Bulletin*. Additionally, the Commission directed that within forty-five days from the date of publication in the *Pennsylvania Bulletin*, it would refer the PWSA’s Compliance Plan to the Office of Administrative Law Judge (OALJ) for the resolution of any factual matter. *September 2018 Secretarial Letter*. It directed the OALJ to submit a recommended decision on the issues raised by the PWSA or the Parties no later than eight months from the date on which the matter is assigned to OALJ. The PWSA’s currently approved water and wastewater tariffs became effective on March 1, 2019.

# History of the Proceeding

On September 28, 2018, the PWSA filed: (a) the Compliance Plan at Docket Nos. M-2018-2640802 (water) and M-2018-2640803 (wastewater); and (b) its Long-Term Infrastructure Improvement Plan (LTIIP), which was docketed at Docket Nos. P-2018-3005037 (water) and P-2018-3005039 (wastewater). These proceedings were subsequently consolidated, upon motion by the PWSA.

On October 18, 2018, the OCA filed an Answer, Notice of Intervention, and Public Statement. The OCA further submitted comments regarding the LTIIP on October 25, 2018 and comments identifying preliminary issues in the PWSA’s Compliance Plan on November 2, 2018. On October 18, 2018, the OSBA filed an Answer and Notice of Intervention. I&E entered its appearance and on October 25, 2018, it submitted comments regarding the PWSA’s LTIIP.

Petitions to Intervene were filed by PAWC and UNITED on October 30, 2018, and November 1, 2018, respectively. UNITED submitted comments in response to the Compliance Plan on November 1, 2018.

By Corrected Secretarial Letter dated November 28, 2018 (*November 2018* *Secretarial Letter*), the Commission provided a Technical Staff Initial Report and Directed Questions – Stage 1 (Stage 1 Initial Report), which lists a variety of specific questions that the PWSA and the Parties were directed to address as part of the Stage 1 litigation.

The *November 2018 Secretarial Letter* also assigned the PWSA’s Compliance Plan to the OALJ for hearings as contemplated in the September 2018 Secretarial Letter and established a two-stage review process for the PWSA’s Compliance Plan.

By Prehearing Order dated December 27, 2018, Deputy Chief Administrative Law Judge (ALJ) Mark A. Hoyer and ALJ Conrad A. Johnson, in part, memorialized the litigation schedule and granted the Petitions to Intervene of PAWC and UNITED.

On February 1, 2019, the PWSA filed and served revisions to the Compliance Plan (Compliance Plan Supplement).

On February 14, 2019, the PWSA served its written direct testimony and exhibits.

On April 5, 2019, I&E, the OCA, the OSBA, UNITED, and PAWC served their written direct testimony and accompanying exhibits. On May 6, 2019, the PWSA, the OCA, the OSBA, and PAWC served their written rebuttal testimony and accompanying exhibits.

On May 13, 2019, the Parties requested a three-month extension in the Commission-established schedule to permit settlement discussions to attempt to resolve all the issues raised in the proceeding. They also requested that the following consumer-related issues be moved from Stage 1 to Stage 2 of the proceedings so that they might discuss the issues in workshops led by the Commission’s Bureau of Consumer Services (BCS): (1) issues concerning residential service termination and collections; and (2) issues related to the PWSA’s compliance with the Discontinuance of Service to Leased Premises Act. Those requests were granted by Secretarial Letter on May 15, 2019 (*May 2019 Secretarial Letter*).

On May 17, 2019, I&E, the OCA, the OSBA and UNITED served their written surrebuttal testimony and accompanying exhibits.

In the Fourth Interim Order dated June 18, 2019, the litigation schedule was amended to accommodate the three-month extension granted by the Commission.

On August 2, 2019, the PWSA and the OSBA served written supplemental direct testimony and exhibits. On August 14, 2019, the PWSA served its written supplemental rebuttal testimony in response to the OSBA’s written supplemental direct testimony of August 2, 2019. On August 14, 2019, I&E, the OCA, the OSBA and UNITED served their written supplemental rebuttal testimony and accompanying exhibits. On August 19, 2019, the PWSA served written rejoinder testimony in response to I&E’s, the OCA’s, the OSBA’s and UNITED’s written supplemental rebuttal testimony of August 14, 2019.

An evidentiary hearing was held on August 21, 2019.

On September 13, 2019, the Joint Petitioners filed the Partial Settlement.[[2]](#footnote-3) On September 19, 2019, the PWSA, I&E, the OCA, the OSBA, and UNITED filed main briefs.

On September 30, 2019, statements in support of the Partial Settlement were filed by the PWSA, I&E, the OCA, the OSBA and UNITED; reply briefs were also filed by these same Parties.

By Interim Order dated October 7, 2019, the record was closed.

In their Recommended Decision (R.D.) issued on October 29, 2019, the ALJs found that the Partial Settlement was in the public interest and recommended its approval without modification. In addition, the ALJs recommended that the 1995 Cooperation Agreement between the PWSA and the City, effective January 1, 1995, be terminated, and business transactions conducted with the City occur on a transactional basis until a new cooperation agreement is filed and approved by the Commission. Further, the ALJs recommended that the Compliance Plan be revised to require the PWSA: (1) to become responsible for the cost of all meter installation in accordance with 52 Pa. Code § 65.7; (2) to introduce a flat rate, at a minimum the customer charge for the customer’s class for all unbilled customers in its next base rate case, and as customers are metered, to immediately bill full usage; and (3) to comply with 52 Pa. Code §§ 65.21-65.23 regarding a utility’s duty to make line extensions, and revise its tariff and operations accordingly. R.D. at 1.

Additionally, the ALJs recommended that the Commission approve without modification the PWSA’s residential Lead Service Line Replacement (LSLR) Program , which was revised over the course of the litigation and to which the PWSA has committed to continuous evaluation to meet its target date of replacing all residential service lines in its system by 2026; and therefore, the ALJs found the PWSA’s LSLR Program to be in the public interest. *Id.*

The ALJs further recommended dismissal of the OSBA’s request to order the PWSA to include non-residential lead service lines as part of the PWSA’s LSLR Program finding that the Commission lacks the power to order a utility to replace privately-owned service lines. Concerning the PWSA’s residency policy which generally requires its employees to reside in the City, the ALJs found that the Commission approval is not required because the PWSA’s residency policy is a discretionary business decision. According to the ALJs, the residency policy is beyond the power of the Commission to affect or supersede. *Id.*

The PWSA, I&E, the OCA, the OSBA, and UNITED filed Exceptions on November 18, 2019, and Replies to Exceptions on December 3, 2019.

In an Opinion and Order entered on March 26, 2020 *(March 2020 Order),* we adopted and modified the Partial Settlement. Additionally, we granted, in part, and denied, in part, the Exceptions filed by the PWSA and I&E; denied the Exceptions of the OCA, the OSBA and UNITED; and adopted and modified the ALJs’ Recommended Decision.

As previously stated, the City filed its Intervention Petition on April 10, 2020. On April 10, 2020, the PWSA, UNITED and the City filed their respective Petitions for Reconsideration. By Order entered April 16, 2020, we granted the PWSA and UNITED Petitions, pending further review of, and consideration on, the merits.[[3]](#footnote-4) On April 20, 2020, I&E filed Answers to the PWSA Petition and the City Reconsideration Petition, the PWSA filed an Answer to the UNITED Petition, the OSBA filed Answers to the PWSA Petition and the City Reconsideration Petition, and UNITED filed an Answer to the PWSA Petition. On April 24, 2020, I&E filed an Answer to the Intervention Petition; the OSBA filed an Answer to the Intervention Petition on April 29, 2020.

# Discussion

## Legal Standards

Initially, we note that any arguments not specifically discussed shall be deemed to have been duly considered and denied without further discussion. The Commission is not required to consider expressly or at length each contention or argument raised by the parties. *Consolidated Rail Corp. v. Pa. Public Utility Commission*,625 A.2d 741 (Pa. Cmwlth. 1993).

The Code establishes a party’s right to seek relief following the issuance of our final decisions pursuant to Subsections 703(f) and (g), 66 Pa. C.S. § 703(f) and § 703(g), relating to rehearings, as well as the rescission and amendment of orders. Such requests for relief must be consistent with Section 5.572 of our Regulations, 52 Pa. Code § 5.572, relating to petitions for relief following the issuance of a final decision.

The standards for granting a Petition for Reconsideration were set forth in *Duick v. Pennsylvania Gas and Water Company*, 56 Pa. P.U.C. 553 (1982):

A Petition for Reconsideration, under the provisions of 66 Pa. C.S. § 703(g), may properly raise any matters designed to convince the Commission that it should exercise its discretion under this code section to rescind or amend a prior order in whole or in part. In this regard, we agree with the court in the *Pennsyl­vania Railroad Company* case, wherein it was stated that “[p]arties . . . cannot be permitted by a second motion to review and reconsider, to raise the same questions which were specifically decided against them . . . .” What we expect to see raised in such petitions are new and novel arguments, not previously heard, or considera­tions which appear to have been overlooked by the Commission.

*Duick,* 56 Pa. P.U.C. at 559 (quoting *Pennsylvania Railroad Co. v. Pennsylvania Public Service Commission*, 179 A. 850, 854 (Pa. Super. Ct. 1935)).

Under the standards of *Duick*, a petition for reconsideration may properly raise any matter designed to convince this Commission that we should exercise our discretion to amend or rescind a prior Order, in whole or in part. Such petitions are likely to succeed only when they raise “new and novel arguments” not previously heard or considerations which appear to have been overlooked or not addressed by the Commission. *Duick*, 56 Pa. P.U.C. at 559.

As we proceed in our review, we note that the considerations of *Duick*, on application, essentially, require a two-step analysis. *See e.g. SBG Management Services, Inc./ Colonial Garden Realty Co., L.P. v. Philadelphia Gas Works*, Docket No. C‑2012‑2304183 (Order entered May 19, 2019) (discussing *Application of La Mexicana Express Service, LLC, to transport persons in paratransit service, between points within Berks County*, Docket No. A-2012-2329717; A-6415209 (Order entered September 11, 2014)). The first step is that we determine whether a party has offered new and novel arguments or identified considerations that appear to have been overlooked or not addressed by the Commission in its previous order. *Id.* The second step of the *Duick* analysis is to evaluate the new or novel argument, or overlooked consideration that is alleged, in order to determine whether to modify our previous decision. *Id.* We will not necessarily modify our prior decision just because a party offers a new and novel argument or identifies a consideration that was overlooked or not addressed by the Commission in its previous order. *Id.*

A party’s intervention in a proceeding before the Commission is governed by Section 5.72 of our Regulations, 52 Pa. Code § 5.72, which provides:

**§ 5.72. Eligibility to intervene.**

(a) *Persons.* 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. The right or interest may be one of the following:

(1) A right conferred by statute of the United States or of the Commonwealth.

(2) An interest 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.

(3) Another interest of such nature that participation of the petitioner may be in the public interest.

(b) *Commonwealth*. The Commonwealth or an officer or agency thereof may intervene as of right in a proceeding subject to subsection (a)(1) - (3).

(c) *Supersession*. Subsections (a) and (b) supersede 1 Pa. Code § 35.28 (relating to eligibility to intervene).

Standing to participate in proceedings before an administrative agency is primarily within the discretion of the agency. *Pennsylvania National Gas Association v. T.W. Phillips Gas and Oil Co.*, 75 Pa. P.U.C. 598, 603 (1991). A reviewing court does not replace its judgement for that of the agency, but rather will overturn the ruling only where the agency’s determination was manifestly unreasonable. *B.B. v. Department of Public Welfare*, 118 A.3d 482 (Pa. Cmwlth. 2015).

**§ 5.74. Filing of petitions to intervene.**

(a) Petitions to intervene may be filed following the filing of an application, petition, complaint or other document seeking Commission action.

(b) Petitions to intervene shall be filed:

1. No later than the date fixed for the filing of responsive pleadings in an order or notice with respect to the proceedings but not less than the notice and protest period established under §§ 5.14 and 5.53 . . .

absent good cause shown

1. No later than the date fixed for filing protests as published in the *Pennsylvania Bulletin* except for good cause shown.

1. In accordance with § 5.53 if no deadline is set in an order or notice with respect to the proceedings.
2. A statutory advocate may exercise a right of participation or file a notice of intervention consistent with law at any time in a proceeding . . . .

(c) Except with regard to statutory advocates under subsection (b)(4), intervention will not be permitted once an evidentiary hearing has concluded absent extraordinary circumstances.

52 Pa. Code § 5.74.

Additionally, the Commission’s standard for permitting a late-filed petition for intervention involves the following four criteria, each of which must be met:

1. The petitioner has a reasonable excuse for missing the protest due date.

(2) The proceeding is contested at the time of the filing of a petition for intervention.

1. A grant of intervention will not delay the orderly progress of the case; and
2. The grant of intervention will not broaden significantly the issues or shift the burden of proof.

*See Joint Application of Pennsylvania-American Water Company and Thames Water Aqua Holdings GmbH*,Docket Nos. A-212285F0096, A-230073F0004 (Order entered May 9, 2002) at 6; and *Application of the City of Pittsburgh for approval of the alteration of the railroad crossings at Ridge Avenue, West Ohio Street, and North Avenue and Brighton Road Bridges*, Docket No. A-00119379 (Order entered February 28, 2013) at 7‑8.

## March 2020 Order

### Joint Petition for Partial Settlement

In our *March 2020 Order*, we first addressed the Partial Settlement noting that the Joint Petitioners identified a total of 186 discrete issues involved in this proceeding. Of these 186 issues, the Joint Petitioners were able to reach agreement on 139 issues (nearly 75% of all identified issues)[[4]](#footnote-5) and proposed deferring another twenty-five issues to future proceedings (including those issues already moved to Stage 2) and to reserve for litigation the remaining issues. *March 2020 Order* at 15.[[5]](#footnote-6)

In our disposition, we explained that the Partial Settlement resolves a variety of the issues necessary for the ultimate resolution of this proceeding. It also removes several potentially contentious issues that would have prolonged or required further litigation or administrative proceedings. We found that the benefits of approving the Partial Settlement are numerous and will result in savings of time and expenses for all Parties involved by avoiding the necessity of further administrative proceedings, as well as possible appellate court proceedings, conserving precious administrative resources. Moreover, we emphasized that the Partial Settlement provides regulatory certainty with respect to the disposition of issues which benefits all Parties. *March 2020 Order* at 23.

With the exception of certain issues pertaining to partial replacements of lead service lines, we agreed with the ALJs’ conclusions that the provisions of the Partial Settlement are in the public interest. We recognized that the PWSA’s transition to Commission jurisdiction is a vast and complex undertaking requiring prioritization and allocation of resources and the redevelopment of operations. With the exception of certain lead issues that we noted in the *March 2020 Order*, we determined that the Partial Settlement is consistent with this transition and supports a finding that the PWSA has presented a plan for compliance that it will adequately ensure and maintain the provision of adequate, efficient, safe, reliable, and reasonable service. Accordingly, with the modifications related to partial replacements of lead service lines, we adopted, in part, the ALJs’ recommendation and approve the Partial Settlement. *March 2020 Order* at 24.

## 

### Litigated Issues other than Lead Infrastructure

Next, we addressed the remaining issues that the Parties reserved for litigation – with the exception of the PWSA’s proposed lead remediation program – within the following topic areas:

1. The Cooperation Agreement between PWSA and City of Pittsburgh effective January 1, 1995
2. Municipal properties and public fire hydrants within the City of Pittsburgh
3. Responsibility for payment of costs related to metering municipal properties within the City of Pittsburgh
4. Billing plan for unmetered and/or unbilled municipal properties within the City of Pittsburgh
5. Billing plan for public fire hydrants within the City of Pittsburgh
6. Applicability of the Municipality Authorities Act, 53 Pa. C.S. § 5601, *et seq.*, and the Commission’s Line Extension Regulations at 52 Pa. Code §§ 65.1, 65.21-65.23
7. PWSA’s residency requirement

*March 2020 Order* at 24-25.

#### Cooperation Agreement between the PWSA and the City of Pittsburgh

As background, we explained that the PWSA was established as a municipal authority by the City in 1984 and originally served as a financing authority. However, pursuant to the Cooperation Agreement between the Authority and the City, effective January 1, 1995, as amended March 21, 2011 (1995 Cooperation Agreement), the PWSA assumed responsibility from the City for day-to-day operations of Pittsburgh’s water and wastewater systems. Under the 1995 Cooperation Agreement, the PWSA and the City provided various services to each other. Included within the services provisions set forth in the 1995 Cooperation Agreement were the requirements that the Authority pay for the City services and provide the City with 600 million gallons of water each year at no cost. R.D. at 88 (citing Compliance Plan at 14, 107-108, and Appendix B).

Regarding the services provided by the City under the 1995 Cooperation Agreement, the PWSA stated that it paid the City an annual fee of $7.15 million for a variety of services and costs but provided no detailed invoice for the fee. As to the annual fee, the PWSA acknowledged that expenses charged to ratepayers must be just, reasonable, and reasonably known and definite. As such, the PWSA asserted it was negotiating a new Cooperation Agreement to revise the payment to only reflect actual services provided. R.D. at 88 (citing Compliance Plan at 105-106).

On February 4, 2019, the PWSA voted to terminate the 1995 Cooperation Agreement with an effective date of May 5, 2019. According to the PWSA, the terms of the 1995 Cooperation Agreement needed to be updated with a new Cooperation Agreement and the Authority originally projected a new Cooperation Agreement to be executed during the course of this proceeding. However, the PWSA extended the target date for terminating the 1995 Cooperation Agreement several times, citing continuing negotiations for a new Cooperation Agreement as the basis for the extension. On July 24, 2019, City Council passed a resolution authorizing the new Cooperation Agreement between the City and the PWSA and providing for the rights and obligations of each party and for payments and cooperation between the parties. The resolution authorized the Mayor to enter into the new Cooperation Agreement and further provided that it be in a form approved by the City Solicitor and shall contain other terms and conditions that may be in the interest of the City. According to the PWSA, any changes to the new Cooperation Agreement would need to be approved by the PWSA. As of the hearing date, the 1995 Cooperation Agreement had still not been terminated. R.D. at 88-89.

In their Recommended Decision, the ALJs found it premature to evaluate the PWSA’s new Cooperation Agreement because ratepayers, parties and the Commission would assume the risk of any terms contained in the new Cooperation Agreement. Instead, the ALJs concluded the merits of the PWSA’s plan to request to operate under the new Cooperation Agreement should be considered only if, and when, the PWSA makes the appropriate filing. R.D. at 102.

The ALJs acknowledged the PWSA’s preference to begin operating temporarily under the new Cooperation Agreement to be filed rather than interacting with the City on an arms-length transactional basis when the 1995 Cooperation Agreement is terminated. According to the PWSA, while such an interim approach would involve the PWSA invoicing the City for services on the basis of the fair market value and paying invoices received from the City on the same basis, it would be better than the *status quo*, would not be as transparent to the Commission or interested parties and would be less structured for the PWSA and the City. R.D. at 102 (citing PWSA M.B. at 17). However, the ALJs reasoned, the PWSA does not expound on its assertion that invoicing the City for services on the basis of the fair market value and paying invoices received from the City on the same basis would be less transparent to the Commission and interested parties and less structured for the PWSA and the City. R.D. at 102.

The ALJs explained that any new Cooperation Agreement will involve two parties, the City and the PWSA, and that the PWSA is subject to the Commission’s jurisdiction while the City is not. The City would be a contracting party with the PWSA. According to the ALJs, the City’s position on contract provisions that are not in compliance with the Code or Commission Regulations, such as arbitration provisions, as well as its position with respect to the Commission’s authority to review and modify or revise any cooperation agreement filed by the PWSA pursuant to Section 508 of the Code is not known. R.D. at 102.

The ALJs noted that the PWSA clearly understands that a new Cooperation Agreement must comply with the Code and, therefore, the PWSA should only enter into a new Cooperation Agreement if it believes it is lawful. Further, the ALJs explained that I&E’s witness agreed with the PWSA’s intention to interact with the City on a transactional basis if no new agreement was negotiated and executed by the original termination date of July 5, 2019, which was later extended to October 3, 2019. R.D. at 103 (citing I&E St. No. 2-SR at 6-7).

The ALJs agreed that the 1995 Cooperation Agreement should not be extended past the October 3, 2019, termination date. The ALJs also concluded that it is premature to address any new Compliance Plan Agreement in this proceeding. Rather, the ALJs recommended that the PWSA be required to adopt an interim approach and interact with the City on a transactional basis. The ALJs recognized that the invoicing for services provided by the PWSA to the City and by the City to the PWSA is a substantial part of any new Cooperation Agreement, and that the interaction on a transactional basis after October 3, 2019, should not prove to be an onerous task. The ALJs considered this rationale to be especially true considering the fact that the contracting parties are far along in the process of finalizing an agreement. R.D. at 103.

No Parties filed Exceptions to the ALJs’ Recommended Decision on this issue. Upon review, we agreed with the ALJs’ analysis and adopted their recommendation. *March 2020 Order* at 31.

We explained that the 1995 Cooperation Agreement had a termination date of October 3, 2019, and noted the Parties’ agreement in the Partial Settlement that the following principles should be incorporated in the new Cooperation Agreement: (a) any payments to the City must be just, reasonable and substantiated; (b) the City and the PWSA’s relationship should be conducted on an arm’s length “business-like” basis; and (c) services provided by the City to the PWSA, and vice versa, should be identified with detailed breakdown and be charged based on the related cost of service. *Id.*

In our disposition, we stated that the City and the PWSA indicated they were in the process of formulating a new Cooperation Agreement but that it was not presently before us for review in this proceeding. A review of the Commission’s public records showed that the new Cooperation Agreement was filed on December 20, 2019, at U-2020-3015258. We explained that in the filing the PWSA requested that the new Cooperation Agreement be referred to the OALJ for a formal on-the-record proceeding and reviewed pursuant to Section 507 of the Code. *March 2020 Order* at 31-32,

In its letter dated January 15, 2019, I&E requested that the new Cooperation Agreement not be assigned to the OALJ until after the Commission enters this Order in this docket, to avoid duplication and in the interest of conserving the Parties’ and the Commission’s resources. In response, the review period for the Cooperation Agreement was extended. *See Cooperation Agreement between the City of Pittsburgh and PWSA*, Docket No. U-2020-3015258 (Secretarial Letter issued January 16, 2020). As part of our disposition, for the sake of administrative efficiency, we granted the PWSA’s request and directed Commission Staff to issue a Secretarial Letter at docket number, U‑2020-3015258, to refer the new Cooperation Agreement to the OALJ for further proceedings as may be necessary. *March 2020 Order* at 32.

However, we explained that since this new Cooperation Agreement had only recently been filed with the Commission and a full review of it will be conducted in a separate proceeding, we agreed with the ALJs that it would be premature to consider and make a decision regarding the new agreement. Thus, we declined to approve the PWSA’s interim proposal which would permit the PWSA to temporarily begin operations under the new Cooperation Agreement while the Commission’s review of that Agreement is pending. *Id.*

We also emphasized our expectation that the City and the PWSA will be incorporating a procedure for invoicing services on a transactional basis consistent with the Partial Settlement approved in this proceeding. Thus, we concluded that in the interim the PWSA should be able to adopt an approach of interacting with the City on a transactional basis. Accordingly, we adopted the ALJs’ findings that business transactions conducted with the City occur on a transactional basis until such time as a new Cooperation Agreement is reviewed and approved by the Commission. *Id.*

#### Payment Responsibility of Metering Costs for Municipal Properties within the City of Pittsburgh

As background, we explained that Section 65.7 of our Regulations provides, in part, that a water public utility shall, “unless otherwise authorized by the Commission…provide; install at its own expense; and continue to own, maintain and operate all meters” and “provide a meter to each of its water customers….and shall furnish water service…exclusively on a metered basis.” *March 2020 Order* at 33 (quoting 52 Pa. Code § 65.7). We also noted the PWSA’s assertion that it is generally in compliance with Section 65.7, but that not all customers are currently metered. The Authority explained that there are 200-400 municipal buildings and 500 flat rate customers currently not metered. *March 2020 Order* at 33 (citing Compliance Plan or CP at 56).

Due to the variations in sites and meter needs, the PWSA proffered that it does not expect to be in compliance with the metering requirement for approximately five years. The PWSA estimated the metering project will cost about $35 million but expressed hope that it will recover some of the associated costs (*e.g.*, additional plumbing, meter pits, and backflow prevention devices) from the City. *Id.*

Additionally, we referenced the testimony of the PWSA Witness Robert Weimar who stated that the Code does not expressly prohibit a charge for meter installation, meters or meter pits provided by a public utility and that the PWSA has an agreement with the City to split the costs of meter installations 50/50. We also noted the assertion of the PWSA that an additional 300-400 “municipally-owned fountains, pools, etc.” are unmetered. *March 2020 Order* at 33 (citing PWSA St. No. C-1 at 23 and PWSA St. No. C-1R at 16, 18).

In the Partial Settlement, the PWSA agreed to pay the cost of the meter and the meter installation for non-municipal properties which are not currently metered or are flat rate customers. However, the Parties agreed to submit Briefs in response to the issue of metering municipal properties. Partial Settlement at 22, ¶ III.G.3.

The ALJs determined that the PWSA must provide metered service and accept responsibility for the costs of meter installation pursuant to 52 Pa. Code § 65.7. The ALJs reasoned that the PWSA has not provided a good reason for deviating from this regulatory requirement and permitting a 50/50 split cost relationship with the City. Although they recognized the historic relationship between the City and the PWSA, the ALJs stated that the purpose of this proceeding is to bring the PWSA into compliance with the Code and Commission Regulations. R.D. at 114.

The ALJs explained that this proceeding is governed by 66 Pa. C.S. § 3204(b) which required the PWSA to file a “compliance plan. . . which shall include provisions to bring” the PWSA “into compliance with the requirements applicable to other jurisdictional water and wastewater utilities.” Implicit in this directive are the following: (1) the PWSA is not currently “in compliance;” and (2) the PWSA needs a plan to come into compliance. R.D. at 114-115 (citing PWSA M.B. at 25). The ALJs found that the PWSA failed to demonstrate how the proposed 50/50 meter cost sharing relationship with the City is a better pathway to compliance than following Section 65.7 of the Commission’s Regulations moving forward. Accordingly, the ALJs recommended that the Commission require the PWSA to comply with 52 Pa. Code § 65.7. R.D. at 115.

Addressing the PWSA’s Exceptions to the ALJs’ recommendation, we recognized that the Commission has the discretion to depart from the regulatory provision directing a public utility to provide and install meters at its own expense. We did not find such a waiver to be appropriate in this proceeding. Moreover, we concluded that the failure to adhere to the meter provision set forth in 52 Pa. Code § 65.7(b) and the adoption of the PWSA’s proposal to split the costs of City meter installations would appear to constitute unreasonable discrimination in ratemaking, which is prohibited under Section 1304 of the Code, 66 Pa. C.S. § 1304. *March 2020 Order* at 39.

In our rationale, we agreed with the ALJs’ finding that the PWSA has failed to establish why it would be reasonable to charge only municipal properties fifty percent of the meter installation costs. Additionally, we found that the PWSA did not adequately explain the reasoning for its proposed disparate treatment for municipal properties and why its concern of possible funding shortfalls would not apply equally to all unmetered properties. Indeed, we noted that under the Partial Settlement, the PWSA has agreed to pay the cost of the meter and the meter installation for non-municipal properties which currently are neither metered nor flat rate customers. Although the PWSA pointed to its unique historical relationship with the City and argued that its approach is a reasonable step toward compliance with the Commission’s Regulations, we disagreed with the PWSA’s proposal and instead determined that the Authority should take the necessary steps of reordering its relationship with the City. In conclusion, we found that compliance with Section 65.7 of our Regulations – coupled with the revised billing plan for unmetered and unbilled City properties discussed in the next section – are necessary elements of moving toward end-state compliance with the Code and our Regulations as contemplated under Act 65 and our *FIO*. *March 2020 Order* at 39-40.

#### Billing Plan for Unmetered and/or Unbilled Municipal Properties within the City of Pittsburgh

In our *March 2020 Order*, we explained that until recently there has not been a plan to address identifying and metering all City facilities, resulting in unmetered and unbilled City properties. Record evidence indicated that the PWSA is aware of between 200-400 City-owned and/or operated locations where it either does not bill the City for water and wastewater service or where it neither meters nor bills the City for water and wastewater service. Additionally, prior to coming under Commission jurisdiction, the PWSA offered a fixed monthly rate for unmetered service. As such, the PWSA’s Compliance Plan and LTIIP acknowledged that currently it has approximately 500 (non-City) flat rate customers that are not metered. *March 2020 Order* at 41-42 (citing PWSA St. No. C-1 at 26; PWSA Hearing Exh. 1 at 56; and PWSA Hearing Exh. 3 at 25).

We further summarized that the PWSA has agreed, as part of this Compliance Plan proceeding, to propose a flat rate for water and wastewater service for all unmetered and unbilled municipal and government properties or buildings served by the PWSA, for inclusion in its next base rate case. Moreover, the PWSA has agreed in the Partial Settlement to commit to completing the metering of all unmetered municipal and flat rate properties where meters can be installed within five years or by December 31, 2024.[[6]](#footnote-7) Partial Settlement at ¶ III.G. Pursuant to the Authority’s proposed plan, the City would start paying for usage for all metered properties at a specific percentage until that percentage reaches 100%. Therefore, in year one, the City would pay 20% of all metered usage. In year two, the City would pay 40% of all metered usage. In year three, the City would pay 60% of all metered usage. In year four, the City would pay 80% of all metered usage. By year five, the City would be paying the PWSA for 100% of all metered usage. As part of the plan, the City would pay the percentage applicable in the year in which any new meter is installed. *March 2020 Order* at 43 (citing PWSA Hearing Exh. 1 at 110; PWSA St. No. C-1 at 27).

The ALJs rejected the PWSA’s proposal and recommended that the Commission adopt I&E’s proposal that the PWSA introduce a flat rate, at minimum the customer charge for the customer’s class, for all unbilled customers in its next base rate proceeding, and as customers are metered their metered usage should be billed immediately. The ALJs also rejected the OCA’s proposal to incorporate a modification to include a flat rate charge that would also ramp up during the five-year transition period for properties that remain unmetered, based on the acceptance of the PWSA’s concerns. R.D. at 128.

Based on our review of the applicable law, the Parties’ positions, and the Recommended Decision, we denied the Exceptions of the PWSA and the OCA as to this issue. We emphasized that the PWSA’s current relationship with the City is problematic for ratemaking purposes. The City currently does not pay for water or wastewater service and many City-owned properties are not metered. As a result, other customer classes are currently absorbing the costs to serve the City. In our disposition, we acknowledged the PWSA’s argument that its ability to resolve this existing inequitable relationship hinges on the development of a new Cooperation Agreement with the City, which will be subject to a future Commission proceeding. However, we noted our agreement with I&E’s arguments, as adopted by the ALJs, that the PWSA cannot circumvent the Code and Commission mandates by making separate arrangements through a Cooperation Agreement with the City. *March 2020 Order* at 58-59.

We explained that the PWSA is an entity independent from the City and is under the jurisdiction of the Commission. We emphasized that a new Cooperation Agreement will not change this fact. Although we noted that the PWSA and the City may not have had the traditional independent utility-customer relationship before coming under the Commission’s jurisdiction, which included the PWSA’s agreement to provide the City with 600 million gallons of water each year at no cost, they must develop an appropriate relationship now. *March 2020 Order* at 59 (citing PWSA Hearing Exh. 1, Appendix B at §§ VII.C & VII.D).

We agreed with the ALJs that issuing anything less than bills based on full metered rates once meters are installed: (1) prevents the PWSA from collecting tariffed revenue; (2) results in charging discriminatory rates; (3) “condone[s] and perpetuate[s] the imbalanced, discriminatory relationship the City has had with the PWSA for longer than necessary;” and (4) requires “non-City ratepayers to foot their full bill for future rate increases while the City is still receiving free water service.” *March 2020 Order* at 59 (quoting R.D. at 127).

In our disposition, we indicated that the PWSA’s rates are currently determined on the basis of cash flow, rather than a fair rate of return on a used and useful rate base. As such, the PWSA should be permitted to charge rates which produce sufficient revenue to fund an operating budget that enables the PWSA to operate and maintain the system, pay for needed capital improvements and maintain access to the capital markets at reasonable rates. However, we reasoned that consumers who pay rates high enough to allow the PWSA to furnish free service to other consumers (such as the City) are being discriminated against, and if water and wastewater service revenues have, in the past, been diverted for other City functions, as suggested in the Auditor General performance audit of the PWSA, the rates which permit either of these circumstances are unreasonably high and unjust. *March 2020 Order* at 59-60.

Continuing with our rationale, we stated that private consumers should not be compelled to bear any part of the cost of the service rendered to the City except as they contribute as taxpayers to the general fund of the City. We explained the City’s status as a consumer similar to residents who patronize the PWSA, which does not entitle it to any privilege as to rates. Moreover, as each City-owned building and property is metered and duly billed for its usage, the taxpayer, rather than the non-City consumers of the PWSA, will then be appropriately responsible for the water and wastewater service rendered to the City. Furthermore, we acknowledged no evidence in the record indicating that the City is not able to take responsibility for, and/or appropriately budget for, the costs the PWSA incurs to provide services to the City; nor has the City elected to participate, despite having received notice of this proceeding and a copy of the PWSA’s Compliance Plan, which implicated issues of City interest, and being advised in writing of the opportunity to do so. *Id.* at 60.

We determined that the existence of free water service and the tolerance of such going forward, even in a reduced amount, diminishes the incentive for the City to conserve. Without an incentive to implement conservation measures, we continued, the City’s water usage is likely much greater than comparable entities. We considered this as an unnecessary use of water that increases costs associated with treatment and distribution of water and which requires a recovery from all billed ratepayers. Therefore, we found that not only are ratepayers covering the cost of foregone revenues, their rates are also unjustly high, in order to recover increased expenses related to potentially wasteful water usage by City entities. *Id.* at 60-61.

We also explained that simply because City-owned buildings and properties are not metered does not permit the allowance of free service. For example, we stated that flat rate service is permissible pending implementation of a reasonable metering program or under special circumstances as may be permitted by the Commission for good cause, pursuant to 52 Pa. Code § 65.7. Therefore, we reasoned that implementation of a flat rate in the PWSA’s tariff for unmetered City-owned buildings and properties will ensure that the City pays the PWSA for its service and alleviate the burden now placed upon the PWSA’s non-City customers. We also determined that I&E’s proposal, adopted by the ALJs, acknowledges the potential need for time to become fully compliant with the Code and Commission Regulations and for all City-owned properties to become metered and duly billed the full amount for their respective usage. *March 2020 Order* at 61.

Next, we addressed the City’s choice to not participate in this proceeding and the lack of any evidence that the City will not be able to take responsibility for, and/or appropriately budget for, the costs the PWSA incurs to provide services to the City. We noted the existence of a potential tool for mitigating any “rate shock” to the City which involves the development of a cost of service study that includes a separate customer class for certain City-owned properties. As an example, we submitted that PAWC has a separate rate for municipal customers and explained the Authority’s option to identify a separate class of customers for the City and the allowance of appropriate ratemaking treatment to be developed in the PWSA’s next base rate proceeding. *Id.* at 61-62.

We concluded that the ALJs properly rejected any step-billing plan, including in the context of the OCA’s proposal, which would treat the City more favorably than all other customers. We further rejected the plan because it would have enabled the PWSA to continue to provide free or reduced cost water and wastewater service to the City, evading full payment of tariffed rates for metered properties. *Id.* at 62.

#### Billing Plan for Public Fire Hydrants within the City of Pittsburgh

In this proceeding, the PWSA asserted its commitment to presenting a rate design reflecting allocation of twenty-five percent of the costs of public fire hydrants to the City in the next rate case and reserved the right to propose a phase-in period at that time. PWSA M.B. at 29 (citing Partial Settlement ¶ III.I.1 at 23). However, I&E opposed any step-billing approach for City public fire hydrant charges and contended that the PWSA has provided no basis for distinguishing why charges related to public fire hydrants should be treated differently than any other water usage by the City. Thus, I&E recommended that the Commission direct the PWSA to charge the City “the full amount of whatever percent allocation is determined in the PWSA’s next rate proceeding.” I&E M.B. at 44.

In our disposition, we noted the Parties’ agreement in the Partial Settlement that the PWSA would provide a class cost of service study reflecting all public fire hydrant costs in the next rate case. At that time, the PWSA commits to presenting a rate design reflecting an allocation of 25% of all public fire hydrant costs to the City. However, the Partial Settlement makes clear that the “PWSA reserves the right to propose a *phase-in period* at that time.” *March 2020 Order* at 66 (quoting Partial Settlement at ¶ III.I.1 at 23 (emphasis added)).

We agreed with the ALJs that the only Commission action necessary at this stage was the approval of the Partial Settlement as to this issue. We reasoned that it would be premature to limit the parameters of the phase-in before the PWSA has had the opportunity to conduct its cost of service study and to present its proposal. Here, we explained that the record is unclear as to what level of phase-in might be appropriate. For example, I&E seemed to accept that some type of phase-in would be reasonable but did not elaborate on its position other than to express its objection to the step-billing approach. We found that the consideration of any proposal pertaining to the step-billing for the cost allocation of fire hydrants should occur in the context of the next rate proceeding as contemplated by the Partial Settlement. Accordingly, we denied I&E’s Exception as to this issue. *March 2020 Order* at 66-67.

#### Line Extensions

During this proceeding, the PWSA argued that the rules governing line extensions present a unique problem of reconciling the mandates applicable to the PWSA as a municipal authority governed by the MAA, 53 Pa. C.S. § 5601, *et seq.*, and the regulatory authority of the Commission. In sum, the PWSA argued it is necessary and appropriate for the PWSA to follow the statutory line extension formulas in Section 5607(d)(24) of the MAA rather than the line extension formula in the Commission’s Regulations, at 52 Pa. Code §§ 65.1, 65.21-65.23. PWSA M.B. at 12, 31-32.

The PWSA submitted that Section 5607(d)(24) of the MAA creates a fair, reasonable, and predictable economic statutory standard that cannot be legally circumvented by any municipal authority, including the PWSA. Divergence from said statutory mandates and the PWSA’s current practices (which are consistent with the statutory mandates in the MAA) would be complex and costly and could result in litigation (due to the lack of compliance with the mandates in MAA), according to the PWSA. Therefore, the PWSA asserted that the Commission should conclude that, in this instance, the MAA directives supersede the conflicting requirements of the Commission's line extension regulations. But, even if the Commission determines that the MAA’s statutory provisions governing line extensions do not control, the PWSA requested that the Commission grant a waiver of the application of the Commission’s line extension regulations so as to permit the PWSA to continue to use the formula required by the MAA. PWSA M.B. at 12, 30-47; PWSA R.B. at 15-21.

In response, I&E argued that the PWSA’s argument that there is a conflict of law favoring the applicability of the MAA over the Commission’s Regulations as to line extensions simply amounts to an elevation of the PWSA’s interests above its ratepayers. I&E submitted that the PWSA’s argument is without merit because, among other things, it is contradicted by the express language of Chapter 32 of the Code, incompatible with the rules of statutory construction, inconsistent with recent and prior case law, and it would produce an unmanageable and absurd result. I&E M.B. at 19-20, 45-57; I&E R.B. at 21-27.

The ALJs determined that the MAA does not govern the PWSA’s line extension processes and that the General Assembly clearly and expressly intended to require the PWSA to comply with the Code and associated Commission rules, regulations, and orders, barring a few, limited exceptions not applicable to the issue here. R.D. at 154-155 (citing I&E M.B. at 50-51; citing also I&E R.B. at 22-23).

Regarding the PWSA’s waiver request, the ALJs concluded that the PWSA’s request is untimely, noting that nowhere in the PWSA’s Compliance Plan or otherwise in the record did the PWSA indicate it would seek such a waiver. Additionally, the ALJs concluded that a factual record would be necessary to appropriately consider such a request and that the Parties had no opportunity to develop the record regarding the prudency of this request. Therefore, the ALJs recommended that the Commission direct immediate compliance and for the PWSA to revise its tariff provisions regarding line extensions to comply with 52 Pa. Code §§ 65.21-65.23. R.D. at 155.

In our *March 2020 Order*, we adopted the ALJs’ statutory analysis and conclusion that the Code and the Commission’s line extension regulations control as to the PWSA’s line extension processes. However, we concurred with the PWSA that our authority under Chapter 32 to grant waiver to the PWSA of the applicability of any provision of the Code is broad and not limited as to the timing of when such request is made. 66 Pa. C.S. § 3202(b). Moreover, we acknowledged that the PWSA made this request in this Compliance Plan proceeding, the main purpose of which is for the Commission to oversee and approve the PWSA’s plans and processes for coming into compliance with the Code, Commission Regulations and Orders. 66 Pa. C.S. § 3204(b). Additionally, we concurred with the PWSA that it has established in the record, unrebutted, that its current line extension processes and practices are compliant with the MAA and that divergence from the PWSA’s current practices would be complex and costly and could result in litigation and potential damage awards. We also recognized, as I&E did as well, that the PWSA is managing, at this time, its many complex and significant processes and practices to come into compliance with the Code and Commission Regulations. *March 2020 Order* at 73-74.

Accordingly, we determined that, pursuant to our authority under Chapter 32, it would be in the public interest to grant a temporary waiver of the Code’s applicability as to compliance with the Commission’s line extension Regulations. We reasoned that this waiver would permit the PWSA’s current processes as to line extensions (consistent with the MAA) to remain status quo until further Commission action. We granted the PWSA one year from the entry date of this Opinion and Order to study the line extension Regulations and its current practices. Before or on the expiration date of that one-year period, we directed the PWSA to file with the Commission either a petition for a permanent waiver of the line extension Regulations or a supplemental compliance plan detailing how it will revise its processes to be compliant with the line extension Regulations. We also clarified that should the PWSA decide to file a petition for a permanent waiver of the line extension Regulations, the petition must explain and detail how the application of the MAA’s formula and processes results in a just and reasonable economic standard and reasonable service, including a comparison/contrast with the Commission’s line extension Regulations. *March 2020 Order* at 74.

#### Residency Requirement for PWSA’s Employees

The PWSA developed a residency requirement to mirror the City’s Home Rule Charter, which required persons employed by the City to live in the City. The PWSA’s residency requirement requires all employees, except those specifically exempted from the requirements by its’ Executive Committee, to live within the City. PWSA St. C-2 at 1. The PWSA explained that it has only deviated from this requirement in the case of specific exemptions made by the PWSA’s Executive Committee. PWSA M.B. at 47.

Although the PWSA admitted that the residency requirement has limited the Authority’s ability to attract and retain capable and skilled individuals as well as meet the diversity goals set out in the Code, it contended that it has taken sufficient steps to remediate such issues. R.D. at 158; M.B. at 49; R.B. at 21. Additionally, the PWSA argued, in part, that the Commission may not act as a “super board of directors” or micromanage the managerial decisions of a utility company under its purview unless such a violation of the Code or Commission Regulations occurs. The PWSA asserted that only if the Commission finds that the residency requirement is causing the PWSA to be out of compliance with a statutory provision or regulation is it empowered to direct its elimination. PWSA R.B. at 22.

I&E argued, in part, that the Commission does have the authority to remove the residency requirement because through the PWSA’s own admissions, the Authority is spending a disproportionate amount of its budget on contractors and is unable to hire sufficient help while still complying with the residency requirement. Moreover, I&E averred that the only possible reason that the PWSA would maintain this inefficient requirement would be to appease the City and improperly elevate the interests of the City above the interests of the PWSA’s ratepayers. I&E argued that the residency requirement violates Sections 1301 and 1501 of the Code and frustrates the Commission’s policy to promote a diverse utility workforce. I&E M.B. at 60, 62-65.

In their Recommended Decision, the ALJs agreed with the PWSA’s position that the residency requirement is essentially a management decision and the Commission cannot interfere with a management decision of a utility under its purview unless there has been an abuse of managerial discretion and the public interest has been adversely affected. R.D. at 163 (citing *Metropolitan Edison Company v. Pa. PUC*, 437 A.2d 76 (Pa Cmwlth. 1981) (*Met-Ed*)). The ALJs reasoned that the PWSA’s decision to hire from the territory it serves does not violate the Code, Commission Regulations, or Orders. Moreover, the ALJs determined that the residency requirement could not be found to be arbitrary because there are many plausible reasons that the PWSA would desire that its employees reside in the City. The ALJs discussed several possibilities such as providing ready access to employees in case of an emergency, expecting residents to be more invested in issues facing the Authority, or wanting the workforce to look like the community it serves. *Id*.

I&E filed Exceptions to the ALJs’ determination and asserted the following: (1) the PWSA’s residency requirement would violate Section 1301, based on the increased cost that would be passed on to ratepayers without value or benefit; (2) the PWSA’s residency requirement would violate Section 1501 by excluding various qualified individuals for failure to satisfy the residency requirement and preventing redundancy among staff; and (3) the PWSA’s residency requirement is arbitrary and the ALJs erred in finding that the record did not support the conclusion that the residency requirement is not arbitrary. I&E Exc. at 8-17.

No Party, including the PWSA, filed Replies to this Exception.

In the *March 2020 Order*, we agreed with the ALJs’ determination that the establishment of the residency requirement was a management decision on the part of the PWSA. We acknowledged that the Commission has long recognized the “management discretion doctrine,” which established that it is not within the province of the Commission to interfere with the management of a utility, including decisions relating to the necessity and propriety of operating expenses, unless the Commission finds an abuse of discretion or arbitrary action by the utility has been shown based on the record evidence. We also reiterated that the Commission is not a “super-board of directors” for the public utility companies and it has no right of management over them. *March 2020 Order* at 79-80.

We further explained that the Commission has routinely recognized that where the evidence demonstrates an abuse of managerial discretion *and* the public interest has been adversely affected, the Commission is empowered to intervene. However, to find an abuse of discretion or arbitrary action by the utility company, we emphasized that the Commission may only consider the information the utility’s management knew or should have known at the time of the decision at issue. *March 2020 Order* at 80 (citing *Met-Ed*, 437 A.2d at 80, and *City of Pittsburgh v. Pa. PUC*, 88 A.2d 59 (Pa. 1952)).

Additionally, we noted that by making a determination that the residency requirement is a ratemaking decision, we would have the right and the duty to review it, without needing to apply the “management discretion doctrine.” *March 2020 Order* at 80 (citing *Philadelphia Suburban Water Co. v. Pa. PUC*, 808 A.2d 1044, 1051 n.6 (Pa. Cmwlth. 2002)). Although recognizing that the PWSA will likely attempt to recoup the increased costs that it has incurred as a result of the residency requirement, we found that classifying the residency requirement as a ratemaking decision would be premature as the PWSA is not proposing to recover these costs in the proceeding before us. Therefore, for the purposes of this proceeding, we concluded that the residency requirement is a management decision and considered any ratemaking implications that may result to be addressed in a future rate case. In making this ruling, we concluded that I&E failed to demonstrate a violation of Section 1301 at this time. *March 2020 Order* at 80*.*

However, based on the record evidence, we reasoned that the continuation of the residency requirement would be an abuse of managerial discretion that would adversely affect the public interest. In sum, we found that it has been demonstrated in this proceeding, in large part through the PWSA’s own admission, that the residency requirement results in a lack of adequate employees in the PWSA’s workforce and a lack of reasonable levels of redundancy among the PWSA’s workforce. These results show that if the residency requirement were permitted to be implemented in the Compliance Plan, it would appear to frustrate and seriously impede the PWSA’s ability to comply with Section 1501 of the Code. *Id*. at 81.

We explained that, traditionally, the Commission has viewed abuses of managerial discretion based on concrete and discernable impacts on consumers such as increased costs for maintenance or imprudent improvements to facilities. *Id*. (citing *Park Towne v. Pa. PUC*, 433 A.2d 610, 615-16 (Pa. Cmwlth. 1981); *Re Limerick Unit No. 2 Nuclear Generating Station*, 60 Pa. P.U.C. 600 (1985)). Here, we noted that the PWSA has estimated that its work force is comprised of over 10% of full-time contractors, who work at a 150% to 200% cost premium; and this has added over $2 million per year to its non-unionized work force cost. Additionally, we emphasized that implementing the residency requirement has prevented the PWSA from recruiting from the vast majority of the surrounding Pittsburgh metropolitan area and has reduced its ability to maintain reasonable levels of redundancy among its staff. We highlighted that these are the types of concrete and discernable impacts that have been traditionally associated with abuses of managerial discretion. *March 2020 Order* at 81.

However, even under an abuse of managerial discretion analysis, we explained that intervention is not permissible unless there is an adverse effect to the public interest. Here, we determined from the evidence presented that the PWSA’s residency requirement if implemented in its Compliance Plan would appear to frustrate and seriously impede the PWSA’s future ability to comply with Section 1501 of the Codes. *Id*. at 81-82.

Despite the benefits cited by the ALJs, we stated that foreclosing 86% of a qualified working population would in our opinion cause harm to consumers. In addition to the increased costs, we found a lack of adequate, qualified technical employees, including reasonable redundancies of such employees, to provide necessary daily operation and maintenance of the PWSA’s system to be inconsistent with a utility’s duty to furnish and maintain adequate, efficient, safe, and reasonable service and facilities. While we recognized that the PWSA’s contractors may be qualified to deal with day-to-day operations and any emergencies that may arise, we found that the lack of redundancy will more likely lead to a drain of institutional knowledge and interfere unreasonably with the PWSA’s duty to provide adequate, efficient, safe and reasonable service. Therefore, we found the impact of the PWSA’s residency requirement to be inconsistent with its obligations under Section 1501. We also emphasized that the PWSA has already admitted that “the record here supports a Commission finding that the residency requirement is increasing costs to the PWSA and *impeding its ability to provide adequate and efficient service*.” *March 2020 Order* at 82 (citing PWSA R.B. at 22 (emphasis added)).

Since the PWSA has admitted that the residency requirement impedes its ability to provide adequate and efficient service, we determined that permitting the implementation of the residency requirement in the PWSA’s Compliance Plan would be inconsistent with Section 1501 of the Code. Accordingly, we directed the PWSA to revise its Compliance Plan to remove the residency requirement as currently proposed. *March 2020 Order* at 82-83.

Moreover, we also rejected the residency requirement on the basis that it is arbitrary and capricious. When asked about the absence of the residency requirement in the Compliance Plan, the PWSA simply indicated that its board chose to adopt the City’s residency requirement. *Id*. at 83 (citing PWSA St. No. C-2 at 14). We stated that the PWSA has not presented any evidence nor advanced any argument to indicate that its board of directors had the public interest in mind when deciding to implement the residency requirement. In the Recommended Decision, the ALJs advanced several possibilities as to why the residency requirement could be in the public interest, however, since the PWSA had not advanced these arguments or provided evidence in support, we did not consider them. Finding no proffered evidence to support the proposition that the residency requirement was enacted to support the public interest, we concluded that the PWSA made no meaningful effort to determine whether its implementation of the residency requirement would benefit the public. *March 2020 Order* at 83 (citing *Met-Ed*, 437 A.2d. at 81).

Therefore, we ordered the PWSA to revise its Compliance Plan and eliminate the residency requirement. *March 2020 Order* at 84.

### Lead Infrastructure Issues

#### Partial Settlement on Lead Service Lines

In the *March 2020 Order*, we explained that the PWSA’s proposed plan to remedy residential lead serve lines (LSLs) existing within and connected to its water distribution system is set forth in the following documents filed in this proceeding: (1) the Compliance Plan filed September 28, 2018 (CP); (2) the Compliance Plan Supplement filed February 1, 2019 (CP Supplement); (3) the LTIIP dated August 21, 2019 (PWSA Hearing Exh. 3) (LTIIP);[[7]](#footnote-8) (4) PWSA’s Board Policy dated July 26, 2019 (PWSA St. C‑1SD, Exh. RAW C-46) (July 2019 Policy); and (5) the Parties’ relevant expert testimony. *March 2020 Order* at 84-85.

We noted that the active Parties engaged in comprehensive litigation with respect to the PWSA’s proposed lead plan and that the Partial Settlement modified the PWSA’s plan. Additionally, we provided a full summary of the PWSA’s proposed lead plan in this proceeding, as modified by the Settlement provisions, to remedy residential LSLs existing in, and connected to, its water distribution system. *See March 2020 Order* at 183-203 (Appendix A).

The Settlement addressed many of the components of the PWSA’s plan to remedy LSLs within its service territory (with the exception of three issues that the Parties reserved for litigation). Our *March 2020 Order* summarized the Settlement Terms pertaining to the following issues:

* LTIIP and Private-Side Residential Lead Service Lines
* Inventory of Residential Lead Service Lines
* PWSA’s 2026 Goal and Its Plans to Achieve It
* Partial Replacements of Lead Service Lines
* Interior Plumbing Inspections
* Meter Replacements
* Tap Water Filter Distribution
* Bottled Water and Flushing Assistance
* Community Lead Response Advisory Committee
* Corrosion Control
* Rate Treatment[[8]](#footnote-9)

The ALJs found the Partial Settlement to be in the public interest and recommended its approval without modifications. *See* R.D. at 79-86. In our disposition, we approved the majority of the Settlement as being in the public interest, but modified the terms pertaining to partial replacement of lead service lines. *March 2020 Order* at 124-126.[[9]](#footnote-10) These modifications are the subject of both the PWSA Petition and the UNITED Petition.

#### Modification of Settlement Terms Relating to Partial Replacements

In our *March 2020 Order*, we commended the PWSA’s commitments to minimize partial replacements of LSLs. Additionally, we detailed the record evidence of unrefuted expert testimony showing that partial replacements of LSLs endanger public health. In particular, we emphasized the permanent negative health effects from lead exposure, especially to uniquely vulnerable populations of developing fetuses, infants, and children. *March 2020 Order* at 116-117.

Based on the factual record, we found substantial evidence supports the PWSA’s commitment in the Settlement to replace a private-side LSL simultaneously when it replaces the public-side service line at no direct cost to the property owner, as being in the public interest. However, we modified the Settlement pertaining to partial replacements in two circumstances: (1) when a residential customer rejects PWSA’s offer to replace the private-side LSL; and (2) partial replacements in extraordinary circumstances. *Id*. at 119-126.

Specifically, we modified Paragraph III.VV.1.b, to include new subsections (v) and (vi), stating as follows:

v. In the event PWSA determines it will not complete the replacement of a private-side lead service line due to any of the circumstances described in III.VV.1.b.i., PWSA will temporarily not replace the public-side service line until it has reported the factual circumstances to the [Community Lead Response Action Committee] CLRAC in accordance with the Settlement at III.WW.4.b. After consulting with the CLRAC, PWSA should make a determination as to the appropriate next steps, including, but not limited to, potentially not replacing the public side of the line while corrosion control treatments and distribution of water filters remain in place or potentially receiving Commission approval to make reasonable changes, substitutions and extensions in or to service and facilities as may be necessary or proper for the accommodation and safety of patrons with these extraordinary circumstances or potentially receiving Commission approval of tariff provisions quantifying specific limits on PWSA’s financial responsibility for a private-side lead service line replacement in extraordinary circumstances.

vi. In the event PWSA does not complete the replacement of a private-side lead service line due to any of the circumstances described in III.VV.1.b.ii-iv., PWSA will not permit the re-connection of the private-side lead service line to the newly installed public-side service line in accordance with PWSA’s tariff at Section B, Rules 1 and 4. PWSA will begin the process to terminate service to the residence with prior notice in accordance with PWSA’s tariff at Section C, Rule 3.j. Reconnection of service shall not be permitted until the customer certifies the removal of the private-side lead service line in accordance with PWSA’s tariff at Section B, Rule 4.

*March 2020 Order* at 124-125.

We also provided an opportunity for the Parties to withdraw from the Settlement within five business days of the entry of our Order based on this modification to the Settlement. No Parties elected to withdraw from the Settlement. However, PWSA and UNITED filed their respective Petitions pertaining to the Settlement modifications which are discussed below.

#### Litigated Issues

Next, we addressed the remaining issues pertaining to the replacement of lead service lines. Regarding residential customers, we noted that it does not appear to be a question of *whether* a residential private-side LSL is covered under the PWSA’s service proposal, but *how* and *when*. We indicated that the issues reserved for litigation in this proceeding for residential LSLs address certain questions relating to the *how* and *when*. However, we explained that with respect to non-residential LSLs, the question is *whether* the PWSA’s proposal should cover these lines. Specifically, the Joint Petitioners reserved the following issues for litigation regarding LSL remediation:

1. Replacement of private-side lead services lines not scheduled for replacement through PWSA’s current LSL replacement programs

a. Income-based reimbursement for private-side LSL replacements initiated by property owner

b. Continuation of neighborhood-based replacement program

2. Replacement of non-residential LSLs

*March 2020 Order* at 130.

As a preliminary matter, we considered the jurisdictional questions pertaining to the Commission’s authority to direct replacement of private-side LSLs. In our disposition, we explained that the modifications to the Partial Settlement direct the PWSA to enforce its existing tariff provisions to refuse a private-side LSL’s re-connection to the PWSA’s system after the PWSA has disturbed the public-side of the service line by removing the old service pipe and installing new service pipe made of non-lead material. We emphasized that our modifications to the Partial Settlement were limited to preventing the adverse health effects to the public in the context of the PWSA’s proposal to conduct partial LSL replacements of the public side portion of its service lines. Accordingly, we declined to address the broader arguments about water quality jurisdiction and modified the Recommended Decision consistent with this determination. *Id*. at 140.

Although we declined to answer the broader legal questions as to the extent of our jurisdiction, we clarified our authority over the PWSA’s plan going forward. In this proceeding, we indicated that the PWSA requested our approval of its plan to remedy lead infrastructure existing in and connected to its system, as submitted by the PWSA and as modified by the Parties’ agreed-to terms of the Settlement. In the *March 2020 Order*, we approved and modified that plan and directed the PWSA to revise its Compliance Plan and amend its LTIIP incorporating the plan consistent with our findings. Thus, we found that the entirety of that plan as well as the PWSA’s implementation of that plan constitute “service” under Section 102 of the Code subject to our jurisdiction. *March 2020 Order* at 140-141.

Regarding the litigated issue of income-based reimbursement and neighborhood-based replacement programs, we concurred with the ALJs’ recommendation to not modify the PWSA’s program for residential customers that elect to replace their own private-side LSL. We explained that the PWSA’s income-based reimbursement policy is designed to offer financial assistance to residential customers who elect to replace their private-side LSL at a time when the PWSA is not replacing public-side infrastructure, by funding either all or a portion of the costs of the private-side replacement based on the customer’s income level. In doing so, this program may apportion some financial responsibility for the replacement to the customer, basing such policy on the notion that customers having the ability to fund such a replacement should do so. To the extent the private-side LSL is connected to a public-side LSL, under this program, to avoid partial replacements, we noted the PWSA’s commitment to replace the public-side LSL at the same time the customer’s contractor replaces the private-side LSL. *March 2020 Order* at 158.

We reasoned that this particular ad hoc replacement program, must be viewed in the context of the PWSA’s overall plan to remedy residential LSLs existing within and connected to its system. Here, we highlighted that the PWSA’s overall plan includes the commitment to replace all private- and public-side LSLs in its system by 2026 and includes the PWSA’s commitment to avoid performing partial replacements wherever possible going forward. To achieve its goal by the target date of 2026, the PWSA proposed certain systematic replacement programs, as summarized in Appendix A of our *March 2020 Order*. However, the PWSA recognized that there would be customers who may elect to replace a private-side LSL at a time when public infrastructure is not being replaced by the PWSA under one of its systematic replacement programs. This ad hoc replacement program addresses these customers. *Id*. at 158-159.

Moreover, we indicated that the implementation of the PWSA’s income-based reimbursement policy is intended by the Authority as a cost-effective means of facilitating the PWSA’s LSL remediation efforts in meeting its goal of replacing 100 percent of residential LSLs (of which it is aware and are operationally feasible to replace) in its system by 2026, independent of whether residential customers choose to participate in the program. We also noted our expectation that the PWSA will use available funds in the most efficient manner, maximizing savings and public health, and that the PWSA’s March 2021 plan will maintain such efficiencies. *Id*. at 161.

We explained that the PWSA’s overall plan for income-based reimbursement, as modified by its Settlement commitments, has sufficiently addressed the Parties’ concerns at this time and that the Parties did not present compelling evidence or arguments to modify the PWSA’s proposed systematic programs. We further reasoned that this determination is supported by the PWSA’s commitment to submit a plan and timeline by March 31, 2021, based on the additional information it obtains through its inventory efforts and implementation experience. *Id*. at 163.

Moving to the final litigated issue, we addressed the OSBA’s challenge to exclude non-residential customers from the benefits to remedy LSLs existing within and connected to the PWSA system. The OSBA had argued that the Commission should modify the PWSA’s plan to: (1) include non-residential customers in the PWSA’s LSLR Programs; (2) replace what would normally be classified as the public-side of such service lines (*i.e*., the portion of the service line that runs from the water main to the customer’s curb stop) at no charge to the non-residential customer; and (3) offer non-residential customers a stipend of $1,000 to offset the costs of replacing the private-side side of their lines running from the curb stop to the meter if the PWSA offers financial reimbursements to residential customers. R.D. at 210-211 (citing OSBA M.B. at 1; OSBA St. 1 at5).

Citing to federal regulations under the EPA’s Lead and Copper Rule, as enforced by PA DEP, the ALJs concluded that the Commission does not have authority to order the PWSA to replace service lines that it does not own. R.D. at 213 (citing R.D. at 208; citing also 40 CFR Part 141.84(d). Accordingly, the ALJs recommended that the Commission dismiss the OSBA’s request that the Commission order the PWSA to include non-residential lead service lines in its LSL replacement plan. R.D. at 213.

We denied the OSBA’s Exceptions regarding the non-residential customer assistance. In our disposition, we also declined to adopt the OSBA’s requests but for reasons different from those expressed by the ALJs in the R.D. With respect to non-residential customers, we found that the PWSA had demonstrated a basis for excluding non-residential customers on the real distinction between the ownership structure of service lines. Residential customers own only a portion of the service line (*i.e*., the private-side from the curb stop to the consumption point) while the PWSA owns the remaining portion of that same line (*i.e*., the public-side from the curb stop to the main). Unlike residential customers, non-residential customers own the entire service line that is from the main to the consumption point. We referenced the distinction that the PWSA does not own any portion of the non-residential service line. As a result, we found that the PWSA had demonstrated that non-residential service lines will not be subject to the same partial replacements as residential LSLs would be. *March 2020 Order* at 174-175.

In addition, we determined that the OSBA presented little evidence in this proceeding to demonstrate how the PWSA’s plan to not replace non-residential LSLs will be inconsistent with its obligation to provide adequate, efficient, safe, and reasonable service. Moreover, we reasoned that the Authority also showed that its plan to exclude non-residential customers was based on the distinction in financial capabilities between these customer classes. Therefore, we concluded that there was a lack of substantial evidence to support the OSBA’s proposals to modify the PWSA’s plans. *Id*. at 175‑176.[[10]](#footnote-11)

## Petition to Intervene, Answers and Disposition

Following the issuance of the *March 2020 Order*, the City filed its Intervention Petition arguing its eligibility to intervene in this proceeding pursuant to 52 Pa. Code § 5.72(a). The City asserts that the Commonwealth Court recently announced that intervention in a Commission proceeding is appropriate where intervention “may be in the public interest” and that this standard “is easily satisfied.” Intervention Petition at 3 (quoting *Allegheny Reproductive Health Ctr. v. Pa. Dept. of Health and Human Servs.*, 225 A.3d 902 (Pa. Cmwlth. 2020)).

The City contends that 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 Authority, with the City continuing to provide services necessary to operate the system, acting as an agent of the PWSA. According to the City, the 1984 Agreement was terminated in 1995, and the City and the Authority entered into a 1995 Capital Lease Agreement, which remains in effect today. Intervention Petition at 4.

The City asserts that in addition to executing the 1995 Capital Lease Agreement, the City and the Authority entered into the 1995 Cooperation Agreement on January 1, 1995, in which the parties agreed, *inter alia*, to the retention of certain services provided by the City to the PWSA and the identification of payments and services provided by the PWSA to the City, including the City’s right to receive up to 600 million gallons of water annually. The City submits that the 1995 Cooperation Agreement as amended remained in effect until October 3, 2019, when the PWSA terminated it because the parties negotiated the new 2019 Cooperation Agreement (2019 Cooperation Agreement or new Cooperation Agreement). *Id.* at 5.

The City proffers it negotiated an arms-length transaction which resulted in the 2019 Cooperation Agreement with an effective date of October 3, 2019. According to the City, if the Commission intends to review, comment on, or revise the 2019 Cooperation Agreement pursuant to Sections 507 and 508 of the Code, it should address all those matters in a proceeding filed under Section 1308(d) of the Code. Intervention Petition at 5 (citing 66 Pa. Code §§ 507, 508 and 1308(d)).

Further, the City argues that our *March 2020 Order* prejudices the City because it did not receive formal notice that the 2019 Cooperation Agreement would be addressed in this proceeding. The City asserts that this omission deprived it of due process. If it had received notice, the City submits, it would have identified its position on the record and introduced supporting legal and factual evidence. According to the City, 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.” Intervention Petition at 5-6.

The City characterizes the current status of the PWSA as an entity “transitioning” from a municipal entity that is not subject to Commission authority to one that is subject to Commission authority and oversight to “an identity that is more akin to a traditional public utility rather than an independent authority.” *Id.* at 6. Likewise, the City contends that it is transitioning from a water and sewer system owner to a customer paying for access to water and sewer services. *Id*.

The City argues that the 2019 Cooperation Agreement was negotiated to balance these changes and to protect the respective customers and residents of the Authority and the City. Specifically, the City states that 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 [sic], 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.

Intervention Petition at 7.

The City proffers that the PWSA integrated some of these provisions from the 2019 Cooperation Agreement into its Compliance Plan and LTIIP, but that the Recommended Decision and our *March 2020 Order* rejected them. According to the City, the Commission action deprived the City and its taxpayers of the opportunity to address these issues. The City submits that the Commission could have identified the terms which were related or not to the provision of water and wastewater, but instead improperly evaluated the 2019 Cooperation Agreement, the Compliance Plan and LTIIP in a piecemeal manner. Additionally, the City argues that the failure to address the totality of the circumstances respecting the cessation of the 1995 Cooperation Agreement and the commencement of the 2019 Cooperation Agreement prejudices the City and necessitates the City’s intervention. Intervention Petition at 8.

Next, the City argues that both the City and the Authority each receive a grant of immunity to claims and lawsuits under the Political Subdivision Tort Claims Act (Tort Claims Act), 42 Pa. C.S. § 8541. This immunity, the City claims, is available because of the City’s current position as the owner of the water and sewer systems and it will continue until the PWSA assumes full ownership of the system. However, the City contends that the general grant of immunity is subject to limited exceptions such as Section 8542(b)(5) of the Tort Claims Act, pertaining to claims and suits arising from alleged dangerous conditions of sewer and water facilities owned by the local agency and located within rights-of-way.[[11]](#footnote-12) Intervention Petition at 8-9.

The City submits that its current ownership position “exposes it to ongoing claims of liability and damages even though the PWSA now operates and maintains the water and sewer system pursuant to edicts announced by the [Commission].” *Id*. at 9. According to the City, this exposure to liability and damages is germane to the overall discussions in this proceeding because both the City and the PWSA are prohibited from shifting this exposure in the same manner as a private entity. Moreover, the City argues that the Commission is not empowered to alter or amend the Tort Claims Act. *Id*.

In conclusion, the City contends that the *March 2020 Order* effects it regarding: (1) the 1995 Cooperation Agreement and the 2019 Cooperation Agreement; (2) the payment responsibility for metering City-owned properties; (3) the billing for unmetered or unbilled City-owned properties; and (4) the billing plan for fire hydrants in the City. The City argues that it is entitled as a matter of law to intervene because it will suffer immediate and irreparable harm if the Commission denies the intervention. *Id*. at 9-10.

In its Answer to the Intervention Petition, I&E argues that the City’s attempt to intervene in this case at this late date must be prohibited. I&E contends that the City’s request conflicts with our Regulations pertaining to petitions to intervene which provide that for parties other than statutory advocates, intervention will not be permitted after an evidentiary hearing has concluded absent extraordinary circumstances. Here, I&E notes that the City is not a statutory advocate and that the evidentiary hearings concluded on August 21, 2019. I&E submits that no extraordinary circumstances exist here because the City was apprised on multiple occasions, by letters with verified service from the PWSA, that its interests would be implicated in this proceeding. I&E Answer to Intervention Petition at 1-2.

In response to the City’s allegations of the omission of formal notice, I&E argues that the City ignores the multiple forms of notice it received. As a result, I&E proffers that the City’s position is frivolous and lacks credulity because it is premised on an argument that prospective litigants need only defend their interest in adjudicative proceedings when they know in advance that the ultimate ruling will be adverse to their interest. According to I&E, the City elected not to intervene in this proceeding, but is now attempting to disturb the outcome because it is dissatisfied with the result. I&E alleges that by doing this “the City has successfully dodged any accountability in the underlying case, circumvented any obligation to answer discovery, and failed to develop and defend any evidentiary record.” *Id.* at 2.

I&E adds that even if the untimely Intervention Petition were to be granted, the City would be entering a case with an evidentiary record closed for over six months. I&E argues that in such a scenario the City would be prevented from receiving retroactive status because it is well settled that intervenors must take the record as they find it at the time of intervention. *Id*. at 2-3 (citing *Com. of Pa., et al. v. IDT Energy, Inc.*, Docket No. C-2014-2427657, 2015 WL 2164637 (Order Granting Petition to Intervene entered May 1, 2015), and *Final Rulemaking for Revision of Chapters 1, 3 and 5 of Title 52 of the Pa. Code Pertaining to Practice and Procedure Before the Commission*, Docket No. L‑00020156 (Order entered January 4, 2006)).

Additionally, I&E asserts that intervention at this late stage is not appropriate because the PWSA already argued many positions on behalf of the City. I&E submits that the arguments the City seeks to reopen through its intervention were already heard and rejected by the Commission. I&E Answer to Intervention Petition at 3. Regarding the City’s averments pertaining to the Tort Claims Act, I&E contends that the City’s claims of liability exposure are not supported nor tied to the record in this case and do not articulate a valid basis for the City’s untimely and unwarranted intervention. I&E continues that to the extent that the City wished to address issues of liability, which it does not tie to any outcome of this case, it had ample opportunity to develop these issues, but elected to waive that opportunity despite having prior notice and opportunity to intervene. *Id*. at 12.

The OSBA also objects to the City’s intervention contending that the City had appropriate notice of this proceeding. In support, the OSBA highlights the publication of the notice of the procedure for the Commission’s review of the Compliance Plan and LTIIP filings of the PWSA in the *Pennsylvania Bulletin* on October 13, 2018, at 48 *Pa. B.* 6635. The OSBA explains that the notice indicated that, “Regarding the PWSA Compliance Plan, no later than forty-five (45) days after this *Pennsylvania Bulletin* publication, the Commission will, by means of secretarial letter, assign the filings to the Office of Administrative Law Judge (OALJ) for the resolution of any factual matters that PWSA or interested parties may seek to develop.” OSBA Answer to Intervention Petition at 4-5 (quoting 48 *Pa. B.* 6635).

Furthermore, the OSBA cites to several filings at Docket No. R-2018-3002645, *et al.,* evidencing notice to the City that the Cooperation Agreement was going to be addressed in the Compliance Plan proceeding. The OSBA references the filing of a letter dated December 13, 2018, from the PWSA to the City in which the PWSA formally notified the City that the Cooperation Agreement would be reviewed in the Compliance Plan proceeding and included copies of the Compliance Plan filing. The OSBA also cites the filing of a letter dated January 28, 2019, from the PWSA to the City in which the PWSA served on the City the Recommended Decisionin the 2018 Base Rate Case of the PWSA. The OSBA explains that the Recommended Decisionin the Base Rate Case adopted the agreement of the parties to investigate the Cooperation Agreement in the Compliance Plan proceeding. Thereafter, the PWSA filed a letter dated February 28, 2019, and served it on the City indicating that the Commission issued an Opinion and Order adopting the Recommended Decisionin the PWSA’s 2018 Base Rate Case. OSBA Answer to Intervention Petition at 5 (citing *Pa. PUC, et al. v. Pittsburgh Water and Sewer Authority*, Docket Nos. R-2018-3002645, *et al*. (Order entered February 27, 2019) (*2018 Base Rate Case*)).

According to the OSBA, the City had ample opportunity to seek intervention in the Compliance Plan proceeding and to make the legal arguments set forth in its Intervention Petition, because it had sixty days from October 13, 2018, to do so. The OSBA submits that the City chose not to seek intervention in the Compliance Plan proceedings until after the issuance of the *March 2020 Order*. The OSBA argues that the City should not be rewarded for sitting on its hands and that permitting intervention at this late stage would prejudice all the other parties who fully participated in the litigation stages of the Compliance Plan proceeding. Moreover, the OSBA contends that the issues asserted in the Intervention Petition were correctly resolved in the *March 2020 Order* and should not be examined in the context of the Cooperation Agreement. The OSBA submits that the Commission’s decision brings the PWSA into greater compliance with the Code and its Regulations and the remainder of the terms of the Cooperation Agreement which are not preempted by the *March 2020 Order* may be examined in the proceeding at Docket No. U-2020-3017970. OSBA Answer to Intervention Petition at 7-9.

Upon review, we shall decline to exercise our discretion to allow the City to intervene at this late stage of the proceeding. Our Regulations set forth the eligibility standards and the procedures for seeking intervention. 52 Pa. Code §§ 5.71-5.76. For a non-statutory advocate such as the City, “intervention will not be permitted once an evidentiary hearing has concluded *absent extraordinary circumstances*.” 52 Pa. Code § 5.74(c) (emphasis added). Although the City sets forth arguments in support of its eligibility to intervene, the City has failed to establish that there are any extraordinary circumstances requiring its intervention over eight months after the close of the evidentiary record in this proceeding. Here, the City’s delay in attempting to intervene cannot be reasonably attributed to any exigent circumstances, but rather to an apparent decision to refrain from participating until a final determination in our *March 2020 Order*.

The City does not directly address the extraordinary circumstances exception to late intervention under 52 Pa. Code § 5.74(c), but generally asserts that it was not provided formal notice of the Cooperation Agreement being considered in this proceeding. According to the City, this lack of notice deprived it of due process and the failure to allow its intervention would cause it prejudice. There is no support for this contention in the record. Moreover, the formal notifications provided in the *2018 Base Rate Case* refute the City’s due process allegations, as explained immediately below.

As both I&E and the OSBA explain, the City had sufficient notice and opportunity to intervene in this proceeding. Beginning with the notice published in the *Pennsylvania Bulletin* on October 13, 2018, the City was first alerted as to its potential need to participate in the Compliance Plan proceeding. After express notices provided in December 13, 2018, January 28, 2019, and February 1, 2019, however, there could be no reasonable doubt that City-related issues would be addressed in this proceeding. Specifically, pursuant to the Settlement obligations in the *2018 Base Rate Case*, the PWSA provided formal notifications to the City as follows:

* + - The PWSA certified service of a letter to the City dated December 13, 2018. The letter, in part, expressly notified the City that the PWSA/City Cooperation Agreement would be reviewed by the Commission in the Compliance Plan case, and provided docket information for this proceeding and information necessary to enable the City’s participation in an upcoming Prehearing Conference.
    - The PWSA certified service of a letter to the City dated January 28, 2019, in which the Authority notified the City that the Cooperation Agreement would be reviewed in the Compliance Plan proceeding and included copies of the Compliance Plan filing to the City.
    - On February 1, 2019, the PWSA certified service of its Compliance Plan Supplement upon the City.

Going beyond the express notifications contained in the PWSA’s certification letters, a review of the Compliance Plan and the Compliance Plan Supplement themselves also make clear that issues related to the Cooperation Agreement would be addressed in this proceeding. Indeed, the PWSA acknowledged that our *FIO* required the Authority to address several issues related to its relationship with the City in this proceeding including unbilled or unmetered usage, including City usage. Compliance Plan at 105.

For example, the Commission specifically directed that the Compliance Plan address, *inter alia*, a metering plan identifying unmetered accounts and plans to meter all customers. Acknowledging that the failure to meter and/or charge some locations but not others is potentially violative of Sections 1303 and 1304 of the Code, 66 Pa. C.S. §§ 1303 and 1304, the PWSA explained that it is set to begin a robust meter installation and replacement campaign that will include the 200-400 City-owned and operated locations and facilities for the first time and related public attractions. In its 2019 Compliance Plan, the PWSA unveiled its multi-step, multi-year plan to address the unmetered and unbilled City-related facilities which became the subject of litigation in this proceeding. Compliance Plan at 108-110. Thus, it is evident from the Compliance Plan that the City’s interests were being implicated and that the Commission would be addressing issues having an impact on the City’s interests.[[12]](#footnote-13)

The City appears to assert that it believed the City-related issues would only be addressed in the context of the consideration of the 2019 Cooperation Agreement under Section 507 of the Code. This apparent view is plainly at odds with the development of this litigated proceeding. As explained in the *March 2020 Order*, the Partial Settlement resolved 139 issues or nearly seventy-five percent of all the identified issues in this proceeding. Additional issues were reserved for the Stage 2 proceeding. The remaining issues reserved for litigation in this proceeding were:

1. The Cooperation Agreement between PWSA and City of Pittsburgh effective January 1, 1995
2. Municipal properties and public fire hydrants within the City of Pittsburgh
3. Responsibility for payment of costs related to metering municipal properties within the City of Pittsburgh
4. Billing plan for unmetered and/or unbilled municipal properties within the City of Pittsburgh
5. Billing plan for public fire hydrants within the City of Pittsburgh
6. Applicability of the Municipality Authorities Act, 53 Pa. C.S. § 5601, *et seq.*, and the Commission’s Line Extension Regulations at 52 Pa. Code §§ 65.1, 65.21-65.23
7. PWSA’s residency requirement

*March 2020 Order* at 24-25 (citing Partial Settlement at 57‑58).

Despite the development of these issues by the Parties through discovery and evidentiary testimony, the City did not express a desire to participate in this proceeding. In the face of such persistent alerts about the record in this proceeding that its interests were being implicated, the City remained silent until it became dissatisfied with our final determination in the *March 2020 Order*. Accordingly, we conclude that the City has failed to establish any extraordinary circumstances supporting its late intervention.

In its Intervention Petition, the City also argues that its current ownership position exposes it to potential liability pursuant to the Tort Claims Act and that this situation entitles it to intervene in this proceeding. There is no evidentiary record in support of these averments and the City has failed to adequately explain how the outcome of this Compliance Plan proceeding would address its vaguely asserted concerns. To the extent that the City had concerns about issues of liability, it had sufficient prior notice to seek intervention and to develop these issues but failed to do so and thus effectively waived this opportunity.

Having denied the City’s Intervention Petition, we shall not consider the City’s Reconsideration Petition due to the City’s lack of standing as a party to the subject proceeding. *See*, *Pa. PUC v. National Fuel Gas Distribution Corp.*, Docket No. R‑00932885, 1994 WL 712660 (Order entered September 26, 1994).

## Petitions for Reconsideration, Answers and Dispositions

### Residency Requirement

#### Petition and Answers

In its Petition, the PWSA requests that we reconsider the decision to eliminate the requirement for the Authority’s employees to reside in the City. The PWSA argues that, by eliminating the residency requirement, we overlooked a line of long-standing cases decided by the Pennsylvania Supreme Court which limit the ability of the Commission to interfere with management or business decisions of a public utility. According to the Authority, these cases confirm a utility’s right of self-management and prohibit the Commission from acting as a “super board of directors.” Specifically, the PWSA contends that we did not give weight to *Coplay Cement Manufacturing Co. v. Public Service Commission*, 271 Pa. 58, 114 A. 649 (1921) (*Coplay*); *Northern Pennsylvania Power Co. v. Pa. PUC*, 333 Pa. 265, 5 A.2d 133 (1939) (*Northern Pennsylvania Power*); and *Bell Telephone Co. of Pa. v. Driscoll*, 343 Pa. 109, 21 A.2d 912 (1941) (*Bell Telephone*). In the Authority’s view, a proper application of these decisions would show that the Commission’s elimination of the PWSA’s residency requirement is an illegal interference with the Authority’s right to manage its own affairs. PWSA Petition at 8-9.

The Authority also acknowledges that we correctly recognized that the residency requirement is a management decision by the PWSA, but that we erroneously relied on case law that permits the Commission to examine managerial decisions of utilities in the context of the impact on rates paid by consumers. As this is not a rate proceeding, the PWSA asserts that the cases cited in the *March 2020 Order* are inapplicable and do not authorize the interference with the PWSA’s management of its business. PWSA Petition at 10 (citing *Met-Ed*).

Additionally, the PWSA claims there was no evidence presented in this proceeding showing any link between the PWSA’s residency requirement and the failure on its part to provide adequate and efficient service. Absent such evidence, the Authority proffers that the Commission is not authorized to direct the elimination of the residency requirement. The PWSA submits that we failed to consider the lack of evidence of any violation of the law or Commission Regulations or Orders and overlooked its evidence of the many steps taken to ensure that it is able to perform its regulatory obligations in connection with providing water and wastewater service to its customers. According to the Authority, our rationale was based solely on the conclusion that the residency requirement would appear to frustrate and seriously impede the PWSA’s ability to comply with Section 1501 of the Code. PWSA Petition at 11-12.

The PWSA also objects to the finding that its residency requirement is arbitrary and capricious. The Authority proffers that the *March 2020 Order* cited to no legal authority for this proposition outside the context of a ratemaking proceeding without evidence of a violation of the Code or a Commission Regulation or Order. In further response, the PWSA argues that it was not required to show that the residency requirement benefits the public. Instead, the Authority submits, I&E was obligated to present evidence of inadequate service under Section 1501 of the Code, which did not occur. *Id*. at 13.

Alternatively, the PWSA requests that if the Commission eliminates the residency requirement generally, it should at least be retained for union employees. The Authority contends that this is an issue that should be addressed during the PWSA’s negotiations with its unions regarding collective bargaining agreements, which are set to expire at the end of calendar year 2020. The Authority asserts that, generally, the Commission does not interfere with negotiations of collective bargaining agreements between public utilities and their unions. Accordingly, the PWSA submits that the Commission should defer this issue to Stage 2 of the Compliance Proceeding. *Id*.

In its Answer, I&E submits that the Commission’s determination on this issue is consistent with record evidence and with sound legal precedent that permits the Commission to interfere with the management decision of a jurisdictional utility when there has been an abuse of managerial discretion and the public interest has been adversely affected. I&E also argues that the ruling is consistent with the PWSA’s record position that sufficient evidence exists to support a Commission finding that the PWSA’s residency requirement is “*impeding its ability to provide adequate and efficient service*.” I&E Answer to PWSA Petition at 5 (quoting PWSA R.B. at 22).

I&E denies that the Commission overlooked the cases cited by the PWSA or that the cases are determinative of this proceeding. In further response, I&E argues that the Commission is empowered to interfere with a management decision of a utility under its purview where there has been an abuse of managerial discretion and the public interest has been affected. According to I&E, the Commission in this proceeding correctly found such an abuse of managerial discretion adversely impacting the public interest and that the PWSA has failed to produce evidence to refute this determination. I&E Answer to PWSA Petition at 10-14.

I&E also objects to the PWSA’s claim that it failed to produce evidence of the residency requirement’s negative impact on the public contending that its evidence was cited by the Commission in its decision as follows:

I&E further argued that the residency requirement would result in the PWSA’s violation of Section 1501 of the Code because the limitations discussed above as well as the PWSA’s admitted inability to keep redundancy among staff is unequivocally at odds with its obligation to furnish and maintain adequate, efficient, safe, and reasonable service and facilities and should therefore be eliminated. Lastly, I&E averred that the PWSA has admitted that they are excluding 84% of the Pittsburgh metropolitan area from its employment pool and therefore, the PWSA’s residency requirement frustrates its ability to comply with the Commission’s diversity policy goals as set forth in Sections 69.801-69.809 of our Regulations, 52 Pa. Code §§ 69.801-69.809. I&E M.B. at 65-66.

I&E Answer to PWSA Petition at 12 (quoting *March 2020 Order* at 77).

In addition, I&E argues that the Authority neglects to identify the numerous decisions allegedly limiting the Commission’s authority to interfere with the residency requirement. I&E asserts that a Petition for Reconsideration is not a second chance or opportunity to brief the issues and highlights that the PWSA had ample opportunity to argue all of the caselaw it desired, including opportunities in its Main and Reply Briefs. According to I&E, it is notable that the Authority forfeited the opportunity to reply to I&E’s Exceptions because it elected not to address I&E’s argument through Reply Exceptions. Regardless, I&E continues, the PWSA’s arguments will not refute the evidence of record which supports a determination of abuse of managerial discretion. I&E Answer to PWSA Petition at 14-15.

Regarding the PWSA’s challenge to the caselaw cited in the *March 2020 Order*, I&E argues that the Authority misrepresents or misconstrues the holding in *Met-Ed* as being limited to the context of rates. Although the issue in *Met-Ed* involved rates, I&E asserts that the case clearly held that, if there is an abuse of managerial discretion and the public has been adversely affected by it, the Commission is empowered to intervene. *Id*. at 15 (citing *Met-Ed*, 437 A.2d at 80). According to I&E, it would be an absurd result if the Commission were powerless to intervene in utility decisions that jeopardized public safety or conflicted with regulatory mandates in a manner that could endanger jurisdictional ratepayers and utilities. Additionally, I&E submits that the PWSA has raised this issue for the first time in its Petition and that the arguments are not novel or new because the Authority could have elected but did not pursue its meritless argument before the issuance of the *March 2020 Order*. I&E Answer to PWSA Petition at 15-16.

Moreover, I&E challenges as false the Authority’s contention that the case law the Commission relied upon was limited in subject matter to rates paid by consumers. *Id*. at 16 (citing *Lower Chichester Township v. Pa. PUC*, 119 A.2d 674, 678 (Pa. Super. 1956) (*Lower Chichester*)). I&E asserts that *Lower Chichester* did not hinge upon rates; rather, the issue was whether the Commission had the right to interfere in a management decision regarding the location of utility facilities, which was decided in the Commission’s favor. I&E Answer to PWSA Petition at 16.

In response to the Authority’s argument of a lack of evidence to support the disposition, I&E submits this claim is easily dispelled by a review of the PWSA’s own litigation position and the *March 2020 Order* itself. I&E emphasizes the PWSA’s concession in its Reply Brief that the record supports a Commission finding that the residency requirement is impeding its ability to provide adequate and efficient service. Thus, I&E proffers that the Authority’s newfound position is a complete reversal of its record position in this proceeding. I&E also argues that the Commission clearly identified the evidence supporting the finding pertaining to Section 1501 of the Code. I&E Answer to PWSA Petition at 18-19 (citing *March 2020 Order* at 82-83)).

As to our determination that the residency requirement is arbitrary and capricious, I&E argues that it presented evidence to support this finding and that the PWSA failed to respond. I&E submits that the Commission correctly determined that it “is clear from the record that the PWSA made no meaningful effort to determine whether its implementation of the residency requirement would benefit the public.” I&E Answer to PWSA Petition at 21 (quoting *March 2020 Order* at 83).

Regarding the PWSA’s alternative request to continue the residency requirement for union employees, I&E contends that the Authority elected not to raise this issue during the course of this proceeding. I&E argues that the PWSA’s attempt to raise the issue of collective bargaining agreements now after almost two years is inappropriate and should be denied. According to I&E, the PWSA cannot credibly claim that it only recently became aware of the timing of collective bargaining negotiations and its failure to raise until the conclusion of the case now prejudices the Parties who were deprived of developing a record on this issue. Additionally, I&E asserts that the PWSA’s request to defer this issue to Stage 2 of the Compliance Plan proceeding is without merit because it would perpetuate the Authority’s non-compliance to the detriment of its own operations and ratepayers. I&E further argues that it would waste the resources of the Parties and the Commission as an unwarranted second opportunity to raise the issue. I&E Answer to PWSA Petition at 22.

In its Answer to the PWSA Petition, the OSBA contends that the Commission conducted a thorough and appropriate analysis in reaching the decision to direct the Authority to remove the residency requirement from its Compliance Plan. The OSBA argues in part that the *March 2020 Order* applied the legal standard articulated in *Met-Ed* and that the findings were supported by substantial evidence in the record. OSBA Answer to PWSA Petition at 4-12.

Submitting arguments in substantial support of I&E, the OSBA further argues that the evidence supports the finding that continuation of the residency requirement would be an abuse of managerial discretion because the PWSA has estimated that its work force is comprised of over 10% of full-time contractors, who work at a 150% to 200% cost premium which adds over $2 million per year to its non-unionized work force. The OSBA also highlights the evidence that the residency requirement has prevented the Authority from recruiting from the vast majority of the surrounding Pittsburgh metropolitan area and has reduced its ability to maintain reasonable levels of redundancy among its staff. *Id*. at 10-11.

#### Disposition

Upon review, in our opinion, the PWSA’s Petition fails to satisfy the first step of the analysis set forth in *Duick* of offering new and novel arguments or identifying considerations that appear to have been overlooked in the *March 2020 Order*. The Authority’s arguments are “new” only to the extent that it did not previously raise them because of its election not to file replies to I&E’s Exceptions as to the residency requirement issue. However, the PWSA’s decision to not address this issue during the Exceptions stage and its subsequent attempt to insert them during the Petition for Reconsideration stage does not satisfy the new and novel argument threshold contemplated under *Duick*; and in the interest of judicial economy the Commission has the discretion to not consider them. *See* *Ruth Mathieu-Alce v. Philadelphia Gas Works*, Docket No. F-2015-2473661 (Order entered April 7, 2016) (“We note that the Commission has held that in the interest of judicial economy, the Commission will not grant exceptions or reconsideration when the party failed to raise an argument earlier in the proceeding.”) at 11.

Moreover, the PWSA’s Petition fails to identify any considerations which appear to have been overlooked in the *March 2020 Order*. For the reasons discussed below, we decline to exercise our discretion to reconsider our determination on the residency requirement issue.

The PWSA argues that we overlooked or ignored Pennsylvania Supreme Court cases – which prohibit the Commission from acting as a “super board of directors” – and that proper application of these cases would show that our decision to eliminate the residency requirement is an illegal interference with the Authority’s right to manage its own affairs. Although the PWSA describes this precedent as a long line of cases, it only identifies three Pennsylvania Supreme Court decisions: *Coplay*, *Northern Pennsylvania Power* and *Bell Telephone*. However, all three of these decisions were referenced in the Commonwealth Court’s decision in *Met-Ed* which outlined the parameters and limitations pertaining to the management discretion doctrine.

In *Met-Ed* the court described the doctrine as follows:

The Commission’s authority to interfere in the internal management of a utility company is limited. See, e.g., [*Bell Telephone Co. of Pennsylvania v. Driscoll*, 343 Pa. 109, 21 A.2d 912 (1941)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1941113055&pubNum=162&originatingDoc=I4ddf6731346811d986b0aa9c82c164c0&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Folder*cid.d7221f0ba3644d9e9a85cf033c9ac4c6*oc.Keycite)); [*Northern Pennsylvania Power Co. v. Pennsylvania Public Utility Commission*, 333 Pa. 265, 5 A.2d 133 (1939)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1939114182&pubNum=162&originatingDoc=I4ddf6731346811d986b0aa9c82c164c0&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Folder*cid.d7221f0ba3644d9e9a85cf033c9ac4c6*oc.Keycite)); [*Coplay Cement Manufacturing Co. v. Public Service Commission*, 271 Pa. 58, 114 A. 649 (1921)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1921109234&pubNum=161&originatingDoc=I4ddf6731346811d986b0aa9c82c164c0&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Folder*cid.d7221f0ba3644d9e9a85cf033c9ac4c6*oc.Keycite)). The Commission is not empowered to act as a super board of directors for the public utility companies of this state. *Northern Pennsylvania Power Co.*, supra. Concerning a utility company's right of self-management, our state Supreme Court in the *Coplay Cement* case said:

(T)he company manages its own affairs to the fullest extent consistent with the protection of the public's interest, and only as to such matters is the commission authorized to intervene, and then only for the special purposes mentioned in the act. (Emphasis in original.)

[271 Pa. at 62, 114 A. at 650](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1921109234&pubNum=161&originatingDoc=I4ddf6731346811d986b0aa9c82c164c0&refType=RP&fi=co_pp_sp_161_650&originationContext=document&transitionType=DocumentItem&contextData=(sc.Folder*cid.d7221f0ba3644d9e9a85cf033c9ac4c6*oc.Keycite)#co_pp_sp_161_650).

It is also fundamental that the Commission has an ongoing duty to protect the public from unreasonable rates while insuring that utility companies are permitted to charge rates sufficient to cover their costs and provide a reasonable rate of return. [*Commonwealth v. Duquesne Light Co.*, 469 Pa. 415, 366 A.2d 242 (1976)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1976122217&pubNum=162&originatingDoc=I4ddf6731346811d986b0aa9c82c164c0&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Folder*cid.d7221f0ba3644d9e9a85cf033c9ac4c6*oc.Keycite)). Recognizing the Commission’s duty to the public and a utility’s right of self-management, our courts adopted the further proposition that it is not within the province of the Commission to interfere with the management of a utility unless an abuse of discretion or arbitrary action by the utility has been shown. [*Lower Chichester Township v. Pennsylvania Public Utility Commission*, 180 Pa. Super. 503, 511, 119 A.2d 674, 678 (1956)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1956112885&pubNum=162&originatingDoc=I4ddf6731346811d986b0aa9c82c164c0&refType=RP&fi=co_pp_sp_162_678&originationContext=document&transitionType=DocumentItem&contextData=(sc.Folder*cid.d7221f0ba3644d9e9a85cf033c9ac4c6*oc.Keycite)#co_pp_sp_162_678); [*Pittsburgh v. Pennsylvania Public Utility Commission*, 173 Pa. Super. 87, 92, 95 A.2d 555, 558 (1953)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1953110281&pubNum=162&originatingDoc=I4ddf6731346811d986b0aa9c82c164c0&refType=RP&fi=co_pp_sp_162_558&originationContext=document&transitionType=DocumentItem&contextData=(sc.Folder*cid.d7221f0ba3644d9e9a85cf033c9ac4c6*oc.Keycite)#co_pp_sp_162_558); see [*Pennsylvania R. R. v. Pennsylvania Public Utility Commission*, 396 Pa. 34, 40, 152 A.2d 442, 425 (1959)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1959106766&pubNum=162&originatingDoc=I4ddf6731346811d986b0aa9c82c164c0&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Folder*cid.d7221f0ba3644d9e9a85cf033c9ac4c6*oc.Keycite)); [*Bell Telephone Co. of Pennsylvania v. Pennsylvania Public Utility Commission,* 17 Pa. Cmwlth. 333, 339-40, 331 A.2d 572, 575 (1975)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1975100202&pubNum=162&originatingDoc=I4ddf6731346811d986b0aa9c82c164c0&refType=RP&fi=co_pp_sp_162_575&originationContext=document&transitionType=DocumentItem&contextData=(sc.Folder*cid.d7221f0ba3644d9e9a85cf033c9ac4c6*oc.Keycite)#co_pp_sp_162_575). ***An obvious corollary of the above proposition is that if there has been an abuse of managerial discretion, and the public interest has been adversely affected thereby, then the Commission is empowered to intervene***.

*Met-Ed*, 437 A.2d at 80-81(emphasis added).

As recognized in *Met-Ed*, the Pennsylvania Supreme Court decisions in *Coplay*, *Northern Pennsylvania Power* and *Bell Telephone,* as well as the additional precedential decisions cited in *Met-Ed,* do not establish a *per se* prohibition on Commission intervention. Rather, *Met-Ed* plainly outlined the limitations and circumstances when Commission intervention would be permissible (*i.e.*, in situations involving an abuse of managerial discretion and an adverse impact on the public interest). In the *March 2020 Order*, we referenced the *Met-Ed* decision and applied the corollary to the managerial discretion doctrine within the context of record evidence in this proceeding. Accordingly, we reject the Authority’s argument that we overlooked or ignored long-standing Pennsylvania Supreme Court cases pertaining to this issue.

Next, the PWSA argues that we improperly relied on *Met-Ed* because that decision is limited to the examination of management decisions in the context of rates. We disagree.

Although the issue in *Met-Ed* involved rates, its holding was not limited to the context of rates. As set forth in the clear language excerpted above, if there is an abuse of a utility’s managerial discretion and the public interest has been adversely affected thereby, the Commission is empowered to intervene. The court in *Met-Ed* did not constrain the exception to the managerial discretion doctrine to proceedings involving rates. Indeed, the Commonwealth Court in its reasoning outlining the exception cited to *Lower Chichester* which did not hinge upon rates. *Met-Ed*, 437 A.2d at 81. In *Lower Chichester*, the issue was whether the Commission had the right to interfere in a management decision regarding the location of utility facilities, which was decided in the Commission’s favor. *Lower Chichester*, 119 A.2d at 678.[[13]](#footnote-14) Further, we agree with I&E that the limitation suggested by the Authority would appear to create an absurd result by rendering the Commission powerless to intervene in utility decisions jeopardizing public safety or conflicting with our authority to enforce all Code provisions including Section 1501.

In its Petition, the PWSA also asserts that we failed to consider whether any evidence was presented showing a violation of Section 1501 of the Code or any other statutory provision or Commission Regulation or Order. A review of the *March 2020 Order* reveals that our determination was supported by substantial evidence in the record.

In the *March 2020 Order*, we explained that the PWSA has estimated that its work force is comprised of over 10% of full-time contractors, who work at a 150% to 200% cost premium, adding over $2 million per year to its non-unionized work force expenses. *March 2020 Order* at 81 (citing in part I&E Ex. No. 2, Sch. 7, at 2). We highlighted how the residency requirement is negatively impacting employee recruitment from the surrounding Pittsburgh metropolitan area and reducing its ability to maintain reasonable levels of redundancy among its staff. *Id.* Additionally, the Authority acknowledged that its residency requirement frustrates its ability to comply with the Commission’s diversity goals of our Statement of Policy at 52 Pa. Code §§ 69.801 to 69.809. I&E M.B. at 65-66.

We further identified the evidentiary record as follows:

Despite the benefits cited to by the ALJs, foreclosing 86%[[[14]](#footnote-15)] of a qualified working population would in our opinion cause harm to consumers. Putting the increased costs aside, a lack of adequate, qualified technical employees, including reasonable redundancies of such employees, to provide necessary daily operation and maintenance of the PWSA’s system is inconsistent with a utility’s duty to furnish and maintain adequate, efficient, safe, and reasonable service and facilities. While the PWSA’s contractors may be qualified to deal with day-to-day operations and any emergencies that may arise, the lack of redundancy will more likely lead to a drain of institutional knowledge that will interfere unreasonably with the PWSA’s duty to provide adequate, efficient, safe and reasonable service. Therefore, the results of the PWSA’s residency requirement is inconsistent with its obligations under Section 1501. It bears repeating that the PWSA has already admitted that “the record here supports a Commission finding that the residency requirement is increasing costs to the PWSA and *impeding its ability to*

*provide adequate and efficient service*.” PWSA R.B. at 22 (emphasis added).

*March 2020 Order* at 82.[[15]](#footnote-16)

We note that the PWSA in its Petition does not address its prior concession that the record evidence supports a finding that the residency requirement is impeding its ability to provide adequate and efficient service. Its apparent reversal of its record position after declining to file Replies to I&E’s Exceptions on this issue is troubling because it has improperly delayed final resolution of the issue and caused the Parties and the Commission to expend resources to address it. Regardless, the Petition has failed to show that we have overlooked or failed to consider any record evidence in support of our determination.

As a final matter, we shall decline to exercise our discretion to reconsider the elimination of the residency requirement as it pertains to union employees. Here, we agree with I&E that the raising of this issue for the first time at this late stage of the proceeding has denied the Parties the opportunity to develop the record on this issue. Since there is a lack of an evidentiary record to support this requested approach, we shall deny it. Moreover, it would be inappropriate and a waste of the resources of the Parties and the Commission to extend consideration of the issue to Stage 2 of the Compliance Plan proceeding when the PWSA had the opportunity to address it during this proceeding but elected not to do so.

### City Meter Issues

#### Petition and Answers

In its Petition, the PWSA also seeks reconsideration and/or clarification pertaining to several litigated issues involving its relationship with the City. The Authority contends that we inappropriately predetermined and prejudged three issues related to payments from the City to the Authority (City Meter Issues): (1) usage for metered properties; (2) a flat fee for unmetered properties; and, (3) costs to install meters. The PWSA contends that in making our rulings we overlooked two proceedings in which full evidentiary records will be developed regarding the City issues addressed in the *March 2020 Order*. According to the PWSA, these two pending on-the-record proceedings will offer a full and fair opportunity to achieve an equitable final resolution of matters related to the City’s payment for services. PWSA Petition at 3 (citing *Cooperation Agreement between the City of Pittsburgh and the Pittsburgh Water and Sewer Authority*, Docket No. U-2020-3015258 (filed December 20, 2019) (Section 507 Proceeding); and *Pittsburgh Water and Sewer Authority Rate Filing*, Docket Nos R‑2020-3017951 (water) and R-2020-3017070 (wastewater) (filed March 6, 2020) (Rate Case Proceeding)).

The PWSA proffers that the Compliance Plan proceeding focused on PWSA’s compliance with hundreds of Commission Regulations and requirements many of which did not implicate the relationship with the City. Stressing that this proceeding was not conducted pursuant to either 66 Pa. C.S. §§ 507 or 1308, the PWSA submits that it must not be denied the ability to fully litigate the issues in the two pending proceedings based on the claim that the *March 2020 Order* has already decided them. PWSA Petition at 3, 14.

The PWSA asserts that our disposition of the City Meter Issues denies the Parties their full and fair due process opportunity to support their positions in the pending cases. It notes that we directed the Authority to invoice services on a transactional basis but submits that specific rates were not determined because this proceeding was not designed to deal with rate issues. Additionally, the PWSA proffers that this proceeding was not a Section 507 review of either the historical or recently negotiated Cooperation Agreement between the PWSA and the City. The Authority asserts that there is no record upon which to direct specific rates that the PWSA should charge the City. According to the PWSA, guidance on the specific rates, including how to address potential revenue shortfalls from any anticipated nonpayment, must be provided in the Section 507 Proceeding and the Rate Case Proceeding after the development of a full evidentiary record. PWSA Petition at 14-15.

The PWSA contends that it is well on its way to achieving the “main themes” of the *March 2020 Order* of reordering its relationship with the City through the Section 507 Proceeding and the Rate Case Proceeding. PWSA Petition at 19. Specifically, the Authority requests that we clarify the *March 2020 Order* to state the prior ruling was not intended to preempt or prejudge either of the pending proceedings and that our opinions in the Compliance Plan proceeding are not preclusive or binding on the Commission’s decision on these same issues in the Section 507 Proceeding. By substantively addressing the City Meter Issues in this proceeding, the PWSA continues, the Commission has created uncertainty as to whether these issues are still to be reviewed in the Section 507 Proceeding or what weight these “opinions” should be given. PWSA Petition at 16-17.

Regarding our rejection of the step-billing plan, the PWSA argues that Section 507 contemplates that the terms of a municipal agreement would diverge from the utility’s otherwise applicable tariff. The Authority contends it is asking the Commission to approve the payment arrangement as set forth in the new Cooperation Agreement. The PWSA argues it is appropriate to consider this request pursuant to Section 507 and predetermining the issue now prior to undertaking a full evaluation of all the terms of the new Cooperation Agreement is an error. *Id*. at 17.

Additionally, the PWSA cites to our determination directing the Authority to be responsible for the costs of all meter installations for the City. In contrast, the PWSA submits that the new Cooperation Agreement proposes to share the costs equally between the City and the PWSA. According to the Authority, by reviewing the overall flow of money between the PWSA and the City, the Commission could be persuaded that the equal cost sharing arrangement proposed in the Section 507 Proceeding is appropriate in the context of the overall Cooperation Agreement. The PWSA proffers that rejecting the proposal now when a pending proceeding will develop a full record on this and all interrelated issues would be a further error. *Id*. at 17-18.

As to our direction for the PWSA to develop and implement a flat rate for unmetered City-owned properties and buildings, the Authority contends it is problematic because the new Cooperation Agreement does not incorporate such a flat rate. Again, the PWSA argues that the City and the Authority should be free to develop the record in the Section 507 Proceeding as appropriate to support this issue and for the Commission to then make a substantive decision. *Id*. at 18.

The PWSA further contends that we appear to have overlooked the filing of its Rate Case Proceeding and the filing of its rate proposals, including its proposed ratemaking treatment of the City issues to address cost allocations and the appropriate rate to be charged to the City. In the Rate Case Proceeding filing, the PWSA continues, the PWSA has identified costs associated with service to the City-owned properties. According to the Authority, the Rate Case Proceeding will focus on ratemaking principles to address cost allocation issues and the appropriate rate to be charged to the City and – since none of these issues were before the Commission in this proceeding –preventing the parties from developing a full record on them would be prejudicial and circumvent due process. *Id*. at 19-20.

In its Answer to PWSA’s Petition, I&E rejects as baseless the claim that the Commission overlooked or failed to consider the Section 507 Proceeding and the Rate Case Proceeding. I&E proffers that the Authority failed cite to any precedent to support the position that the Commission’s duty to enforce the Code and applicable Regulations and Orders must be limited to the proceeding the PWSA determines to be appropriate. Moreover, I&E argues that the PWSA’s claims of being denied due process is meritless because the Authority had ample opportunity over the 18-month period of this Compliance Plan proceeding to present its positions regarding the City issues. In fact, I&E continues, the PWSA did litigate these issues which directly refutes the claims of due process denial. I&E contends that the PWSA’s request pertaining to the City Issues is simply an effort to relitigate matters that it had the full opportunity to present. I&E Answer to PWSA Petition at 6-7.

I&E argues that the General Assembly expansively mandated that the Compliance Plan proceeding is to “bring an authority’s existing information technology, accounting, billing, collection and other operating systems and procedures into compliance with the requirements to jurisdictional water and wastewater utilities under this title and applicable rules, regulations and orders of the [C]ommission.” *Id*. at 23 (quoting 66 Pa. C.S. § 3204(b)). I&E asserts that there is no basis to the PWSA’s claim that the General Assembly forbade scrutiny of its relationship with the City during the Compliance Plan proceeding. *Id*.

I&E also highlights the notice to the PWSA that the City Issues would be addressed in this case as evidenced by the Directed Questions from Commission staff at the outset of the proceeding, citing the Stage 1 Initial Report. In particular, I&E references the specific staff questions indicating that the City Issues would include municipal metering and metered service and the PWSA’s relationship with the City including but not limited to free water service, the Cooperation Agreement (as a general matter), costs and services provided to the City and the PWSA’s payments to the City. I&E notes that the PWSA did not contest or oppose the inclusion of these issues in the Commission’s Directed Questions or object to evidence presented by I&E at the evidentiary hearing. I&E submits that “now, at the eleventh hour, [the] PWSA attempts to cherry-pick issues related to the City as inappropriate for the Compliance Plan.” I&E Answer to PWSA Petition at 24.

Specifically, I&E objects to the PWSA’s claim that in this Compliance Plan Proceeding there was no basis upon which to direct specific rates that the PWSA is to charge the City. I&E argues that throughout this proceeding, the Authority stated that it would charge the City 20% of all its usage in year 1, starting January 1, 2020. I&E Answer to PWSA Petition at 24 (citing PWSA M.B. at 26). I&E asserts that now the PWSA has completely changed course in response to our rejection of the step-billing approach in the *March 2020 Order* and currently claims it is not possible to charge the City for its water usage absent a tariffed rate. According to I&E, the Authority should be estopped from now claiming it cannot charge the City for water usage absent a tariffed rate because the PWSA did not raise this issue at all in the context of its step-billing proposal, even though it was clearly a similar circumstance of its proposal. Additionally, I&E submits that in the pending Rate Case Proceeding, the PWSA has submitted witness testimony that the Authority is following the terms of the 2019 Cooperation Agreement in its interactions with the City; and the City will be assessed under the PWSA’s Commercial customer tariff rates even though there is not a specific “municipal” or similar rate in the PWSA’s tariffs. I&E Answer to PWSA Petition at 25 (citing PWSA St. 2 at 6, n.4 in Rate Case Proceeding).

Moreover, I&E argues that the PWSA’s concerns do not extend to developing a flat fee for unmetered properties and the costs to install meters. I&E asserts that the flat fee is only to be developed in conjunction with the next rate case and the costs to install meters are applicable to all customers and not just to the City. I&E Answer to PWSA Petition at 25 (citing *March 2020 Order* at 179).

I&E also contends there is no basis to claim that the Commission needs to qualify the *March 2020 Order*. I&E states that the “Compliance Plan proceeding was a voluminous proceeding that touched on a number of subjects that arguably could be a subject of a Section 507 proceeding (e.g., regarding bulk water or bulk wastewater conveyance agreements) or a 1308(d) proceeding (e.g., various tariff revisions), but here again, [the] PWSA only points to matters relating to the City as being unripe for decision in the Compliance Plan proceeding.” I&E Answer to PWSA Petition at 26. I&E proffers that the Authority’s concerns are unfounded because the General Assembly clearly set forth the broad scope of Compliance Plan proceedings and the PWSA had sufficient opportunity to present its position. Moreover, I&E denies that the *March 2020 Order* makes a final decision regarding the PWSA and the City’s proposed 2019 Cooperation Agreement but instead resolves certain topics, fully developed over on the record proceedings, which will help streamline review of the proposed 2019 Cooperation Agreement. *Id*. at 26-27.

Likewise, the OSBA argues that the PWSA’s Petition should be denied. The OSBA asserts that the Commission did not overlook the pending Section 507 Proceeding or the Rate Case Proceeding, but rather correctly chose to deal with the unmetered issues in this proceeding. In addition, the OSBA denies that the PWSA was deprived of the opportunity to fully litigate these issues by highlighting the PWSA’s submission of testimony, briefs, and Exceptions on these issues. The OSBA also notes that the Authority agreed in the 2018 Settlement of PWSA’s 2018 base rate proceeding that the Commission will consider in the Compliance Plan proceeding the proposal for a flat rate for water and wastewater service for all unmetered and unbilled municipal and government properties served by the PWSA for inclusion in the next base rate case. OSBA Answer to PWSA Petition at 12-13 (citing 2018 Settlement at ¶ III.H.6).

The OSBA contends that the City Meter Issues were properly resolved in the *March 2020 Order* and when it becomes final it will be binding on the Parties on any subsequent proceedings concerning the PWSA. The OSBA further emphasized our determination that “the PWSA cannot circumvent the Code and Commission mandates by making separate arrangements through a Cooperation Agreement with the City.” OSBA Answer to PWSA Petition at 14 (quoting *March 2020 Order* at 59).

The OSBA submits that we properly reached decisions on rejecting any step-billing plan for City-owned properties and on meter installation costs for the City after the development of a full evidentiary record in this proceeding. According to the OSBA, it would be highly inappropriate and prejudicial to allow the PWSA to relitigate the City-owned property billing issues that were presented and ruled upon in the Compliance Plan proceeding. OSBA Answer to PWSA Petition at 14-17.

#### Disposition

Upon review, we shall deny the PWSA’s Petition pertaining to the City Meter Issues. As a preliminary matter, we reject the Authority’s contention that we overlooked or did not give appropriate consideration to the PWSA’s pending Section 507 Proceeding and the Rate Case Proceeding. The *March 2020 Order* clearly referenced the Section 507 Proceeding in the disposition section addressing the Cooperation Agreement between the PWSA and the City and provided an ordering paragraph referring the new Cooperation Agreement to the OALJ for further consideration. *March 2020 Order* at 31-32 and 182. Thereafter, we directly addressed and ruled on the litigated issues presented in this proceeding including the payment responsibilities of metering costs for municipal properties in the City, the billing plan for unmetered and/or unbilled municipal properties in the City, and the billing plan for public fire hydrants with the City. *Id*. at 39-40, 58-62, and 66-67.

Additionally, although we did not cite to the docketed Rate Case Proceeding, we crafted the *March 2020 Order* with the clear expectation that the PWSA would be filing a base rate proceeding within the near future. Indeed, our disposition of the litigated issue pertaining to the step-billing plan for unmetered and/or unbilled properties contemplates a subsequent consideration within a rate proceeding. For example, we discussed how a cost of service study would be an effective tool to address potential concerns about our ruling eliminating the step-billing plan within the construct of a base rate proceeding. *Id.* at 61-62. Our *March 2020 Order* resolved certain topics, fully developed over on the record proceedings, which will help streamline review of the proposed Cooperation Agreement in the Section 507 proceeding and the step-billing plan for unmetered and/or unbilled properties in the rate proceeding. Accordingly, we reject the PWSA’s contention that we overlooked or did not give consideration to the pending and expected proceedings.

Next, we address the Authority’s apparent contention that our rulings on the City Meter Issues should only be considered advisory and subordinate to later Commission determinations in the Section 507 Proceeding and the Rate Case Proceeding. Specifically, the PWSA suggests that it is well on its way to satisfying the main themes towards reordering its relationship with the City through the Section 507 Proceeding and the Rate Case Proceeding. The Authority further believes that our determinations on the City Meter Issues in this proceeding has created uncertainty as to whether these issues are preclusive or binding on the pending proceedings. PWSA Petition at 16-17, 19.

In this proceeding, our disposition of the litigated issues, including the City Meter Issues, following the full development of an evidentiary record by the Parties was authorized and required under Chapter 32 of the Code. Section 3204 pertaining to compliance plan filings and review by the Commission provides in pertinent part:

Within 180 days of the effective date of this section, an authority shall file a compliance plan with the commission which shall include provisions to bring an authority’s existing information technology, accounting, billing, collection and other operating systems and procedures into compliance with the requirements applicable to jurisdictional water and wastewater utilities under this title and applicable rules, regulations and orders of the commission. The compliance plan shall also include a long-term infrastructure improvement plan in accordance with Subchapter B of Chapter 13 (relating to distribution systems).

66 Pa. C.S. § 3204(b).

Chapter 32 further provides that the Commission shall review the PWSA’s Compliance Plan filing and grants the Commission the authority to order the PWSA to file a new or revised Compliance Plan if the Compliance Plan fails “to adequately ensure and maintain the provision of adequate, efficient, safe, reliable and reasonable service.” 66 Pa. C.S. § 3204(c). Thus, approval of the Compliance Plan is appropriate if it will ensure adequate, efficient, safe, reliable, and reasonable service.

There is nothing in the statutory mandate pertaining to the review and evaluation of the Compliance Plan under Section 3204(c) suggesting that the Commission is prevented from making definitive rulings to ensure the provision of adequate, efficient, safe, reliable, and reasonable service. To the contrary, the Commission is authorized to require the filing of new or revised Compliance Plans consistent with its rulings. Moreover, there is nothing in the statutory language to support the PWSA’s suggestion that the Commission’s Compliance Plan ruling on such litigated positions after a full evaluation and application of the evidentiary records and legal authority should only be considered advisory and secondary to any subsequent litigation or proceeding on the same issues. Here, the PWSA can cite to no legal authority for its claim that the General Assembly prevents full scrutiny and disposition of litigated issues presented for our disposition. Although we recognized in the *March 2020 Order* that the Authority’s implementation of its Compliance Plan is a complex undertaking and may not result in immediate compliance, particularly with respect to the terms of the Partial Settlement, it would be illogical and a waste of administrative resources to deem our resolution of the litigated issues as simply precatory.

Accordingly, we reject the Authority’s contention that our disposition of the City Meter Issues causes potential confusion in the pending Section 507 Proceeding and the Rate Case Proceeding. Our disposition of all of the litigated issues decided in the *March 2020 Order* shall have preclusive effect in the PWSA’s pending proceedings such that the same issues resolved herein shall not need to be litigated again.

We next address the PWSA’s claims that our disposition in the *March 2020 Order* is prejudicial to a full development of the record on the City Meter Issues in the pending Section 507 Proceeding and the Rate Case Proceeding. This argument, along with the contention that the Authority is being denied due process, is without support in the record. We agree with the arguments of I&E and the OSBA that the Authority had sufficient opportunity over the 18-month period of this Compliance Plan proceeding to present its positions regarding the City Issues. Thus, we conclude that the PWSA’s full litigation of these issues negates its claims of due process denial.

During this proceeding, the Authority argued that the City Issues should be resolved within the context of the agreed upon terms between the City and PWSA as set forth in its new Cooperation Agreement. In response, we clarified that the PWSA cannot bypass the Code and our mandates by making separate arrangements with the City. We also ruled upon the litigated City Meter Issues and thereby set the parameters for their implementation in any subsequent proceedings. Thus, the *March 2020 Order* serves to streamline consideration of these issues in the Section 507 Proceeding and the Rate Case Proceeding so as to prevent the re-litigation of Compliance Plan issues which the Parties already had the full opportunity to present in this proceeding.

Accordingly, we shall decline to exercise our discretion to reconsider and/or clarify our *March 2020 Order* as to the City Meter Issues.

### Lead Service Line Remediation Issues: Commission’s Modifications to Partial Settlement

While the Commission’s *March 2020 Order* approved the Partial Settlement as resolution to many of the litigated issues with respect to the PWSA’s Lead Remediation Program, it also modified Paragraph III.VV.1.b. of the Partial Settlement by including new subsections b.1(v) and b.1(vi) related to partial replacements of lead service lines.

In the *March 2020 Order*, we found substantial record evidence to support our approval of the PWSA’s commitment to replace a private-side LSL simultaneously when it replaces the public-side service line, at no direct cost to the property owner, as being in the public interest. *March 2020 Order* at 116-118. We did not find, however, substantial record evidence to support our approval of the terms that would allow the PWSA to complete a partial replacement in the four circumstances defined in the Partial Settlement.[[16]](#footnote-17) Three of the situations involved instances where a property owner does not consent to the PWSA’s offer to replace the private-side LSL, and the fourth situation involved instances where the PWSA determines, in its sole discretion, that performing the replacement would be operationally infeasible and/or produce excessive cost. *March 2020 Order* at 98-99.

More specifically, the Partial Settlement stated that the PWSA will complete the replacement of a public-side LSL without simultaneously completing the replacement of the private-side LSL, in the following circumstances:

1. If PWSA determines, in its sole discretion, that replacement of the portion of the LSL owned by the property owner at a particular residence or related interior plumbing modification is not technically feasible, the residence is unsafe from a structural or sanitary condition, or will result in excess expense, due to conditions, such as length, terrain, obstructions, structures, pavements, trees, or other utilities, PWSA may exclude such residence and not replace private side of the LSL; (Partial Settlement at ¶ III.VV.1.b.i; July 2019 Policy at 2, ¶ 3.3)

ii. PWSA is replacing a public-side service line through the small-diameter water main replacement program or is moving a residential service line from an abandoned water main to a different water main, and PWSA is unable to obtain consent to replace the private-side LSL from the property owner after making at least one attempt to contact the property owner by mail, one attempt by telephone, and one attempt by visiting the residence in person; (Partial Settlement at ¶ III.VV.1.b.ii)

iii. A property owner who also resides at the property signs a formal agreement stating that they do not consent to a free private-side LSL replacement and that they understand the risks of a partial replacement; or (Partial Settlement at ¶ III.VV.1.b.iii)

iv. PWSA is replacing a public-side service line as a result of an emergency circumstance (e.g., water main leak, broken curb stop, or damage to other infrastructure requiring a public-side service line replacement), and PWSA is unable to obtain consent to replace the private-side LSL from the property owner after making at least one attempt to contact the property owner by telephone and one attempt by visiting the residence in person. (Partial Settlement at ¶ III.VV.1.b.iv.)

*March 2020 Order*, Appendix A, at 194-95 (citing Partial Settlement at ¶¶ III.VV.1.b.i-iv).

With respect to these four situations, based on the factual record before us, we did not find evidentiary support for allowing the private-side LSL to reconnect to the PWSA’s system after the PWSA disturbs the public-side of the service line by removing the old pipe and installing new service pipe. *March 2020 Order* at 119. We stated that we were unable to conclude from the factual record that it would constitute adequate, efficient, safe or reasonable water service, or be in the public interest, for the PWSA to permit the private-side LSL to reconnect to PWSA’s water system following the PWSA’s replacement of the public-side service line. *Id*. Recognizing that a customer is free to reject the PWSA’s offer to replace the private-side LSL, we expressed our concerns about the effects of a customer’s rejection of the PWSA’s offer. *Id*. We explained that one effect of a rejection, assuming the PWSA completes the partial replacement, is, at worst a proven exposure to harm via the unmitigated, elevated lead levels in tap water, and, at best, a waste of drinking water for an undefined period. *Id*.

Accordingly, we made modifications to the Partial Settlement, which directed certain service and facilities to be observed, furnished, enforced, or employed by the PWSA, as reasonably necessary and proper for the safety, accommodation, and convenience of the public. *See* *March 2020 Order* at 120-125; *see also* 66 Pa. C.S. § 1505.

To address the three situations where the PWSA does not obtain consent to replace the private-side LSL, the Commission modified the Partial Settlement by adding subsection (vi) to Paragraph II.VV.1.b, which states as follows:

vi. In the event PWSA does not complete the replacement of a private-side lead service line due to any of the circumstances described in III.VV.1.b.ii-iv., PWSA will not permit the re-connection of the private-side lead service line to the newly installed public-side service line in accordance with PWSA’s tariff at Section B, Rules 1 and 4. PWSA will begin the process to terminate service to the residence with prior notice in accordance with PWSA’s tariff at Section C, Rule 3.j. Reconnection of service shall not be permitted until the customer certifies the removal of the private-side lead service line in accordance with PWSA’s tariff at Section B, Rule 4.

*March 2020 Order* at 125. Pursuant to the terms of subsection (vi), following a partial replacement and where a customer voluntarily rejects the PWSA’s offer to replace the private-side LSL, the PWSA is directed to enforce the terms of its Tariff and “not permit the re-connection of the private-side lead service line to the newly installed public-side service line.” Recognizing that to not permit the re-connection will result in a cessation of service, we directed the PWSA to “begin the process to terminate service to the residence with prior notice.” We further directed the PWSA to only reconnect customers after the customer certifies that their private-side LSL has been removed, as *per* the terms of its existing Tariff. *March 2020 Order* at 125.

In adding subsection (vi), we directed the PWSA to enforce certain provisions of Section B, Rule 4 and Section C, Rule 3 of its Commission-approved tariff, *The Pittsburgh Water and Sewer Authority, Tariff Water – Pa. P.U.C. No. 1* (Tariff),[[17]](#footnote-18) which became effective on March 1, 2019. *March 2020 Order* at 120-122. The enforcement of these provisions requires the PWSA to disallow the reconnection of a private non-conforming lead line, give prior notice of a termination of service due to the non-conforming private line, terminate service and not restore service unless and until the customer certifies that it has replaced the lead line with a conforming line. *March 2020 Order* at 120-122.

To address the fourth situation, the Commission modified the Partial Settlement to add subsection (v) to Paragraph II.VV.1.b, which states as follows:

v. In the event PWSA determines it will not complete the replacement of a private-side lead service line due to any of the circumstances described in III.VV.1.b.i., PWSA will temporarily not replace the public-side service line until it has reported the factual circumstances to the CLRAC in accordance with the Settlement at III.WW.4.b. After consulting with the CLRAC, PWSA should make a determination as to the appropriate next steps, including, but not limited to, potentially not replacing the public side of the line while corrosion control treatments and distribution of water filters remain in place or potentially receiving Commission approval to make reasonable changes, substitutions and extensions in or to service and facilities as may be necessary or proper for the accommodation and safety of patrons with these extraordinary circumstances or potentially receiving Commission approval of tariff provisions quantifying specific limits on PWSA’s financial responsibility for a private-side lead service line replacement in extraordinary circumstances.

*March 2020 Order* at 125. Pursuant to the terms of subsection (v), where it is deemed, by the PWSA, to be operationally infeasible to complete the replacement of a private-side line, the PWSA was directed to “temporarily not replace the public-side service line “ and to then consult with the CLRAC over the particular factual circumstances and to subsequently “make a determination as to the appropriate next steps.” The Commission gave a non-exhaustive list of potential appropriate next steps, including, but not limited to: potentially not replacing the public side of the line while corrosion control treatment and distribution water filters (as regulated by the Pennsylvania Department of Environmental Protection (PA DEP)) remain in place or receiving the Commission’s approval to make reasonable changes, substitutions and extensions in or to service and facilities as may be necessary or proper for the accommodation and safety of patrons. *March 2020 Order* at 125.

As noted above, two Parties to the Partial Settlement – the PWSA and UNITED – filed Petitions for Reconsideration and Answers with respect to the Commission’s modifications to the Partial Settlement.

In summary, with respect to the Commission’s modifications to the Partial Settlement, the PWSA’s Petition raises arguments relating to our jurisdiction and the due process afforded the Parties in this proceeding, which we address more fully below. *See* PWSA Petition at 21, n. 56; 21-22.

With respect to new subsection (vi), in summary and as discussed in more detail below, UNITED requests that we clarify or modify the notice requirements that the PWSA must follow prior to a service termination. UNITED Petition at 5-11. The PWSA requests that we narrow the circumstances in which the directives in the *March 2020 Order* will apply, by permitting certain exceptions in the following specific factual circumstances (the “Requested Exception Situations”): (1) tenant-occupied properties and the property owner does not consent to replace the private-side LSL; (2) properties involving tangled titles or other technical property issues; (3) if termination is barred by an independent legal restriction, such as the COVID-19 moratorium; (4) if PWSA replaces a public-side LSL under emergency circumstances and cannot obtain the property owner’s consent; and (5) properties with high restoration costs. PWSA Petition at 24-27. While UNITED agrees with some of the situations presented in the PWSA’s Petition as warranting an exception, it also supports the application of the Commission’s directives in other situations provided that the PWSA is required to meet certain other conditions, chiefly related to notice. UNITED Answer at 1-8. In addition, the PWSA argues in its Petition that different service or facilities should be observed by the PWSA for lead service line replacements arising under the Requested Exception Situations depending on whether the replacement is being made as part of its Small Diameter Water Main Replacement (SDWMR) program or the neighborhood-based LSLR Program. PWSA Petition at 27-28.

With respect to the new subsection (v), in summary and as discussed more fully below, the PWSA requests that the Commission modify the requirements so as to permit the PWSA to make decisions in a timely manner and maintain a reasonable pace in proceeding with scheduled replacements. UNITED does not disagree with the PWSA’s requests but asks the Commission to require the PWSA to make best efforts to connect the property owner to resources for rectifying issues and to increase the frequency of reporting to the CLRAC and require additional content on which the PWSA shall consult with the CLRAC. *See* PWSA Petition at 22-23; 28-29; *see also* UNITED Answer at 7-8.

The PWSA proposes, as an alternative to its requested clarifications and amendments to the two subsections added by the Commission to Paragraph III.VV.1.b of the Partial Settlement, a collaborative process open to interested parties to this proceeding and to craft, for review by the Commission, a fair, reasonable and equitable policy regarding: (1) a process for PWSA to consult with CLRAC regarding instances in which PWSA determines it will not complete the replacement of a private-side LSL due to any of the circumstances described in III.VV.1.b.i.; and (2) instances in which PWSA will undertake termination of service to residences based on the non-replacement of the private-side LSL in instances where PWSA does not complete the replacement of a private-side LSL due to any of the circumstances described in ¶¶ III.VV.b.ii-iv of the Partial Settlement. Petition at 29. Likewise, UNITED requests that the Commission grant the Parties thirty (30) days from the date of this Order for the Parties to confer, and the PWSA to then submit a proposal on the appropriate timing for initiating termination in the compliance filing within sixty (60) days of the Commission’s Order on this Petition. UNITED Petition at 11.

#### Jurisdictional Questions

##### Petitions and Answers

In its Petition, the PWSA argues that the Commission lacks the jurisdiction to regulate the safety of water service in connection with lead in drinking water and the PWSA’s operation, repair and replacement of its distribution system infrastructure. Specifically, in a footnote in its Petition, the PWSA states that its filing of information or entering into a settlement with respect to its lead remediation efforts (or otherwise) should not be construed as acquiescence to, or a waiver by the PWSA of the right to challenge the Commission’s jurisdiction. PWSA Petition at 21, n. 56. The PWSA argues that the Commission cannot obtain jurisdiction by silence, agreement, waiver or estoppel. *Id*. (citing e.g., *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967); *Commonwealth v. VanBuskirk*, 449 A.2d 621 (Pa. Super. 1982); *Scott v. Bristol Twp. Police Dep’t*,669 A.2d 457 (Pa. Cmwlth. 1995); *In Re Borough of Valley-Hi*, 420 A.2d 15 (Pa. Cmwlth. 1980)). The PWSA argues that the Commission must act within, and cannot exceed, its statutory jurisdiction. PWSA Petition at 21, n.56 (citing *City of Pittsburgh v. PUC*, 43 A.2d 348 (Pa. Super. 1945)). The PWSA submits that the level of lead in tap water (even though the lead stems from a service line) is undeniably a “water quality” issue that is clearly regulated by the PA DEP, and not the Commission, as argued by the PWSA in its Briefs, Exceptions and Reply Exceptions. PWSA Petition at 21, n.56. The PWSA submits that its position remains that any conflict between the PA DEP and the Commission regarding lead remediation needs to be resolved in favor of the PA DEP. *Id*.

UNITED’s Answer recognizes that the PWSA continues to assert that the Commission lacks jurisdiction to order replacement of lead service lines. UNITED Answer at 2, n.4 (citing PWSA Petition at 21, n.56). However, UNITED asserts that the Commission has already rejected this argument. UNITED Answer at 2 (citing *March 2020 Order* at 139-­41). In its Petition, UNITED states that “[t]he Commission properly concluded that partial lead service line replacements are dangers to residents’ health because they may result in immediate spikes in water lead levels.” UNITED Petition at 5 (citing *March 2020 Order* at 116-117). UNITED continues that “when a lead line remains in the ground as a result of an owner’s refusal to replace the line, current and future residents continue to face a risk of lead exposure.” UNITED Petition at 5 (citing *March 2020 Order* at 116-117; UNITED St. C-3 at 21). UNITED stated that despite the risks related to water service termination, UNITED agrees with the Commission’s direction for the service and facilities to be observed by the PWSA, stating that it “agrees that, for property owners who refuse [the] PWSA’s offer of a free private-side lead service line replacement, the threat of service termination – and of having to pay for a replacement to reconnect to the system – is appropriate, as the Commission concluded.”[[18]](#footnote-19) UNITED Petition at 6.

Although the PWSA does not specifically request that we reconsider our conclusions in the *March 2020 Order* regarding the jurisdictional questions decided therein, we believe the arguments presented in its Petition compel our response thereto since such arguments underscore the basis of its Petition.[[19]](#footnote-20)

##### Disposition

Initially, it is important to highlight that both Petitions do not seek reconsideration of our findings of fact related to partial replacements based on substantial evidence in the record. Specifically, the Petitions do not seek reconsideration of our finding that the “unrefuted expert testimony” in this proceeding showed “that partial replacements of LSLs endanger public health because they can disturb the protective scales inside service pipes that help to prevent water from leaching lead by shaking loose lead-containing scales from the pipe’s interior, which flow to the household tap.” *March 2020 Order* at 116-117.

Also, the Petitions do not challenge our finding that partial replacements endanger public health because they “cause spikes in drinking water lead levels from days to several months or potentially even longer.” The Petitions do not dispute our finding of a lack of evidence demonstrating the presence of any effective techniques, either upstream or downstream of the curb stop, to mitigate the elevated exposure to lead in tap water following the completion of a partial replacement. *March 2020 Order* at 118. As for upstream mitigation, the Petitions do not challenge our finding that no expert testimony was presented to demonstrate that orthophosphate water treatment will effectively mitigate the elevated exposure to lead in the short term resulting from the disturbance of the protective scale in the service pipe caused by a partial replacement. In fact, we found the record showed the opposite – that it could take up to a year for the corrosion control benefits of orthophosphate water treatment to be fully realized. *March 2020 Order* at 118 (citing UNITED St. C-2 at 16-18; UNITED St. C-3 at 21, 34; UNITED St. C-3SR at 8). As for downstream mitigation, the Petitions do not challenge our finding that no expert testimony was presented to support the notion that efforts to inform or notify customers of the risks of lead exposure and/or to provide households with instructions on flushing, testing kits and water filters are, in fact, effective in mitigating exposure to lead following the completion of a partial replacement. *March 2020 Order* at 118. Specifically, we found that no expert testimony supported the notion that customers, or any and all members of customers’ households, who drink water from the tap and who employ any amount of informed or practical testing, flushing, use of water filters, or even a temporary discontinuance of tap water for drinking and cooking, will effectively mitigate the elevated exposures to lead in the short term following the completion of a partial replacement. *Id*.

Finally, the Petitions do not dispute our finding that “[t]he negative effects of partial service line replacements are well documented in scientific literature…” and that “[t]he permanent negative health effects from lead exposure, especially to uniquely vulnerable populations of developing fetuses, infants and children, is explained in the *unrebutted* testimony of [UNITED’s expert witness] Dr. Lanphear, the only qualified medical expert in this proceeding.” *March 2020 Order* at 117 (citations omitted) (emphasis added). Instead, as noted above, UNITED’s Petition affirms these findings. UNITED Petition at 5 (citing *March 2020 Order* at 116-117).

With these unopposed factual findings and unrefuted descriptions of the record evidence from the Commission’s *March 2020 Order* in mind, we will address the PWSA’s arguments challenging our jurisdictional authority.

While it is the policy of the Commission to encourage settlements, pursuant to 52 Pa. Code § 5.231, the Commission does not simply rubber stamp settlements without determining whether the terms are in the public interest. *Pa. PUC v. Philadelphia Gas Works*, Docket No. M‑00031768 (Order entered January 7, 2004); *Pa. PUC v. CS Water and Sewer Assoc.*, 74 Pa. P.U.C. 767 (1991) (*CS Water and Sewer*); *Pa. PUC v. Philadelphia Electric Co.*, 60 Pa. P.U.C. 1 (1985). The Commission’s standards for reviewing a partial settlement, as was proposed here in this proceeding, are the same as those for deciding a fully contested case. *Pa. PUC v. PECO Energy Company*, 1997 Pa. PUC Lexis 51. Accordingly, substantial evidence consistent with statutory requirements must support the proposed settlement. *Popowsky v. Pa. PUC*, 805 A.2d 637 (Pa. Cmwlth. 2002); *ARIPPA v. Pa. PUC*, 792 A.2d 636 (Pa. Cmwlth. 2001). “Substantial evidence” is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Consolidated Edison Company of New York v. National Labor Relations Board*, 305 U.S. 197, 229, 59 S.Ct. 206, 217. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. PUC*, 489 Pa. 109, 413 A.2d 1037 (1980).

Based on our legal duty to only approve settlements that are in the public interest, consistent with statutory requirements and supported by substantial evidence, and further based both on our unrefuted factual findings demonstrating the dangers of, and our findings of a lack of evidence in the record to demonstrate the safety of, partial replacements, we concluded in the *March 2020 Order* that the terms of the Partial Settlement that would permit the PWSA to complete a partial replacement in the four situations presented in the Partial Settlement were not in the public interest and were inconsistent with the statutory requirements at 66 Pa. C.S. § 1501.

As for the Commission’s statutory authority to regulate the safety of water service in connection with lead in drinking water and a water utility’s operation, repair and replacement of its distribution system infrastructure, we recognized in the *March 2020 Order* that the Parties’ arguments in the proceeding were mainly focused on the question of whether the Commission has jurisdiction to direct the PWSA to replace a private-side LSL. However, because the PWSA had voluntarily made the commitment to replace or fund the replacement of private-side residential LSLs in the Partial Settlement, and submitted such commitments via the Partial Settlement for our approval, we determined that this question had been rendered moot and we exercised judicial constraint by avoiding an unnecessary decision on the merits. *March 2020 Order* at 138. Additionally, we declined to address the broader legal questions as to the extent of our jurisdiction over water service safety vis-a-vis the water quality jurisdiction of the PA DEP and modified the ALJs’ Recommended Decision consistent with the foregoing determinations. *March 2020 Order* at 140.

However, as to our jurisdiction to modify the Partial Settlement with the specific directives in the new subparagraphs (v) and (vi) to Paragraph II.VV.1.b., we concluded that the basis of our authority to prescribe the service and facilities to be observed by the PWSA is from the Commission’s granted powers under Sections 1501 and 1505 of the Code. *March 2020 Order* at 119, n.40; 140. Additionally, we recognized in the *March 2020 Order* that Chapter 32 of the Code gives the Commission jurisdiction and oversight over the PWSA and the responsibility of determining whether the PWSA’s Compliance Plan will “adequately ensure and maintain the provision of adequate, efficient, safe, reliable and reasonable service.” *March 2020 Order* at 12-13 (citing 66 Pa. C.S. § 3202(a)(1), 3204(b)-(c)). Thus, approval of the Compliance Plan is appropriate if it will ensure adequate, efficient, safe, reliable, and reasonable service. *March 2020 Order* at 12-13.

We recognized that the PWSA objected to the ALJs’ general conclusion that water quality and water service are inseparable in this proceeding. *March 2020 Order* at 139. Specifically, the PWSA expressed concerns that the implicit recommendation of the ALJs would improperly expand the Commission’s jurisdiction to water quality issues such as lead remediation that are fully regulated by other government agencies. *Id*. (citing PWSA Exc. at 31). However, we noted that in the R.D. the ALJs carefully clarified that Section 1501 of the Code requires the PWSA to make repairs and changes to its facilities necessary to ensure safe service and public safety.  *See* *March 2020 Order* at 139 (citing R.D. at 208). The ALJs also emphasized that the Commission would have the authority over the PWSA’s service lines as a service issue if the water quality is not safe and determined that the Commission has jurisdiction over the PWSA’s water service. *See* *Id*. We agreed with the ALJs’ analysis and conclusion as to our authority, stating “[i]ndeed, it is upon this proper foundation of authority that our decisions…to modify the partial replacement provisions of the Settlement and to approve the exclusion of non-residential customers in the PWSA’s current lead infrastructure plans rest.” *March 2020 Order* at 139.

We explained that the distinctions set forth in the Commonwealth Court’s decisions in *Sheldon R. Rovin, D.D.S. v. Pa. PUC*, 502 A.2d 785 (Pa. Cmwlth. 1986); and *Susan K. Pickford, et al. v. Pa. PUC*, 4 A.3d 707 (Pa. Cmwlth. 2010) – that the Commission regulates water service and PA DEP regulates water quality – are not in dispute. However, we stated that our decision to approve the PWSA’s proposed plan to remedy residential LSLs and to modify the Partial Settlement, “is integral to our authority over the safety of water service and PA DEP’s authority over water quality.” We continued:

Importantly, our approval and modification of the PWSA’s Settlement commitments herein do not overlap with or impinge upon and will not impact PA DEP’s oversight authority or primary enforcement responsibilities under the Federal Safe Drinking Water Act. Specifically, nothing in our determination alters or impacts the Consent Order and Agreement between PA DEP and the PWSA dated November 17, 2017, or PA DEP’s continued responsibility for monitoring the lead action levels.

*March 2020 Order* at 139.

We further explained that there is substantial, unrebutted evidence in the record showing that the PWSA’s undertaking of partial LSL replacements endangers public health through the proven exposure to elevated lead levels in tap water caused by the disruption to the public portion of the service line that is connected to the private portion of the service line. We further found that Sections 1501 and 1505 of the Code provide the authority for the Commission to direct the proper service and facilities to be observed by the PWSA in order to prevent such harm. *March 2020 Order* at 140.

In the *March 2020 Order*, we explained that our modifications to the Partial Settlement, in part, directed the PWSA to enforce its existing Tariff provisions to refuse a private-side LSL’s re-connection to the PWSA’s system after the PWSA has disturbed the public-side of the service line by removing the old service pipe and installing new service pipe made of non-lead material. *March 2020 Order* at 120[[20]](#footnote-21); *March 2020 Order* at 140. We explained that our modifications to the Partial Settlement were *narrow in scope* and intended to prevent the proven adverse health effects to the public in the context of the PWSA’s proposal to complete partial replacements in the four situations defined in the Partial Settlement. *Id*. Based on the substantial evidence of the record, we rejected the PWSA’s proposal to complete a partial replacement involving the reconnection of a private lead portion to a newly installed, non-lead public portion of the service line, *in any circumstance*.

Accordingly, as for the ALJs’ reasoning that the Commission’s jurisdiction stops at the connection point simply because federal regulations – *i.e*., the EPA’s Copper and Lead Rules – which the PA DEP enforces, specifically state that a water utility has no obligation to replace the owner’s privately-owned service line, we disagreed, and we modified the ALJs’ Recommended Decision consistent with the foregoing discussion. *See March 2020 Order* at 140; *see also March 2020 Order* at 134 (citing R.D. at 208-209 (citing 40 CFR § 141.84(d))).

To expand this discussion, the ALJs’ analysis rendered the Commission powerless over the interconnection of customer facilities to utility facilities. The Commission is a creature of statute and, as such, has only those powers that are expressly or by necessary implication conferred upon it by the Legislature. *See e.g. Feingold v. Bell of Pennsylvania*, 383 A.2d 791 (Pa. 1978); *Allegheny County Port Authority v. Pa. PUC*, A.2d 602 (Pa. 1967). Generally, our authority to regulate a public utility’s service facilities includes facilities owned and operated by the public utility within the public utility’s distribution system up to and including the metering point (*i.e*., where the water enters the customer’s premises). However, it is well-settled that our authority, by necessary implication, includes our authority to oversee and enforce the specifications and configuration of customer facilities connecting to the utility’s facilities to ensure the public utility’s provision of reasonable, safe, adequate and reliable utility service.[[21]](#footnote-22) In countless examples,[[22]](#footnote-23) we have approved tariff provisions across utility industries governing the conforming specifications of connecting customer facilities to utility facilities and, for example, the following additional rights of utilities: (1) the utility’s general right to review and approve a customer’s plans and specifications of customer facilities prior to interconnection; (2) the utility’s right to conduct ongoing inspection of the customer’s facilities after the customer’s facilities interconnect with the utility’s infrastructure; and, (3) the utility’s right to disconnect the customer’s facilities in appropriate circumstances. Thus, in this manner, our directive in the *March 2020 Order* to refuse the reconnection of a non-conforming private-side LSL to the PWSA’s distribution system infrastructure, does not conflict with or impact the PA DEP’s oversight authority or primary enforcement responsibilities under the Federal Safe Drinking Water Act, the Consent Order and Agreement between the PA DEP and the PWSA dated November 17, 2017, or the PA DEP’s continued responsibility for monitoring the lead action levels in the PWSA’s drinking water.

Finally, while recognizing that we declined to answer the broader legal questions as to the extent of our jurisdiction, we stated that our doing so does not obfuscate our authority over the PWSA’s lead remediation plan, as submitted for approval, going forward. In this proceeding, we acknowledged that the PWSA requested our approval of its plan to remedy lead infrastructure existing in and connected to its system, as submitted by the PWSA and as modified by the Parties’ agreed-to terms of the Settlement. In the *March 2020 Order*, we approved and modified that plan and directed the PWSA to revise its Compliance Plan and amend its LTIIP incorporating the plan consistent with the *March 2020 Order*. Accordingly, we stated that the entirety of that plan as well as the PWSA’s implementation of that plan constitute “service” under Section 102 of the Code subject to our jurisdiction. *March 2020 Order* at 140. We explained in the *March 2020 Order* that Section 102 of the Code specifically instructs the interpretation of the term “service” to be “in its broadest and most inclusive sense” and the term to include “all acts done, rendered, or performed, and all things furnished or supplied, and any and all facilities used, furnished, or supplied by public utilities” in the performance of their duties under the Code. *March 2020 Order* at 141 (citing 66 Pa. C.S. § 102; [*Country Place Waste Treatment Co., Inc. v. Pa. PUC*, 654 A.2d 72 (Pa. Cmwlth. 1995)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1995028537&pubNum=0000162&originatingDoc=I68cba70861f811e7b73588f1a9cfce05&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))).

To expand on this discussion here, while we intend to oversee and enforce the Partial Settlement as part of the PWSA’s “service” under Section 102 of the Code, to clarify, we recognize that with respect to certain terms of the Partial Settlement – such as the requirements to treat the water supply with orthophosphate corrosion control and to distribute certain testing, flushing and filter kits following replacements – is specifically regulated by the PA DEP under the Lead and Copper Rule. However, the PWSA made certain commitments related to these requirements in the Partial Settlement and obtained our approval of these commitments as part of its utility “service” to customers going forward. Thus, it is the PWSA’s adherence to these Settlement commitments that will be enforced as part of its utility “service” going forward. In this manner, our approval and enforcement of certain terms of the PWSA’s Settlement commitments herein do not conflict with or impact the PA DEP’s oversight authority or primary enforcement responsibilities under the Federal Safe Drinking Water Act, the Consent Order and Agreement between the PA DEP and the PWSA dated November 17, 2017, or the PA DEP’s continued responsibility for monitoring the lead action levels in the PWSA’s drinking water.

Thus, for all of the foregoing, in our opinion, we reject the PWSA’s argument that our approval, modification and ongoing oversight and enforcement of the PWSA’s plan and the modified Partial Settlement, pursuant to and in accordance with Chapter 32, Sections 1501, 1505 and 1352 of the Code, and the Commission’s Regulations at 52 Pa. Code §§ 121.1 – 121.8, constitutes our attempt to gain jurisdiction by silence, agreement, waiver or estoppel.

Based on the foregoing discussion, we find that the PWSA’s Petition does not meet the *Duick* standard on the jurisdictional questions addressed in the Commission’s *March 2020 Order* because it does not raise new and novel arguments or identified considerations that appear to have been overlooked or not addressed by the Commission’s *March 2020 Order*.

#### Due Process

##### Petitions and Answers

In its Petition, the PWSA implies that the Commission abused its discretion and committed an error of law when it added the two new subsections to the Partial Settlement and used the process set forth in Paragraph 58 of the Partial Settlement as the process for the Parties to have additional opportunity to be heard on the issues pertaining to those modifications.

More specifically, the PWSA expressly argues that the new subsections to the Partial Settlement “were unilaterally presented by the Commission.” PWSA Petition at 21. The PWSA states that “[t]he Commission did not receive any evidence on requirements or potential alternatives thereto. Nor did the Commission receive any criticism and/or advice regarding these subsections from the parties, since the first time that the PWSA (or, presumably, any other Party), saw the language creating the new requirements was in the [*March 2020 Order*] itself.” *Id*. at 21-22.

The PWSA continues that it “elected not to withdrawal [sic] from the Partial Settlement notwithstanding the addition of these new provisions.” *Id*. at 22. The PWSA submits that the reason it did not withdraw from the Partial Settlement per the terms of Paragraph 58 is because it “believes that it would have been counter-productive to disregard the resolution of 139 identified issues in the Partial Settlement, merely because the Commission unilaterally created two totally new (binding) requirements regarding lead remediation efforts upon PWSA.” *Id*.

The PWSA requests that the Commission “work with” the PWSA “to attempt to clarify and revise these provisions in a manner that furthers the Commission’s apparent goal (shared by the PWSA) of attempting to minimize the instances of partial replacements, but does so in a fair and equitable manner that is not going to result in customers unreasonably losing their water service.” PWSA Petition at 22.

UNITED does not raise or address in its Petition or Answer any process issues with regard to the Commission’s modification of the Partial Settlement.

##### Disposition

We are aware that the gravamen of administrative due process is notice, the opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case before the tribunal. *Sentner v. Bell Tel. Co. of PA*, Docket No. F-00161106 (Order entered October 25, 1993) (citing *Conestoga National Bank v. Patterson*, 442 Pa. 289, 275 A. 2d 6, 9 (1971) and *Pennsylvania Coal Mining Association v. Insurance Department*, 471 Pa. 437, 370 A. 2d 685, 692 (1977)).

While the Commission’s Regulations at 52 Pa. Code § 5.231 encourage settlements, they do not establish procedures to be followed in the event the Commission modifies a settlement. The Parties in this proceeding closed this gap by agreeing to a provision in the Partial Settlement governing the process and procedure in the event of a Commission modification to the Partial Settlement. This provision states as follows:

This Partial Settlement is conditioned upon the Commission’s terms and conditions contained herein without modification. If the Commission should disapprove the Partial Settlement or modify any terms and conditions herein, this Partial Settlement may be withdrawn upon written notice to the Commission and all parties within five (5) business days following entry of the Commission’s Order by any of the Joint Petitioners and, in such event, shall be of no force and effect. In the event that the Commission disapproves the Partial Settlement or PWSA or any other Joint Petitioner elects to withdraw from the Partial Settlement as provided above, each of the Joint Petitioners reserves their respective rights to fully litigate this case, including, but not limited to, presentation of witnesses, cross-examination and legal argument through submission of Briefs, Exceptions an Replies to Exceptions.

Partial Settlement at ¶ 58.

In the *March 2020 Order*, we approved Paragraph 58 of the Partial Settlement. Based on these provisions, we stated that any party that wished to withdraw from the Settlement, based on the modifications to the Partial Settlement governing partial replacements of lead service lines, could do so, and that, per the terms of Paragraph 58, the Partial Settlement would be disapproved. In such event, we also said we would return the matter to the Commission’s OALJ for further proceedings as may be appropriate. Specifically, in the *March 2020 Order*, we stated as follows:

Should any of the Parties wish to withdraw from the Settlement based on this modification to the Settlement, that Party shall e-file or hand deliver to the Secretary of the Commission and serve on all Parties to this proceeding an election to withdraw within five (5) business days from the date that this Opinion and Order is entered. If such an election to withdraw is filed, the Settlement shall be disapproved, without further action by this Commission, and this matter shall be returned to the Commission’s Office of Administrative Law Judge for further action as deemed appropriate.

*March 2020 Order* at 126 (citing Partial Settlement at ¶ 58).

In its Petition, the PWSA explains that it does not prefer this process and procedure. The PWSA seemingly takes a contradictory position by first claiming that it did not withdraw from Settlement to maximize efficiency and to not disturb the 139 terms of the Partial Settlement that were approved by the Commission, while also criticizing the Commission for not taking additional evidence related to the Settlement modifications. We reject the PWSA’s argument. Indeed, the PWSA and the other Parties to the Settlement were provided with the additional opportunity to be heard on this matter, as *per* the approved terms at Paragraph 58 and per our decision to remand the matter back to the OALJ should a party withdraw from the Settlement based on the Commission’s modifications. The PWSA simply has declined to follow the very process and procedure that it had agreed to and sought the Commission’s approval of, but now criticizes the Commission for following the Parties’ agreed-to process.

Moreover, as noted above, based on the unrefuted factual findings in the *March 2020 Order*, in modifying the Partial Settlement, we directed the PWSA to enforce certain provisions of its existing, Commission-approved Tariff. *March 2020 Order* at 120-122. Additionally, in the *March 2020 Order*, we determined that the Tariff provisions are not unique to the PWSA, but rather are consistent with other Commission-approved water utility tariffs. *March 2020 Order* at 121-122. The PWSA now, in its Petition, essentially takes the position that the enforcement of these Tariff provisions, which results in a cessation of service to the customer, is not adequate, efficient, or reasonable water service in the Requested Exception Situations. However, the Tariff does not enumerate such exceptions within the Tariff itself. The PWSA’s position raises concerns for us over either the lack of clarity in the Tariff or the manner the PWSA planned to adhere to and enforce these provisions of its Tariff. *See* 66 Pa. C.S.§ 1502.

Based on all of the foregoing discussion, we reject the PWSA’s implication that our modifying the Partial Settlement, by adding the two new subsections to the Partial Settlement and our observing the process established *per* the Partial Settlement related to such modifications, constituted an abuse of our discretion or an error of law.

Notwithstanding the foregoing, based on the new arguments and issues raised for our consideration in both Petitions, as discussed more fully below, and given that the Parties may be involved in litigation in Phase Two of the PWSA’s Compliance Plan, we recognize that judicial economy is served in providing additional opportunity for the Parties to this proceeding additional time to work in a collaborative process to craft, for review by the Commission, a proposal in compliance with this Opinion and Order. In this portion of the Opinion and Order, we reach tentative conclusions and direct the Parties to confer on certain remaining issues. Accordingly, we shall grant the Parties to this proceeding seventy-five (75) days from the entry date of this Opinion and Order for the Parties to confer on the remaining issues addressing the Partial Settlement as it pertains to the partial replacement of lead service lines as discussed below, and for the PWSA to then submit a proposal within ninety (90) days of the entry date of this Order for the Commission’s review. We will provide for a 25-day comment period following the filing and service of the PWSA’s proposal, consisting of fifteen (15) days for comments and ten (10) days for reply comments, for the Parties to this proceeding to provide comments regarding the proposal. The Commission shall address the compliance proposal submitted by the PWSA and any filed comments and reply comments in a subsequent Opinion and Order.

#### Subsection (vi) to Paragraph III.VV.1.b of the Partial Settlement

##### Pre-Termination Notice Requirements

###### 1.) Petitions and Answer

In its Petition, UNITED submits that the Commission properly concluded that partial LSL replacements are dangerous to residents’ health because they may result in immediate spikes in water lead levels. UNITED Petition at 5 (citing Order at 116‑117). And when a lead line remains in the ground as a result of an owner’s refusal to replace the line, current and future residents continue to face a risk of lead exposure. UNITED Petition at 5 (citing Order at 116-117; citing also UNITED St. C-3 at 21).

At the same time, UNITED recognizes that water service termination is “a severe consequence that can have far-ranging impacts – particularly on low income and other marginalized communities” – jeopardizing individuals’ everyday lives, including their ability to access clean drinking water, bathe, and cook, and is particularly dangerous for children, seniors, and individuals with medical needs, who are more susceptible to the spread of illness. UNITED Petition at 5 (citing testimony of UNITED’s expert Mitchell Miller, UNITED St. 2 at 17 (rate case testimony incorporated by reference at UNITED St. C-1 at 9 & nn.5-6). In its Petition, UNITED noted that the Commission’s recent recognition of the risks from water shut-offs have recently increased with the onset of the COVID-19 pandemic, which further highlights the critical role access to water plays in protecting public health. UNITED Petition at 5, n. 20.

Despite these risks, UNITED states that it agrees with the Commission’s conclusion “that, for property owners who refuse PWSA’s offer of a free private-side LSL replacement, the threat of service termination – and of having to pay for a replacement to reconnect to the system – is appropriate….” UNITED Petition at 6. According to UNITED, however, this is only true so long as property owners are given the advance, actual and verifiable notice, and detailed information necessary for them to make an informed choice. UNITED submits that special consideration must also be given to the unique vulnerability of tenants and other non-owner occupants who do not have the legal authority to accept a line replacement. UNITED Petition at 6.

UNITED explains that the Partial Settlement’s existing requirements for soliciting property owner consent for lead service line replacements reflect the necessity of developing robust outreach and education measures. These requirements – which commit the PWSA to making at least one attempt to contact the owner by mail, one attempt by telephone, and one attempt in person – have yielded a high consent rate among owners. UNITED Petition at 6 (citing Partial Settlement ¶ III.VV.1.b.ii; UNITED Statement in Support at 16). But, according to UNITED, the threat of water shut offs raises the stakes. UNITED Petition at 6. UNITED submits that even more “aggressive and extensive community outreach” will be “necessary to ensure that as many property owners as possible consent to private-side replacements” and, thus, avoid service termination. UNITED Petition at 6 (citing UNITED St. C-3SR, at 6; UNITED St. C-3, at 23 (“The burden is on PWSA to avoid partial replacements, particularly at tenant-occupied residences, by encouraging as many property owners as possible to consent to private-side replacements.”)). As it stands though, UNITED asserts it is unclear from the Commission’s Order whether the termination process the PWSA will use clears this bar – especially for those property owners who do not reside at their properties and may have tenants. UNITED Petition at 6.

UNITED asserts that the PWSA must ensure that property owners are aware of its replacement offer, understand the gravity of a decision to refuse a replacement, and have sufficient time to change their minds and opt back into the lead service line replacement program before termination. To that end, the PWSA first must confirm that property owners receive actual and verifiable notice of the termination, such as by sending notice and detailed information about the replacement and potential water shut off by certified mail, requiring the signature of the recipient, to those property owners who do not respond to PWSA’s initial letters. UNITED Petition at 6-7.

Additionally, UNITED asserts that special consideration and outreach should also be provided to non-owner occupants. Landlords may be more difficult to contact and less concerned with the safety of a tenant’s drinking water. It would be unfair for a tenant to lose water service and potentially be displaced because their landlord did not receive, ignored, or refused PWSA’s offer of a free replacement. Other individuals may have a “tangled title” that does not provide them with sufficient legal authority to consent to a line replacement. The PWSA’s outreach should include, at the very least, efforts to connect the non-owner occupants with local social and legal service providers to ensure that these residents are able to fully exercise their rights to a habitable home. Importantly, these outreach and notice activities should all occur well in advance of commencing line replacement activities to ensure that there is ample time for tenants to exercise their rights and for property owners to voluntarily opt in to the program before service is terminated. UNITED Petition at 7.

According to UNITED, sometimes, it may not be possible for the PWSA to provide actual notice to the owner of a property, even after the PWSA uses the robust outreach measures and termination procedures discussed in this Petition. For instance, at homes with a tangled title or other technical property issues preventing the occupants from exercising ownership rights, it may not be clear who the property owner is. For homes where the PWSA is unable to provide actual notice to the property owner and the residents otherwise lack the authority to consent to a LSL replacement, the PWSA should not terminate service following a partial replacement. UNITED Petition at 7-8.

UNITED further submits that the PWSA should consider additional opportunities for in-person outreach. As it has in the past, the PWSA could host town hall meetings and other community events. It could send canvassers to unresponsive households (or partner with local community groups or other concerned public agencies to do so), with the goal of making at least two in-person attempts, preferably once over a weekend and once on a weeknight, to obtain consent. The PWSA should also require written acknowledgement of a customer’s refusal at owner-occupied properties, as it does for the neighborhood-based replacement program. UNITED Petition at 8.

UNITED requests that the Commission provide the Parties with an opportunity to discuss these and other outreach measures the PWSA will take to secure property owner consent for LSL replacements at owner-occupied and tenant-occupied homes. Accordingly, UNITED requests that the Commission direct the Parties to confer on this issue within thirty (30) days from the entry date of the Commission’s Opinion and Order on this Petition. Within sixty (60) days from the entry date of the Commission’s decision, the PWSA should submit a compliance filing describing the additional outreach efforts the PWSA will make before performing a partial replacement or terminating service. UNITED Petition at 8.

Moreover, UNITED argues that the PWSA should initiate non-emergency termination procedures as set out at Chapters 14 and 15 of the Code and in the Commission’s Regulations at 52 Pa. Code §§ 56.91-.97, 56.99-.100 prior to a service termination. Importantly, the rights of tenants pursuant to Chapter 15, subchapter B should be closely followed and should apply to any termination of service to a tenant-occupied property. PWSA should complete these procedures before shutting off water to the residence – and well in advance of commencing the service line replacement work. UNITED Petition at 8-9.

UNITED submits that the Commission’s *March 2020 Order*, as written, is unclear as to whether emergency or non-emergency termination procedures will apply when property owners refuse a private-side LSL replacement. In the *March 2020 Order*, the Commission first states that “termination of service with prior notice” is appropriate for customers who refuse the PWSA’s offer of a private-side lead service line replacement. UNITED Petition at 9 (citing Order at 122). But then, in the text of the modification, the *March 2020 Order* indicates that, once the PWSA completes a partial replacement, it “will not permit the re-connection of the private-side” lead service line and “will begin the process to terminate service to the residence with prior notice in accordance with PWSA’s tariff.” UNITED Petition at 9 (citing Order at 125). According to UNITED, although the *March 2020 Order* references “prior notice,” it nonetheless suggests that notice would be given after the partial replacement and water service shut off had occurred. Moreover, UNITED submits that the *March 2020 Order* could be read to allow the PWSA to follow the emergency termination procedures in section 56.98 of the Commission’s Regulations, which are reflected in PWSA’s tariff and allow for the immediate termination of service for violation of PWSA’s tariff rules. UNITED at 9 (citing PWSA Tariff at Sec. C, Rule 3, pp. 44-45; 52 Pa. Code § 56.98). UNITED urges the Commission to clarify that the PWSA must follow non-emergency termination procedures before shutting off water service when a property owner has refused a free private-side lead service line replacement. UNITED at 9.

UNITED submits that advance notice of water service termination is critical in view of the serious consequences stemming from termination, discussed above. Non-emergency termination procedures under Pennsylvania law require utilities to provide written notice of termination to customers at least ten days ahead of time and make personal contact to provide additional notice both three days in advance of and immediately prior to termination. UNITED Petition at 10 (citing 52 Pa. Code §§ 56.91, 56.93-.95; PWSA Tariff at Sec. C, Rule 3, at 44-45; UNITED St. C-1 at 11). Landlords and tenants must receive 37 days’ and 30 days’ notice, respectively.29 UNITED Petition at 10 (citing PWSA Tariff at Sec. C, Rule 3.j.ii-iii). According to UNITED, these detailed procedures should not be abrogated when a property owner refuses a private-side LSL replacement. Thus, at a minimum, UNITED urges the Commission to clarify that all residential termination processes and procedures apply when the PWSA initiates service termination in response to a property owner’s refusal of a non-emergency private-side LSL replacement. UNITED Petition at 10. Moreover, if the PWSA has initiated termination at a property it believed to be owner occupied but later learns that the property is tenant occupied, PWSA should immediately initiate the notice procedure required under Chapter 15, subchapter B and make additional efforts to connect the tenant to appropriate social and legal services to ensure that the tenant has the resources to protect their right to a habitable home, as discussed above. *Id*.

UNITED submits that the timing of the termination itself is also important. UNITED recommends that the PWSA should begin the termination process early enough that water service shut off would occur well in advance of the projected replacement date. UNITED predicts that doing so would spur responses from owners who might otherwise ignore the PWSA’s notices while also giving the owners enough time to opt-in to the replacement program. *Id*. That, in turn, would allow the PWSA to incorporate the property into the scheduled replacements for that block, ensuring that the replacement is done in an efficient and cost- effective way and that water service at the property is promptly restored. Indeed, termination only provides the intended leverage over a property owner if the owner has a chance to change course and accept the free replacement upon realizing the consequences of their inaction. *Id*. at 10-11. Otherwise, termination simply acts as a punitive measure against the owner, causing harm to both them and any occupants at the property. *Id*. at 11.

To further work through the details of the notice and outreach efforts that PWSA will employ, UNITED requests that the Commission grant the Parties thirty (30) days from the entry date of this Opinion and Order for the Parties to confer and the PWSA to then submit a proposal on the appropriate timing for initiating termination in the compliance filing within sixty (60) days of the Commission’s Opinion and Order on this Petition. UNITED Petition at 11. Additionally, UNITED explains that Stage 2 of the Compliance Plan proceedings will address other issues related to termination of service, including the PWSA’s process for identifying and terminating service at tenant-occupied properties. Consequently, UNITED notes that the Commission’s final order in the Stage 2 proceedings might further modify the PWSA’s practices for terminating service following a property owner’s refusal of a lead service line replacement. UNITED Petition at 11, n. 30.

In its Answer, the PWSA does not oppose UNITED’s recommendation that the Commission establish a “workshop” regarding the details of the future notice and outreach efforts that PWSA will need to employ to comply with the subsections added by the Commission. PWSA Answer at 4 (citing UNITED Petition at ¶ 17, 22). According to the PWSA, a workshop to further discuss outreach efforts associated with future LSL replacement efforts is not unreasonable. PWSA Answer at 4. PWSA submits, however, that the workshops should not delay construction in 2020, and should focus on the notice and outreach for projects in the future. PWSA Answer at 4, n.16. The PWSA states that it is working on outreach and notices for construction planned for 2020; work will start in late May 2020 (assuming the Governor lifts the current COVID-19 work restrictions). PWSA Answer at 4, n.16. The PWSA submits that there is insufficient time to convene a workshop prior to the 2020 construction without creating long delay in 2020 construction. PWSA Answer at 4, n.16.

However, the PWSA indicates that it does oppose UNITED’s requests to impose additional procedures and processes on the PWSA when the initiation of termination procedures is justified. Specifically, the PWSA opposes UNITED’s request that, in other than emergency circumstances, the PWSA be required to adhere to additional procedures beyond those required for the termination of service which are normally applicable for terminations due to non-payment. PWSA Answer at 4-5 (citing UNITED Petition at § III.A.(ii)). According to the PWSA, this requirement itself represents a significant increase in the effort necessary to implement this program by the PWSA, in the efforts necessary for the notifications along with developing the databases and controls needed to ensure compliance with the current extensive requirements for termination. The PWSA also opposes UNITED’s requests that the Commission direct the PWSA to use additional and “robust outreach procedures” to secure property owner consent for lead service line replacements, including providing actual and verified notice to property owners ahead of service termination. PWSA Answer at 5 (citing UNITED Petition at § III.A.(i)).

According to the PWSA, these requested additional procedures and processes are unreasonable and should be rejected for at least two reasons.

First, the PWSA intends to follow the Commissions’ Regulations, especially concerning termination. In addition, it must be remembered, consistent with the Settlement, the PWSA is already doing a tremendous amount of notice and outreach. UNITED’s requests would add more requirements and, therefore, more expense and delay to those efforts; but UNITED has not presented any cost-benefit analysis to justify any of the UNITED’s proposed requirements. PWSA Answer at 5. For example, Paragraph 13 of UNITED’s Petition suggests that if there has been no response to PWSA’s initial notice and outreach efforts, that the PWSA must send a notice by certified mail, requiring the signature of the recipient. UNITED does not, however, present any evidence that a property owner who did not respond to initial efforts would later sign for a second notice sent by certified mail. People may be intimidated when a postal employee asks them to accept and sign for certified or registered mail, or other form of acknowledged delivery. They mistakenly believe that they will avoid negative legal consequences by refusing the mail. However, before requiringthe use of certified mail by the PWSA, there should be a cost-benefit analysis to establish that the extra cost and effort is likely to produce more responses. PWSA Answer at 5, n.21. Since there is no analysis of these requirements, nothing suggests that they are reasonable and should be imposed upon the PWSA. PWSA Answer at 5.

Second, according to the PWSA, imposing these additional procedures would be unnecessary if the PWSA’s suggested solution – to exempt from the termination directive locations where the homeowner or customer is not legally capable of authorizing the replacement or where replacement would impose an unreasonable burden on the homeowner or customer – is a better approach than creating additional burdensome requirements to termination while still requiring the PWSA to move forward with termination. PWSA Answer at 5-6. In many instances in which the property owner refuses, either affirmatively or by not responding, there is a justifiable reason for the refusal. PWSA Answer at 6 (citing PWSA Reply Exceptions at 22). For example, as discussed in Section V of PWSA’s Petition, (1) there may be ownership issues, such as a lack of clear legal ownership and/or lines that are located on property owned by others; and (2) replacement may impose unaffordable costs on the property owner. In fact, work that creates unaffordable costs is an issue the PWSA commonly hears about at community meetings. PWSA Answer at 6 (citing PWSA Petition at ¶ 51.c.). The PWSA argues it does not have the resources to both replace a lead service line and pay for all restorative work, including landscaping, hardscaping, etc., especially when the necessary restoration work is extensive. PWSA Answer at 6 (citing PWSA Petition at ¶ 51.c.). Accordingly, the PWSA submits that its proposed solution in its Petition, to exempt these instances from the termination requirement, is a better and more efficient approach than creating still more outreach and termination procedures. PWSA Answer at 6 (citing PWSA Petition at § V). The PWSA submits this is so, “Particularly in light of the successful Corrosion Control Treatment implemented by the PWSA.” PWSA Answer at 6.

Moreover, the PWSA asserts that it is important to note that the PWSA has already committed to work with the CLRAC to minimize these types of situations. PWSA Answer at 6. As a part of the Settlement, the PWSA committed, among other things, to consult with the CLRAC regarding lead remediation efforts on a quarterly basis on various topics including: information on instances when the PWSA has been unable to replace private-side LSLs because of conditions such as technical infeasibility or refusal of the property owner to give consent, as well as information about improving outreach efforts and exploring other methods for obtaining customer consent for private-side LSL replacements. PWSA Answer at 6-7 (citing *March 2020 Order* at 109-110).

Accordingly, the PWSA submits that UNITED’s requested additional procedures be rejected in favor of PWSA’s more practical and reasonable approach, which will better enable the PWSA to continue to meet its overall lead service line removal program goals. Alternatively, the PWSA offers that the two approaches be considered in a workshop setting, coordinated by the Commission’s Staff, in which all interested parties could participate, to discuss the details of future notices, outreach and implementation. PWSA Answer at 7.

###### 2.) Disposition

In the Partial Settlement, the PWSA committed to making at least one attempt to contact the owner by mail, one attempt by telephone, and one attempt in person. Partial Settlement ¶ III.VV.1.b.ii. Additionally, in the March *2020 Order*, we directed that additional notice be given prior to the termination of service in accordance with the notice procedures in the PWSA’s Tariff.

While we appreciate UNITED’s suggestions for the PWSA to consider additional opportunities for in-person outreach, such as town hall meetings and other community events and sending canvassers to unresponsive households – and while we believe it is possible such efforts may continue to serve the interests of the PWSA and its customers – we shall deny UNITED’s requests that we direct the PWSA to take these additional notice measures. In addition, we shall deny UNITED’s request that we direct the PWSA to confirm that property owners receive actual and verifiable notice of the termination, such as by sending notice and detailed information about the replacement and potential water shut off by certified mail, requiring the signature of the recipient, to those property owners who do not respond to PWSA’s initial letters. UNITED Petition at 6-7.

Additionally, at this Stage 1 proceeding, we decline UNITED’s request in its Petition to reconsider our decision in the *March 2020 Order* to direct the PWSA to follow the notice procedures in its Tariff. UNITED requests that we direct the PWSA to provide notice in accordance with Chapter 14 of the Code, Chapter 15, subchapter B of the Code,[[23]](#footnote-24) and Chapter 56 of the Commission’s Regulations prior to a service termination. However, as UNITED itself recognized in its Petition, the Stage 2 of the Compliance Plan proceeding is supposed to address issues related to termination of service, including the PWSA’s process for identifying and terminating service at tenant-occupied properties. UNITED Petition at 11, n.30. Thus, all Parties of record should be on notice that, in the final order in the Stage 2 proceedings, we may find it necessary or appropriate to further modify the PWSA’s practices for terminating service following a property owner’s refusal of a LSL replacement.

However, the clarification sought by UNITED with respect to the notice we directed in the *March 2020 Order* prior to service termination meets the *Duick* standard and, in our opinion, warrants additional amendment or clarification. Specifically, UNITED submits that the Commission’s *March 2020 Order*, as written, is unclear as to whether emergency or non-emergency termination procedures will apply when property owners refuse a private-side LSL replacement. As clarification, we agree that, in non-emergency replacement situations, the PWSA should initiate non-emergency termination procedures as set forth in its Tariff, Section C, Rule 3.j.i.-iii.,v., but not the emergency termination procedure set forth in its Tariff, Section C, Rule 3.j.iv. Non-emergency termination procedures under the PWSA Tariff require the PWSA to provide written notice of termination to customers at least ten days ahead of time and make telephone call, e-mail or personal contact three days in advance of termination. *See* Tariff, Section C, Rule 3.j.i. and 3.j.v. Landlords and tenants must receive 37 days’ and 30 days’ notice, respectively. *See* PWSA Tariff at Sec. C, Rule 3.j.ii-iii. We note that the PWSA does not dispute following the non-emergency procedures for the termination of service which are normally applicable for terminations due to non-payment. PWSA Answer at 4-5.

In emergency repair or replacement situations, however, the PWSA should use the emergency termination procedures set forth in its Tariff, Section C, Rule 3.j.iv., which permits 24 hours’ prior notice, or no prior notice, depending on the circumstances. However, as discussed below under the Requested Exception Situations, we recognize that additional notice and outreach may be required in emergency repair situations so that the property owner and customer are adequately informed of the situation and the consequence for refusing the PWSA’s offer to replace the private-side LSL. Accordingly, as discussed below, we request that the Parties confer on the notice and outreach procedures that the PWSA will undertake to residences in instances where PWSA does not complete the replacement of a private-side LSL due to an emergency repair and a non-responsive property owner.

Moreover, we note that Section 1523(a) of the Code vests the Commission with the authority to define certain exceptions to the advanced notices required to landlords and tenants in “emergencies” and/or circumstances involving “danger to life.”[[24]](#footnote-25) Specifically, the Commission requests the Parties to address this issue in the collaborative directed herein and invites comments to this section of the Order as to whether it is appropriate for the Commission to define as an “emergency” or “danger to life” for purposes of Section 1523(a), the repair or replacement of a utility-owned LSL without the simultaneous replacement of a customer-owned LSL, and that the termination of service will alleviate this emergency or danger to life. In the alternative, we request the Parties to indicate whether they deem it appropriate or necessary to reserve and address the issue in Stage 2 Compliance proceedings rather than in the collaborative / comment period provided herein.

Also, we agree with UNITED that it is important that property owners receive advance notice and detailed information necessary for them to make an informed choice. The notice should inform property owners of the PWSA’s replacement offer and the consequences of an owner’s decision to refuse a replacement.

Additionally, we concur with UNITED that the timing of the termination itself is important. We are persuaded by UNITED’s recommendation that it is important to provide sufficient time for the property owner to make a decision prior to the LSL replacement. UNITED predicts that terminating service in advance of the replacement would spur responses from property owners who might otherwise ignore the PWSA’s notices while also giving the owners enough time to make a decision to opt-in to the replacement program. That, in turn, would allow the PWSA to incorporate the property into the scheduled replacements for that block, ensuring that the replacement is done in an efficient and cost-effective way and that water service at the property is promptly restored. We see the practicality of this approach and the potential benefit to increasing property owner participation in the PWSA’s LSL replacement program.

The content and timing of notices should apply to both owner-occupied and tenant-occupied properties receiving water service from the PWSA. In tenant-occupied properties, both the landlord and the tenant(s) should also receive sufficient notice, in timing and content.

To further work through the details of the content and timing of the notice and notice procedures that the PWSA will employ, we shall grant the Parties to this proceeding seventy-five (75) days from the entry date of this Opinion and Order for the Parties to confer, and for the PWSA to then submit a proposal consistent with this Opinion and Order within ninety (90) days from the date that it is entered.

##### Requested Exception Situations to Subsection (vi) of Paragraph III.VV.1.b.

##### 1.) Petitions and Answer

The PWSA submits that in the *March 2020 Order*, the Commission directed that the PWSA initiate termination efforts in each and every situation that falls within the scope of subsection (vi). In doing so, however, the PWSA submits that the Commission did not clearly indicate that it considered the situations where (a) the customer or occupant has no ability to authorize the replacement of the customer service would face termination; and/or (b) the owner would be forced to bear excessive, unduly burdensome and unreasonable costs as a result of replacing the private side line. PWSA Petition at 26.

The PWSA submits that it is unreasonable and contrary to the overall public interest to deny water service to customers when they cannot reasonably replace their private-side line or control the replacement process or there is some other valid reason why the PWSA should not terminate service. PWSA Petition at 26.

The PWSA submits that:

Access to clean water is fundamental to good health. Lack of water in the home compromises the ability of people to wash their hands, clean their home, and safely prepare food. The loss of water service causes tremendous hardship and stress, and may have a disproportionate impact on disadvantaged communities. *See* United St. 1 at 6 (stating, in part, that low income households are disproportionately likely to face involuntary loss of service).

PWSA Petition at 26, n.58.

The PWSA further submits that:

While [it] shares the Commission’s general concern with creating “partial” lead service lines, it believes that the harm to the resident and the system from terminating service to customers who don’t have the legal or practical ability to permit PWSA to replace their lead service line is greater than the temporary impacts of a partial lead service line replacement.

PWSA Petition at 26.

The PWSA states that it has committed to providing household flushing instructions, lead test kits, NSF-certified lead removal pitchers, and six months’ worth of filter cartridges for all partial replacement locations; and to conducting follow-ups if the customer does not return the lead test kit, and, if they do and lead levels are higher than 10 parts per billion are seen, the PWSA supplies additional filter cartridges. PWSA Petition at 26; *see also March 2020 Order* at 196-197, 198-199; *see also* Partial Settlement at ¶ III.UU.1, ¶¶ III.TT.1-3. The PWSA further argues that the foregoing approach is consistent with the accepted approach adopted by many other water utilities. PWSA Petition at 26-27. In addition, the PWSA argues that since its successful implementation of a new corrosion control treatment process, the effects of the partial line replacements are expected to be short term as the orthophosphate addition allows the creation of scale inside the lead pipe to reduce potential corrosion. PWSA Petition at 27.

The PWSA submits that the clarifications and amendments requested in its Petition for the Requested Exception Situations meet the *Duick* standard and are warranted because the subsections were raised by the Commission for the first time in the *March 2020 Order* and, as written by the Commission, overlook or fail to address the Requested Exception Situations in which the requirements will be problematic for either the PWSA’s customers or the PWSA or both. PWSA Petition at 24.

The PWSA and UNITED further explain their positions regarding each of the Requested Exception Situations, as discussed immediately below.

**a.) Tenant-Occupied Properties and Unresponsive Landlords**

The PWSA submits that a portion of the PWSA’s unresponsive locations are tenant-occupied, and the landlord has not responded to the PWSA’s offer to replace the private side. In these cases, the Settlement Modification would require the PWSA to terminate water service to a customer who has no ability to provide authorization but would nonetheless lose water service. PWSA Petition at 25. In addition, the PWSA submits:

The termination of water service may also have a greater impact on tenants who could find themselves being forced to move (due to the lack of water service) if their landlord refuses to replace the private-side lead service line either by the timely acceptance of PWSA’s offer or by timely efforts by the landlord.

PWSA Petition at 26, n. 58.

In its Answer, UNITED explains that the PWSA requests that the Commission not require a termination of service at tenant-occupied properties when a landlord does not accept a free LSL replacement. UNITED Answer at 2. UNITED states that it does not endorse the PWSA’s request because that approach, according to UNITED, will result in an unacceptable number of dangerous partial replacements. UNITED Answer at 2, 4

UNITED explains that, without the threat of service termination, landlords have an easy out: they can ignore or refuse the PWSA’s offer and avoid both the hassle of coordinating a replacement and potential restoration costs, at no health risk to themselves. As a result of partial replacements, lead levels in tenants’ water may spike. UNITED Answer at 4 (citing *March 2020 Order* at 116-117). UNITED submits that the community will bear the burden of increased lead exposure. UNITED Answer at 4 (citing UNITED St. C-3 at 8-11, 21). But there is no penalty for the property owner. UNITED Answer at 4.

In contrast, UNITED submits that “a more prudent public health and safety approach” and “[t]he best strategy for protecting tenants’ access to safe drinking water and preventing an unfair loss of service” is to retain service termination as the consequence of a landlord’s recalcitrance but also to give property owners/landlords actual and verified notice of the PWSA’s offer of a replacement. UNITED Answer at 2, 4. UNITED urges the Commission to require the PWSA to develop a robust outreach and notice process (as discussed in its Petition) – including actual notice, specific and targeted outreach, education, and legal referrals for tenants – prior to proceeding with termination of service to rental properties, and well in advance of the PWSA performing LSL replacement work. UNITED Answer at 2, 4. UNITED submits that the PWSA should also match tenants with legal and social services to ensure they can vigorously defend their right to a habitable home. UNITED Answer at 4.

UNITED explains that the threat of termination will demand the attention of landlords who do not care about the safety of their tenants’ water and might otherwise ignore the PWSA’s offer. UNITED Answer at 4. UNITED explains that the termination of services produces the risks of cutting off the landlord’s rental revenue and substantially reducing the property’s value. UNITED Answer at 4. According to UNITED, landlords are unlikely to accept these significant costs just to escape the inconvenience of a LSL replacement. UNITED Answer at 4.

UNITED submits that it is clear that in order for the threat of termination to be an effective deterrent, landlords must be aware of it, and have enough time to agree to the replacement before it is scheduled to be conducted.[[25]](#footnote-26)  UNITED Answer at 4-5. This is why UNITED asks the Commission to direct the PWSA to consult with the interested parties to this proceeding regarding additional notice and outreach procedures that the PWSA will employ for tenant-occupied properties. UNITED Answer at 5 (citing UNITED Petition at 8, 14-15). And for those landlords who remain unconvinced after reading the PWSA’s offer on paper, hearing it over the phone, and speaking to someone in person, the PWSA should shut off water at the rental property well in advance of the partial replacement, so that the landlord has a final opportunity to opt back into the service line replacement program before PWSA has completed replacements on that block. UNITED Answer at 5 (citing UNITED Petition at 10-11).

While UNITED shares the PWSA’s desire to avoid unnecessary water shut offs that harm and displace renters, UNITED submits that those concerns must be balanced against the imperatives of maximizing pressure on landlords to authorize LSL replacements and avoiding dangerous partial replacements that put tenants at risk. Thus, UNITED disagrees with the PWSA’s request to exclude all tenant-occupied properties from the Commission’s modification. UNITED Answer at 2.

**b.) Tangled Titles and Other Technical Property Issues**

The PWSA submits that the PWSA should not terminate service at homes with tangled titles or other technical property issues that prevent occupants from consenting to the replacement, such as when a service line crosses two properties and the neighboring property owner refuses to consent to a replacement. The PWSA states as follows in its Petition:

PWSA does not have the right to enter onto private property to do work – which is why PWSA requires the property owner to sign an agreement authorizing and consenting for PWSA to do work on their private property. For some of our customers, the property owner is deceased, and a relative or other person is living in the residence. For many of these locations the property never went through probate, either because of the low value of the property, inability of the relative living there to afford to go through the process, or a dispute between potential heirs. PWSA typically tries to connect these customers to a lawyer or Neighborhood Legal Services to assist them in resolving these issues, however this process can take, at a minimum, several months to be resolved. Since PWSA usually is not aware of this issue until it reviews the signed agreement that it receives, PWSA’s LSLR work in that neighborhood/street is typically completed long before the ownership can be cleared and resolved. In these cases, the proposed PUC Order Settlement Modification would require PWSA to terminate water service to a customer who has no ability to provide authorization, but would nonetheless lose water service.

Another issue faced by PWSA are private service lines for one property located on property owned by someone else. In these instances, PWSA needs, ideally, an easement that allows for the maintenance and/or replacement for PWSA to do the work, although PWSA may be able to proceed with written permission from both property owners. PWSA has been able to obtain the necessary approvals by obtaining replacement authorization from all parties, but this does not happen in every case. In these “access legality” cases, the Settlement Modification would require PWSA to terminate water service to a customer who has no ability to provide authorization, but would nonetheless lose water service.

PWSA Petition at 24-25.

In its Answer, UNITED explains that the PWSA asks that the Commission not require service termination when a lead service line crosses two properties and the neighboring property owner refuses to consent to the replacement. UNITED Answer at 6. In those circumstances, UNITED states that it agrees with the PWSA that a customer should not have service terminated because their neighbor is uncooperative. But an uncooperative neighbor should also not be able to block the PWSA from removing a lead service line and force their neighbor to receive a partial replacement. UNITED Answer at 6-7. According to UNITED, the PWSA should, therefore, ensure that neighboring property owners receive adequate notice and outreach. UNITED Answer at 7 (citing UNITED Petition at 6-8 (describing necessary notice and outreach measures)). UNITED also urges the Commission to direct the PWSA, in consultation with the interested parties to this proceeding, to explore its legal authority to replace a lead service line without the neighboring property owner’s consent. UNITED at 7.

Thus, UNITED supports the PWSA’s proposal to exclude these properties from the settlement modification, provided that the PWSA is required to explore ways to remove lead service lines without the consent of uncooperative neighbors. UNITED Answer at 2.

**c.) Independent Legal Restrictions that Bar Service Termination due to Non-Payment of Utility Bills**

The PWSA submits that it has several situations where it does not terminate water service for bill payment issues, including the winter moratorium, medical cases and the Commission’s COVID-19 moratorium, which has extended the winter moratorium to ensure that the utility customers are able to have water necessary for sanitary purposes to address the COVID-19 crisis. In these situations, the PWSA does not believe that water service should be terminated when a private line replacement cannot be readily implemented. PWSA Petition at 25-26.

In its Answer, UNITED states that it agrees with the PWSA that a customer’s refusal to accept a private-side LSL replacement should not result in a loss of service if termination is barred by an independent legal restriction, such as the winter moratorium, the Commission’s COVID-19 moratorium, or a medical certificate documenting an occupant’s serious illness. UNITED Answer at 1. In its Petition, UNITED noted that the Commission’s recent recognition of the risks from water shut-offs have recently increased with the onset of the COVID-19 pandemic, which further highlights the critical role access to water plays in protecting public health. UNITED Petition at 5, n.20.

**d.) Emergency Repairs**

The PWSA explains that when it does an emergency repair, the PWSA’s current approach is to provide a temporary connection and to engage a contractor (with property owner approval) to replace the private-side LSL. At some locations, however, a temporary service connection is not possible due to weather conditions or the configuration of the structure or plumbing. If the PWSA cannot get in contact with the property owner, or the property owner is not local and cannot respond in a timely manner, the PWSA may need to reconnect to the private-side LSL to ensure the residents are not without water. In these cases, the PWSA provides the requisite water testing for lead, drinking water filters with instructions, and satisfies other applicable requirements of the PA DEP and County Health Departments. PWSA Petition at 25.

In its Answer, UNITED states that the PWSA should not terminate service when it replaces a public-side service line under emergency circumstances and cannot obtain the property owner’s consent to replace the private-side LSL. UNITED Answer at 1. In its Petition, UNITED submits that the Parties’ Partial Settlement authorizes the PWSA to perform a partial replacement when the utility replaces “a public-side service line as a result of an emergency circumstance (e.g., water main leak, broken curb stop, or damage to other infrastructure requiring a public-side service line replacement), and PWSA is unable to obtain consent to replace the private-side lead service line from the property owner.” UNITED Petition at 11 (citing Partial Settlement ¶ III.VV.1.b.iv.). The Commission’s modification to the Partial Settlement would require the PWSA to terminate water service at those properties, as well. UNITED Petition at 11.

According to UNITED, termination under these circumstances is unfair to the customer. *Id*. For instance, the PWSA might not be able to obtain the property owner’s consent for a private-side LSL replacement simply because the PWSA could not reach the property owner during the short window between the PWSA’s discovery of the emergency and its performance of the partial replacement. *Id*. at 11-12. UNITED submits that even a property owner who receives notice that the PWSA is going to terminate their water service if they do not accept a private-side LSL replacement might not have time to understand the terms of the PWSA’s offer or the consequences of refusal.  *Id*. at 12. For these reasons, UNITED requests that the Commission eliminate the requirement that the PWSA terminate service at a residence that receives a partial replacement under emergency circumstances. *Id*.

**e.) Properties with High Restoration Costs**

The PWSA submits that property owners can opt-out of private side replacement because of unreasonably large impacts to their property. Current Authority policy is that the PWSA will install the service line and backfill any excavations necessary to do so, but the PWSA does not restore any landscape or hardscape (including retaining walls, walk­ways, driveways, etc.). Property owners opt-out for many different reasons (in PWSA’s experience to date typically there is about a 4% opt-out rate), but some of these owners opt out because of the costs to them for restoration due to the need to remove a retaining wall or some extensive landscaping or hardscaping they have in place. In these locations, the PWSA’s work may impose unaffordable costs on the PWSA’s customers (one of the issues the PWSA commonly hears about at community meetings). The PWSA does not have the resources to both replace a lead service line and pay for all restorative work, including landscaping, hardscaping, etc., especially when the necessary restoration work is extensive. PWSA Petition at 25.

In its Answer, UNITED explains that although the Parties in this proceeding often refer to the PWSA’s offer as a “free” LSL replacement, removing a lead line can damage customers’ retaining walls, walkways, driveways, and landscaping. UNITED Answer at 5 (citing PWSA Petition at 25). UNITED submits that repair costs can be substantial, and they fall on the homeowner. Meanwhile, the PWSA’s post-replacement restoration is limited to filling in ditches and patching the wall where the service line enters the home. UNITED Answer at 5 (citing UNITED St. 4 at 23-24 (rate case testimony of Gregory Welter incorporated by reference at UNITED St. C-2 at 2-3)). UNITED explains that the remaining damage can be more than just an eyesore. If a work crew tears up a walkway or steps to the property, mobility-impaired residents may have difficulty leaving and entering their homes. UNITED Answer at 5 (citing UNITED St. C-1 at 50). UNITED, therefore, shares the PWSA’s concerns that projected restoration costs might dissuade some homeowners, particularly low-income customers, from allowing PWSA to replace their private-side lead service line. UNITED Answer at 5-6.

Although UNITED agrees that the Commission should modify its order to avoid service termination at homes with unduly burdensome restoration costs; UNITED states that modification alone is insufficient to address this problem. UNITED Answer at 6. According to UNITED, low-income homeowners should not have to choose between unsafe water from a partial replacement and significant damage to their homes that they cannot afford to repair. UNITED urges the Commission to require the PWSA to create a fund that low-income homeowners can draw on to pay for repairs to stairs, walkways, driveways, and retaining walls. UNITED Answer at 6 (citing UNITED St. C‑1 at 50; UNITED St. C-1SR at 16-18). UNITED also recommends that the PWSA be required to explore other sources of funding to assist low-income homeowners with restoration costs, such as the Urban Redevelopment Authority of Pittsburgh’s Housing Opportunity Fund. UNITED Answer at 6.[[26]](#footnote-27) Finally, UNITED requests the Commission to direct the PWSA to confer with the interested parties to this proceeding to develop a proposal for creating the fund for low income homeowners to make post-replacement repairs, as well as to explore other sources of funding. UNITED Answer at 6. Thus, UNITED supports the PWSA’s proposal to exclude these properties from the settlement modification, provided that the PWSA is required to create a fund to defray post-replacement restoration costs for low income homeowners. UNITED Answer at 2.

##### 2.) Disposition

We remind the Parties here that our jurisdiction is over the service and facilities rendered by a public utility and to ensure that every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities. 66 Pa. C.S. 1501. The safety of utility service and facilities remains the Commission’s paramount concern in the interest of the public utilities we regulate, the utility consumers who pay for and receive utility service and the general public. Essentially, we interpret the broad safety mandate of Section 1501 to mean that *there shall be no provision of service by a public utility unless it is safe service*. 66 Pa. C.S. § 1501.

As we stated in the *March 2020 Order*, we found that the evidence in this proceeding established that partial replacements result in the proven exposure to the harm of elevated lead levels in tap water. *March 2020 Order* at 119, n.40 (citing 66 Pa. C.S. §§ 1501, 1505). Therefore, we concluded that allowing a private-side LSL to reconnect to the PWSA’s water system, without being replaced, would endanger public health. *Id*. We concluded that we have the authority to direct that proper service and facilities be observed, furnished, enforced, or employed, in order to prevent such harm. *Id*.

In the *March 2020 Order*, as discussed above, we made specific, undisputed factual findings based on the record before us and directed the PWSA to observe and enforce certain service and facilities as shall be reasonably necessary and proper for the safety, accommodation, and convenience of the public. *March 2020 Order* at 116-122. Our discussion of the record and our findings in the *March 2020 Order* was as follows:

The record in this proceeding is complete and contains unrefuted expert testimony showing that partial replacements of LSLs endanger public health because they can disturb the protective scales inside service pipes that help to prevent water from leaching lead by shaking loose lead-containing scales from the pipe’s interior, which flow to the household tap. UNITED St. C-2 at 10, 22; UNITED C-3 at 19. The potential for physical disruption of the lead scale on a private-side LSL is the same regardless of whether the public-side service line removed was made of lead or some other material. UNITED St. C-2 at 24-25. Partial replacements can cause spikes in drinking water lead levels from days to several months or potentially even longer, as documented by post-replacement tap water monitoring in Pittsburgh. UNITED St. C-2 at 10, 22-25; UNITED St. C-3 at 15-24. The negative effects of partial service line replacements are well documented in scientific literature, and, given the risk they pose to the public, the Allegheny County Health Department’s Lead Task Force currently prohibits plumbers from replacing the private-side portion of a LSL when the public side of the service line is left in place. UNITED St. C‑2 at 23; UNITED St. C-3 at 21.

The permanent negative health effects from lead exposure, especially to uniquely vulnerable populations of developing fetuses, infants and children, is explained in the unrebutted testimony of Dr. Lanphear, the only qualified medical expert in this proceeding. *See* UNITED St. C-3 at 5-14.

As mentioned, the foregoing evidence was unrebutted in this proceeding….

…

Therefore, based on the factual record before us, as summarized above, we find substantial record evidence that supports the PWSA’s commitment in the Settlement to replace a private-side LSL simultaneously when it replaces the public-side service line at no direct cost to the property owner, as being in the public interest.

…

In any instance where a customer does not consent to the PWSA’s offer to replace the private-side LSL at the same time the PWSA is replacing the public-side portion of the service line, we are concerned with the PWSA allowing the private-side LSL to reconnect to the PWSA’s system after it has replaced the public-side of the service line. As summarized above, based on the factual record before us, we find little to no evidentiary support for allowing the private-side LSL to reconnect to the PWSA’s system after the PWSA has disturbed the public-side of the service line by removing old pipe and installing new service pipe. Following the PWSA’s replacement of the public-side service line, we are unable to conclude from the factual record that it would constitute adequate, efficient, safe or reasonable water service, or be in the public interest, for the PWSA to permit the private-side LSL to reconnect to PWSA’s water system.

*March 2020 Order* at 116-119 (footnotes omitted).

The PWSA reiterates in its Petition that it has committed to deploying household flushing instructions, lead test kits, NSF-certified lead removal pitchers, and six months’ worth of filter cartridges for all partial replacement locations, and adding orthophosphate corrosion control to the water supply. *See* PWSA Petition at 26-27. However, such discussion in the PWSA’s Petition does not address the discussion in the *March 2020 Order*, in which we found the record lacked evidence to support a finding that any of such efforts are effective in mitigating the elevated exposure to lead in tap water following the completion of a partial replacement. Specifically, we stated:

[W]e note that no expert testimony was presented to demonstrate the existence of any effective techniques, upstream or downstream of the curb stop, to mitigate the elevated exposure to lead in tap water following the completion of a partial replacement. As for upstream mitigation, for example, no expert testimony was presented to demonstrate that orthophosphate water treatment will effectively mitigate the elevated exposure to lead in the short term resulting from the disturbance of the protective scale in the service pipe caused by a partial replacement. In fact, the record shows the opposite – it could take up to a year for the corrosion control benefits of orthophosphate water treatment to be fully realized. UNITED St. C-2 at 16-18; UNITED St. C-3 at 21, 34; UNITED St. C-3SR at 8.

As for downstream mitigation, we recognize that it has been presented in this proceeding, as if it were an established fact, that informing customers on the risks of lead exposure and providing them with instructions on flushing, testing kits and water filters are effective in mitigating exposure to lead following the completion of a partial replacement. However, no expert testimony supported this. Specifically, no expert testimony showed that customers, or any and all members of customers’ households, who drink water from the tap and who employ any amount of informed or practical testing, flushing, use of water filters, or even a temporary discontinuance of tap water for drinking and cooking, will effectively mitigate the elevated exposures to lead in the short term following the completion of a partial replacement.

*March 2020 Order* at 118.

Thus, we are not persuaded by the PWSA’s Petition with respect to its listing of its commitments both downstream and upstream of the curb stop following a partial replacement in any of the Requested Exception Situations because it does not address the discussion in the *March 2020 Order* based on the record in this proceeding. The PWSA’s Petition has not offered new and novel arguments or identified considerations that appear to have been overlooked or not addressed by the Commission in the *March 2020 Order* with respect to mitigation efforts following a partial replacement.

Additionally, while the PWSA’s Petition argues that the harm to customers from a cessation of service in the Requested Exception Situations would outweigh the harm to customers resulting from elevated lead levels in water following a partial replacement, and while UNITED argued that a cessation of service is unfair in certain Requested Exception Situations,[[27]](#footnote-28) again we find these arguments do not address the findings of record in the *March 2020 Order* with respect to adequate, safe and reasonable water utility service and facilities.

Thus, in our opinion, and as discussed in more detail below, nothing presented in the Petitions and Answers with respect to the Requested Exception Situations warrants our granting reconsidering of the findings and conclusions regarding the dangers of partial replacements in the *March 2020 Order*.

However, we reiterate that we agree with UNITED that the content and timing of notices provided by the PWSA to property owners is important, especially in the context of tenant-occupied properties, tangled titles, properties with other technical real property issues and emergency repairs. Thus, as discussed more below and consistent with the above discussion, we shall grant the Parties’ requests for additional time to confer and collaborate on the content and timing of notices.

Additionally, we remind the PWSA that Section 1501’s broad mandate that utility service and facilities be “adequate, efficient, safe and reasonable” further mandates public utilities to “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.” 66 Pa. C.S. § 1501. Thus, as discussed further below, we shall grant the Parties’ request for additional time to confer and collaborate on proposals for the PWSA to make reasonable changes, substitutions and extensions in or to its service and facilities as may be necessary or proper for the accommodation and safety of customers in extraordinary circumstances involving tangled titles, technical property issues and high restoration costs.

**a.) Tenant-Occupied Properties and Unresponsive Landlords**

An underlying issue here is that the occupant and owner of the property may not be the same person. In tenant-occupied properties, either the tenant or the landlord may be the direct customer of the utility, depending on the metering situation. In all cases, however, the landlord is the apparent decision maker as to either accepting or rejecting the PWSA’s offer of replacing the private-side LSL. A decision by the landlord to accept or reject the PWSA’s offer will impact the water service received by the tenant from the PWSA. If the landlord accepts the PWSA’s offer, the danger of a partial replacement is avoided. At dispute here, however, is how the tenant will be impacted if the landlord rejects the PWSA’s offer.

Under the Partial Settlement and the PWSA’s Petition, the proposal is to allow a landlord to effectively consent to the partial replacement on behalf of the tenant(s), at no health risk to landlord while the tenant(s) and other occupant(s) bear the burden of the proven exposure to harm via the unmitigated, elevated lead levels in tap water. *March 2020 Order* at 116-118. The Partial Settlement and the Petitions do not explain whether the tenant(s) will be requested to give consent to the partial replacement or how the tenant will be notified of the health risks caused by the partial replacement.

Under the *March 2020 Order*, if a landlord rejects the PWSA’s offer to replace the private-side LSL, the PWSA is directed to enforce its Tariff and refuse the reconnection of non-conforming, private lead line, leading to a cessation of service.[[28]](#footnote-29) Thus, a landlord who does not live at a property who refuses to authorize the PWSA to replace a private-side LSL will not stop the PWSA’s replacement of the public-side LSL but will cause the termination of service to the property. After the landlord removes the private-side LSL, installs a conforming line, and receives the PWSA’s approval for reconnection to the public-side service line, water service may resume to the property.

In our opinion, any disputes between the landlord and the tenant regarding the landlord’s duty to maintain a habitable home for the tenant (*i.e*., by failing to consent to the replacement of the private-side LSL and maintaining water service to the premises) and/or regarding the financial burdens related to the replacement of the private-side LSL (*i.e*., restoration costs, etc.) are private maters outside the subject matter jurisdiction of this Commission, and which can only be addressed by a court of competent jurisdiction.[[29]](#footnote-30)

However, as noted above, we do agree with UNITED’s Petition and Answer that the content and timing of notices provided by the PWSA is important in this context and falls within our oversight of utility service. As noted above, in tenant-occupied properties, with regard to the private-side LSL and service termination, both the landlord and the tenant(s) should receive sufficient notice, in content and in timing. Thus, while we decline to grant reconsideration on the directive in the *March 2020 Order*, we shall grant the Parties to this proceeding seventy-five (75) days from the entry date of this Opinion and Order for the Parties to confer, and for the PWSA to then submit a proposal on the notices within ninety (90) days of the entry date of this Opinion and Order.

**b.) Tangled Titles and Other Technical Property Issues**

In our opinion, any disputes between property owners regarding a property owner’s refusal to provide the PWSA access to private property to replace a private-side LSL is a private mater outside the subject matter jurisdiction of this Commission, and which can only be addressed by a court of competent jurisdiction.

However, we concur with UNITED that the PWSA should ensure that all affected property owners receive adequate notice of the PWSA’s need for access and grant the Parties additional time to confer regarding the PWSA’s notice procedures to property owners and tenants. We also believe the PWSA should confer and explore its legal authority to replace a lead service line in tangled title situations and without a neighboring property owner’s consent.

Additionally, in instances involving neighboring property owners, we direct the PWSA to explore solutions to installing conforming service lines, including proposing reasonable changes, substitutions and extensions in or to its service and facilities as may be necessary or proper for the accommodation and safety of customers of customers. 66 Pa. C.S. § 1501.

Accordingly, we shall grant the Parties to this proceeding seventy-five (75) days from the entry date of this Opinion and Order for the Parties to confer, and for the PWSA to then submit a proposal consistent with this Opinion and Order within ninety (90) days of the entry date of this Order.

**c.) Independent Legal Restrictions that Bar Service Termination due to Non-Payment of Utility Bills**

Recognizing our decision above to decline reconsideration of our directives in the *March 2020 Order* when a customer rejects the PWSA’s offer to replace the private-side LSL, we invite comments and grant the Parties additional time to confer on the following two options that appear to be available to the PWSA when encountering situations where there exist independent legal restrictions that prohibit service termination due to non-payment of utility bills: (1) the PWSA will not replace either the public-side LSL or the private-side LSL; or (2) the PWSA may proceed with the replacement of the public-side LSL and follow the directive in the *March 2020 Order* to refuse the reconnection of the private-side LSL.

In support of the first option, as discussed below, we note there is no record evidencethat there is an exposure to harm if the entire lead service line remains intact while the PWSA replaces its mains and is subsequently reconnected to the new main as an unbroken service line.

In support of the second option, we recognize that the situations addressed in the *March 2020 Order* do not pertain to a customer’s non-payment of bills. Meanwhile, the several situations where the PWSA does not terminate water service, including the winter moratorium, medical cases and the Commission’s COVID-19 moratorium, relates directly to a customer’s non-payment of a utility bill and the rights and responsibilities of public utilities and customers alike. *See* 66 Pa. C.S. § 1402. We recognize the importance of these consumer protections as provided under Chapter 14 and the Commission’s Regulations and Orders with respect to preventing the termination of utility service despite a customer’s payment delinquency. However, the situation addressed in the *March 2020 Order* is not related to bill payment. Rather, the situation pertains to the PWSA’s right and responsibility to refuse to connect with a lead service pipe on the private portion of the service line because the record demonstrated that lead pipe is material through which safe water service cannot be delivered following the PWSA’s removal of the lead pipe and installation of non-lead pipe on the public portion of the service line. It bears repeating here that the safety of utility service and facilities remains the Commission’s paramount concern, and we interpret the broad safety mandate of Section 1501 to mean that *there shall be no provision of service by a public utility unless it is safe service*. 66 Pa. C.S. § 1501.

Furthermore, we recognize that a public utility will typically plan and perform scheduled main replacement work during the non-winter moratorium months, although we recognize that if the weather conditions permit, a public utility may perform such work during the winter moratorium months. Practically speaking then, the potential for overlap between the winter moratorium months and the months in which the PWSA will execute scheduled SDWMR main replacement will likely be limited.

Accordingly, we shall invite comments and grant the Parties to this proceeding seventy-five (75) days from the entry date of this Opinion and Order for the Parties to confer, and for the PWSA to then submit a proposal consistent with this Opinion and Order within ninety (90) days of the entry date of this Opinion and Order.

**d.) Emergency Repairs**

The PWSA submits that during an emergency repair, if it cannot get in contact with the property owner, or the property owner is not local and cannot respond in a timely manner, the PWSA may need to reconnect to the private-side LSL to ensure the residents are not without water. In these cases, the PWSA provides the requisite water testing for lead, drinking water filters with instructions, and satisfies other applicable requirements of the PA DEP and County Health Departments. PWSA Petition at 25. The Petitions do not address our findings and conclusions regarding the dangers of a partial replacement or raise any new arguments or considerations overlooked regarding these findings in the event of an emergency repair of the PWSA’s facilities.

With that said, we recognize that additional notice and outreach may be required in emergency repair situations so that the property owner and customer are adequately informed of the situation and the consequence for refusing the PWSA’s offer to replace the private-side LSL. As clarified above, pursuant to the Tariff, the PWSA will use the emergency termination procedures set forth in its Tariff, Section C, Rule 3.j.iv., which permits 24 hours’ prior notice, or no prior notice, depending on the circumstances. But again, we recognize that additional outreach may be required to ensure an informed decision is made by the property owner relating to the replacement of the private-side LSL during and/or following an emergency replacement of the PWSA’s public-side service line. Accordingly, we request that the Parties confer on the notice and outreach procedures that the PWSA will undertake to residences in instances where PWSA does not complete the replacement of a private-side LSL due to an emergency repair and a non-responsive property owner. Accordingly, we shall grant the Parties to this proceeding seventy-five (75) days from the entry date of this Opinion and Order for the Parties to confer, and for the PWSA to then submit a proposal consistent with this Order within ninety (90) days of the entry date of this Order.

**e.) Properties with High Restoration Costs**

We are persuaded by the concerns of the PWSA and UNITED for the PWSA to determine if there are reasonable changes, substitutions and extensions in or to service and facilities as may be necessary or proper for the accommodation and safety of customers with unduly burdensome restoration costs related to customer mobility and stairs, walkways, driveways (but excluding landscaping and hardscaping). Rather than permit a partial replacement to go forward in these instances, however, we shall grant the request for additional time for the Parties to confer on other potential solutions and for the PWSA to quantify any specific maximum limits (outside of its average costs in standard situations) on PWSA’s financial responsibility for a private-side LSL replacement in such extraordinary circumstances. Any such proposal may also need to be considered in the PWSA’s concurrent base rate proceeding.

Accordingly, we shall grant the Parties to this proceeding seventy-five (75) days from the entry date of this Opinion and Order for the Parties to confer, and for the PWSA to then submit a proposal consistent with this Opinion and Order within ninety (90) days of the entry date of this Opinion and Order.

##### PWSA’s Requested Distinctions Between the SDWMR Program and the Neighborhood LSLR Program

##### 1.) Petitions and Answers

In the PWSA’s Petition, the PWSA proposes that when any of the Requested Exception Situations, as discussed further below, are encountered during replacements made under the neighborhood LSLR program, the PWSA will not replace either the public-side LSL or the private-side LSL. PWSA Petition at 27.

However, when any of the Requested Exception Situations are encountered during replacements under the SDWMR program, the PWSA proposes it will replace the public-side LSL and reconnect the private-side, non-conforming lead service line rather than refuse the re-connection of the private lead line and terminate service as directed in the *March 2020 Order*. PWSA Petition at 27.

The PWSA argues that such distinctions must be made due to the nature of the SDWMR program. PWSA Petition at 27. The PWSA explains that, in the SDWMR program, the PWSA excavates the road, sidewalk and other infrastructure to shut off, discontinue and replace the old water main. As justification, the PWSA states that the installation of the new water main disturbs the connecting public-side LSL and has a similar impact on leaching lead as a partial replacement does and, therefore, the public-side line should be replaced. PWSA Petition at 27. The PWSA’s statement is offered without any citation to record evidence as support.

Specifically, the PWSA states as follows:

*Since the installation of the new water main disturbs the connecting public-side lead service lines, it has a similar impact to a partial replacement* *(even though the replacement is not technically a partial replacement under the Lead and Copper Rules)*. Since the installation of the new main disturbs the public-side line and the road and other infrastructure is already opened/disturbed, *the public-side lines should be replaced for* efficiency and *water quality purposes*.

PWSA Petition at 27 (emphasis added). Based on the foregoing, the PWSA requests that the Commission modify its directive in the *March 2020 Order* in accordance with the distinctions outlined by the PWSA. PWSA Petition at 27-28.

In its Answer, UNITED does not respond to the PWSA’s request to make distinctions between replacements made under the SDWMR and the neighborhood LSLR Program.

#### 2.) Disposition

The PWSA had the burden of proof in this proceeding. *March 2020 Order* at 11 (citing, *inter alia*, 66 Pa. C.S.§ 302(a)). Now, for the first time in this proceeding, in its Petition for Reconsideration, it states that the installation of a new water main disturbs the connecting lead service line, and, as a result, it has a similar impact on leaching lead as a partial replacement does – even though the replacement is not technically regulated as a partial replacement under the Lead and Copper Rule.[[30]](#footnote-31) The PWSA does not provide a cite to the record to support its statement, and in our review, we do not find evidence in the record to support these statements.

Indeed, these new statements in the PWSA’s Petition run contrary to the primary basis for the Commission’s decision in the *March 2020 Order* regarding the treatment of small business customers. In the *March 2020 Order*, we stated as follows:

As part of its overall plan to remedy LSLs existing within and connected to its water distribution system, the PWSA has proposed to replace or fund the replacement of all qualifying residential LSLs, in large part, to avoid the exposure to harm of elevated lead levels in tap water caused by partial replacements. As discussed extensively above, based on the factual record before us, we find substantial record evidence supports the PWSA’s commitment to avoid performing partial replacements on residential LSLs.

With respect to non-residential customers, however, the PWSA demonstrated that the basis for excluding non-residential customers is based on the real distinction between the ownership structure of service lines. Residential customers own only a portion of the service line (*i.e*., the private-side from the curb stop to the consumption point) while the PWSA owns the remaining portion of that same line (*i.e*., the public-side from the curb stop to the main). Unlike residential customers, non-residential customers own the entire service line that is from the main to the consumption point. The PWSA does not own any portion of the non-residential service line. *As a result, the PWSA has demonstrated that non-residential service lines will not be subject to the same partial replacements as residential LSLs would be.*

The OSBA presented little evidence in this proceeding to demonstrate how the PWSA’s plan to not replace non-residential LSLs will be inconsistent with its obligation to provide adequate, efficient, safe and reasonable service. The only record evidence the OSBA cited in support of its position is its Witness Kalcic’s generalized statement challenging the PWSA’s proposal. *See supra*; *see also* R.D. at 211 (citing OSBA St. 1 at5; OSBA St. 1-S at 2; OSBA St. 1-SD at 2; OSBA St. 1-SR at 2-3). However, as Witness Kalcic’s background and employment is in economics, he was not qualified as an expert in this proceeding in the areas of engineering, medical health and/or lead in drinking water, requiring us to assign the appropriate weight to his generalized opinion. *Other than raising this challenge, the OSBA did not go forward with presenting evidence to show that the PWSA’s plan to not replace any portion of a non-residential LSL while the PWSA carries out its mains infrastructure replacement program will endanger public health. To the extent a non-residential customer elects not to replace its LSL, the PWSA submitted that its orthophosphate corrosion control program, as approved by the PA DEP, is*

*expected to reduce lead levels in tap water to below the Lead and Copper Rule lead action level*.

*March 2020 Order* at 174-176 (emphasis added) (footnotes omitted).

Now, in its Petition, the PWSA takes the position that when it replaces the main, it disturbs the connecting lead service line and produces the similar result as if a partial replacement were performed. This position, again, if supported by record evidence, may warrant reconsideration of our analysis and/or decision in the *March 2020 Order* regarding the treatment of small business customers. Even if such new evidence would not change the overall outcome as to a small business customer’s financial responsibility to bear the cost of the replacement of the service line, it may change the type and content of notice that should be given to these customers regarding the safety of the main replacement while the small business customer’s lead service line remains connected thereto as opposed to being replaced at the same time. It also may warrant a similar approach as taken for residential customers – that the PWSA should enforce its Tariff provisions and refuse reconnection of the small business customer’s non-conforming lead service line to the water main. At this juncture, however, there is no record evidence to support reconsideration of the *March 2020 Order* based on the PWSA’s newly asserted position.

The PWSA proffers that since the installation of the new main disturbs the public-side LSL, the public-side lines should be replaced. PWSA Petition at 27. However, with respect to this statement, we note that, our decision in the *March 2020 Order* did not direct the PWSA to not replace its connecting public service line to the main. Instead, under the SDWMR program, where an owner rejects the PWSA’s offer to replace the private-side LSL, we directed that the PWSA may go forward with the replacement of its public-side service line but it must refuse the reconnection of a non-conforming, private LSL to the newly-installed public portion of the line, in accordance with its Tariff. Indeed, based on the record evidence before us, we stated as follows:

Another effect of rejection, assuming the PWSA temporarily halts the replacement of the public-side of the service line, is to allow the customer’s rejection to slow the pace of the PWSA’s removal of lead infrastructure existing in its system and thereby drive up the costs related to this work and increase street dislocations and inconvenience. PWSA St. C-1R-Supp. at 3-5. It bears repeating that it has been demonstrated in this proceeding that it is in the public interest to approve the provisions of the Settlement affirming the PWSA’s commitment to accelerate the replacement of LSLs existing within and connected to the PWSA’s system by a target date certain.

*March 2020 Order* at 119-120.

Based on the foregoing, we find the PWSA has not met the *Duick* standard with respect to any of the Requested Exception Situations replacements under the SDWMR program. We have maintained our decision in the *March 2020 Order* to permit the PWSA to replace the public-side LSL but we have directed that the PWSA enforce its Tariff and refuse the re-connection of the private lead line and terminate service as directed in the *March 2020 Order*.

#### Subsection (v) to Paragraph III.VV.1.b of the Partial Settlement

##### Petitions and Answer

In its Petition, the PWSA submits that in consideration of the requirements of Subsection (v), as written by the Commission, it is important to understand the fairly infrequent nature of the situations covered by Subsection (v). During the PWSA’s 2019 LSLR Program, the PWSA has opted-out at approximately seventy-five locations out of the almost 7,000 customer locations at which replacement work has occurred. At virtually all of the seventy-five locations, replacing the private LSL presented an unacceptable risk to the health and safety of the PWSA’s employees and construction staff, which lead to the PWSA’s refusal. About two-thirds of these seventy-five locations were properties owned by the City (e.g., taken for non-payment of taxes) and were in deplorable condition. PWSA Petition at 28.

Based on the foregoing, the PWSA submits that requiring consultation with CLRAC before the PWSA proceeds with public side replacements in these circumstances would create unduly long delays in lead service line replacement projects without justification. If a replacement falls within the scope of subsection (v), ongoing efforts would need to stop until action (consultation from CLRAC) occurred. This could take place at the next (or subsequent) quarterly meeting of the CLRAC. Beyond the delay, this would impose increased costs upon the PWSA (and the PWSA’s ratepayers). Moreover, in virtually all of these instances, a consultation with the CLRAC would produce little benefit, since the only likely outcome is to complete a public replacement only. PWSA Petition at 28.

In contrast, the PWSA proposes amendments to subsection (v) that would allow the PWSA to proceed with completing the partial replacement and to notify the CLRAC, for review and advisory input, of each situation and the PWSA’s determination in such situation. The PWSA proposes that such notification will occur in accordance with the provision of the Partial Settlement at ¶ III.WW.4.b. PWSA Petition at 22-23.

The PWSA submits these amendments to subsection (v), as submitted by the PWSA, seek to ensure that decisions are made timely and that scheduled replacements will proceed at a reasonable pace. PWSA Petition at 28. The PWSA proposes to continue to report these situations to CLRAC so that CLRAC and the PWSA can explore whether there are steps that can be taken in the future to reduce or eliminate the issues that resulted in not replacing the private lead line. PWSA Petition at 28-29. The PWSA explains that it has already agreed in the Partial Settlement, at Paragraph III.W.4.b., to report these instances on a semi-annual basis. PWSA Petition at 29. The PWSA, therefore, requests that the Commission revise Paragraph III.VV.1.b.(v) of the Partial Settlement (Section J.2.(i) of Appendix A to the Order) in the manner as set forth on pages 22-23 of its Petition, so as to ensure that decisions are made timely and that scheduled replacements will proceed at a reasonable pace. PWSA Petition at 29.

In its Answer, UNITED states that while it supports the Commission’s efforts to bolster consultation with the CLRAC regarding partial replacements that the PWSA plans to perform based on its determination that replacing a private-side LSL is not operationally feasible, UNITED agrees with the PWSA that the pre-replacement consultation requirement should be amended, as it may not be the most effective way to draw on the CLRAC’s expertise or to minimize the number of partial replacements. UNITED Answer at 7.

UNITED recommends the Commission direct the PWSA, when it determines that it is not operationally feasible to replace a private-side LSL, to make best efforts to connect the property owner to resources for rectifying the issue. Additionally, UNITED recommends that the PWSA should then follow-up with the homeowner within a reasonable time to determine whether the issue has been addressed so that the partial replacement can be avoided. In addition, UNITED urges the Commission to bolster the consultation provision in the Settlement, which mandates that the PWSA report only the number of partial replacements every six months. UNITED Answer at 7 (citing Partial Settlement ¶ III.WW.4.b). UNITED recommends that reporting occur at least quarterly, and the PWSA should inform the CLRAC of the facts underlying PWSA’s determination that it is not operationally feasible to replace a private-side lead line, the efforts the PWSA took to connect the property owner to resources for rectifying the issue, and the outcome of those efforts. UNITED Answer at 7-8.[[31]](#footnote-32) UNITED submits that the PWSA should also consult with the CLRAC about its procedures for referring customers to resources that can help them repair conditions in their home that prevent them from receiving a full LSL replacement. Finally, UNITED submits that the PWSA should discuss with the CLRAC how, if a customer addresses the issue that had rendered a LSL replacement unsafe, the customer could still receive a free replacement in the future – for instance, through the income-based reimbursement program. UNITED Answer at 8.

##### Disposition

We shall grant reconsideration, in part, of the PWSA’s request to modify the requirement that the PWSA engage in pre-replacement consultation with the CLRAC, as it may not be the most effective way to draw on the CLRAC’s expertise.

However, we decline the PWSA’s request to be able to proceed with completing the partial replacement and to notify the CLRAC post-partial replacement. In the *March 2020 Order*, we directed the PWSA, in the context of its next rate case (as either part of its direct case or supplemental direct case), to propose reasonable changes, substitutions and extensions in or to service and facilities as may be necessary or proper for the accommodation and safety of customers in these extraordinary circumstances and to quantify any specific limits on PWSA’s financial responsibility for a private-side LSL replacement in such extraordinary circumstances. *March 2020 Order* at 124. We remind the PWSA here that as part of Section 1501’s mandate that utility service and facilities be “adequate, efficient, safe and reasonable” it further mandates utilities to “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.” 66 Pa. C.S. § 1501.

Accordingly, we shall grant the Parties to this proceeding seventy-five (75) days from the entry date of this Opinion and Order for the Parties to confer on the directive in the *March 2020 Order*, and for the PWSA to then submit a proposal consistent with the *March 2020 Order* within ninety (90) days of the entry date of this Opinion and Order or to submit it as part of its next base rate case.

Finally, we highlight that we expressed our concern in the *March 2020 Order* that the PWSA’s enforcement of its Tariff to refuse reconnection to a private-side service line comprised of lead-based materials could constitute, in certain situations, a *de facto* abandonment of service to the customer, such as, for example, if the conditions of performing the replacement, such as length, terrain, obstructions, structures, pavements, trees, or other utilities, would effectively prohibit even the customer from replacing the private-side LSL. Thus, in appropriate cases involving operational infeasible situations, the PWSA must show that it offered to make reasonable repairs, changes, alterations, substitutions, extensions and improvements in or to its service and facilities, consistent with its Commission-approved tariff, and that the customer’s service nonetheless shall be terminated based on what is “necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public.” In certain outlier locations in which the PWSA may decide to abandon or surrender service, in whole or in part,[[32]](#footnote-33) however, PWSA will file an application to abandon service with the Commission pursuant to Section 1102(a)(2) of the Code.[[33]](#footnote-34)

### Lead Service Line Remediation Issues: Income-Based Reimbursement Program

#### Petition and Answer

In its Petition, UNITED also requests reconsideration and clarification of two aspects of the *March 2020 Order* regarding the PWSA’s income-based reimbursement program. First, UNITED submits that before the PWSA implements this program, it should be required to fulfill its commitment to revise the program’s terms so that participating customers need not pay the full cost of a LSL replacement upfront. Second, UNITED seeks a modification to direct the PWSA to include a report on the income-based reimbursement program in the Authority’s March 2021 LSL replacement plan regardless of whether the PWSA intends to continue the program beyond that date. UNITED Petition at 2.

Regarding the direct payment of contractors, UNITED notes its prior concerns about the PWSA’s program which requires residential customers who pay contractors to replace their private-side LSL can apply to the Authority for all or part of the expense. Since the replacement of LSLs costs several thousand dollars, UNITED along with I&E and the OCA had argued that low income customers who could not afford to pay this expense upfront would be unfairly excluded from the PWSA’s program. *Id.* at 12.

UNITED acknowledges our finding regarding these concerns in which we stated that “the PWSA has committed to implement its income-based reimbursement policy by working directly with the customers’ contractors to reimburse the contractor directly for the work, which will eliminate the need for customers to cover the cost of replacements upfront and await reimbursement.” *Id*. at 12 (quoting *March 2020 Order* at 160).

In its Petition, however, UNITED expresses concerns that the PWSA’s Witness Robert Weimer testified that the Authority faces “certain legal and operational hurdles” to implementing this change. UNITED Petition at 13 (citing PWSA M.B. at 63). UNITED requests clarification that the PWSA is not permitted to implement the income-based reimbursement program unless it modifies the program so that the Authority pays contractors directly for its share of replacement costs. According to UNITED, if the PWSA is unable to resolve the legal and operational hurdles described by Mr. Weimer, it should not be allowed to proceed with the program, which unfairly excludes low income customers. *Id*.

As to the second request pertaining to the report on the program, UNITED recaps our directive requiring the PWSA to address its effectiveness in the Authority’s March 2021 LSL replacement plan filing if the PWSA proposes to continue the program without modification.[[34]](#footnote-35) UNITED Petition at 13.

UNITED asserts it supports this reporting requirement because it will allow for a proper evaluation of the program which will help determine whether to continue it. However, UNITED argues that an analysis of the income-based reimbursement program should inform the PWSA’s LSL replacement plans even if the Authority intends to modify or discontinue the program. Thus, UNITED requests the clarification that the PWSA be required to include an assessment of the program regardless of whether it proposes to continue the program without modification. UNITED contends that this modification will enable the CLRAC to fulfill its consultative role under the Partial Settlement and will ensure that its expertise will help guide the PWSA’s decision regarding the fate of the program. In addition, UNITED submits that the clarification will help promote transparency, accountability, and public trust regarding an important and controversial part of the Authority’s lead remediation program. *Id*. at 14.

The PWSA objects to the first requested modification that the Commission direct the Authority to only implement the income-based reimbursement program if the PWSA pays the contractors directly. The PWSA argues that UNITED is not raising any new facts or issues with respect to the policy which was supported by the evidentiary record and approved by the Commission. The PWSA asserts that in its testimony and brief below it explained how it was working toward a process to effectively eliminate the need for customers eligible for reimbursement to avoid having to pay the reimbursement amount to the plumber or contractor upfront and await reimbursement. According to the Authority, UNITED provided testimony if the PWSA’s program is approved the Commission should require the PWSA to “pay its share of replacement costs directly to contractors performing replacements.” PWSA Answer to UNITED Petition at 8 (quoting UNITED St. C-1-Supp-R at 3). Since this issue was already raised and decided, the PWSA argues that UNITED’s request is not appropriate for a petition for reconsideration. *Id*.

In addition, the PWSA submits that UNITED’s request to make the entire income-based reimbursement policy conditional upon its change being implemented is unreasonable and incapable of performance. The Authority asserts that it continues to have questions about whether it can hire contractors to replace private service lines and is exploring alternative legal options. In the meantime, the PWSA continues, it has proposed a reasonable workaround by having customers hire contractors – potentially from a pre-approved list to make it easier for them to find a qualified plumber – to conduct the customer side work. Moreover, the PWSA notes its prior testimony that the PWSA has found that a homeowner can replace a private-side service line at about 75% of the direct construction costs that the Authority averages. PWSA Answer to UNITED Petition at 9 (citing PWSA St. C-1RJ at 9-12).

The PWSA contends that UNITED has failed to set forth any support for its position that the asserted legal and operational hurdles, which were actually acknowledged by UNITED, can be overcome. The PWSA asserts that its representation that it is working with contractors to accept payments directly from the Authority so that the homeowner would not be required to initially pay the cost for the line replacement and await reimbursement should be sufficient. PWSA Answer to UNITED Petition at 10.

In response to the second clarification by UNITED pertaining to the report on the program, the PWSA does not oppose the request. *Id*. at 6.

#### Disposition

Regarding UNITED’s first clarification request that the PWSA should be required to fulfill its commitment to revise the program’s terms so that participating customers need not pay the full cost of a lead service line replacement upfront, we find that UNITED has failed to satisfy the first step under *Duick*. Here, UNITED has not offered any new and novel arguments or identified considerations that appear to have been overlooked or not addressed in the *March 2020 Order*. Rather, UNITED’s argument appears to be a reiteration of its prior position and concerns asserted during the evidentiary hearing and Exceptions stage of the proceeding. Accordingly, we decline to exercise our discretion to reconsider or modify our decision as to this issue.

Regarding the second clarification request pertaining to the report of the program, however, we agree that we appear to have overlooked the full impact of the directive as worded in the *March 2020 Order*. UNITED is correct that under a plain reading of our directive, the PWSA would appear to be excused from submitting the March 2021 LSL replacement plan filing *if* the PWSA proposes to continue the program without modification. Given the importance of this filing which is designed to assist the CLRAC in its advisory capacity to the PWSA and to help promote transparency, accountability, and public trust regarding lead remediation program, we agree that our directive language should be clarified to state that in the March 2021 filing, the PWSA is directed to address the effectiveness of the income-based reimbursement program based on the information available to the PWSA at that time.

Also, since the PWSA does not object to this clarification, we shall grant UNITED’s Petition and amend the *March 2020 Order* to clarify that the March 2021 LSL replacement plan report is required to be filed regardless of whether the PWSA intends to continue the program beyond that date.

# 

# Conclusion

For the reasons stated, *supra*, we shall deny the City’s Intervention Petition, grant in part, and deny, in part the PWSA Petition, and grant, in part, and deny, in part, the UNITED Petition, all consistent with this Opinion and Order; **THEREFORE,**

**IT IS ORDERED:**

1. That the Petition for Reconsideration, Clarification and/or Amendment of Pittsburgh Water and Sewer Authority filed on April 10, 2020, seeking reconsideration of our Opinion and Order entered on March 26, 2020, is granted, in part, and denied, in part.

2. That the Petition for Reconsideration and Clarification of Pittsburgh UNITED filed on April 10, 2020, seeking reconsideration of our Opinion and Order entered on March 26, 2020, is granted, in part, and denied, in part.

3. That the Petition to Intervene of the City of Pittsburgh filed on April 10, 2020, is denied.

4. That our Opinion and Order entered on March 26, 2020, which modified Paragraph III.VV.1.b of the Joint Petition for Partial Settlement filed by the Pittsburgh Water and Sewer Authority, the Bureau of Investigation and Enforcement of the Pennsylvania Public Utility Commission, the Office of Consumer Advocate, the Office of Small Business Advocate, Pittsburgh UNITED and Pennsylvania-American Water Company on September 19, 2019, is further modified to state as follows:

(a) That Ordering Paragraph No. 8 in our Opinion and Order entered on March 26, 2020, is held in abeyance pending a subsequent Opinion and Order as set forth in this Ordering Paragraph;

(b) That the Parties to this proceeding shall have 75 days from the entry date of this Opinion and Order to confer on the remaining issues addressing the following issues, consistent with this Opinion and Order:

(i) Pre-termination notice requirements;

(ii) Tenant-occupied properties and unresponsive landlords;

(iii) Tangled titles and other technical property issues;

(iv) Independent legal restrictions that bar service terminations due to non-payment of utility bills;

(v) Emergency repairs;

(vi) Properties with high restoration costs; and

(vii) Partial replacement of lead service lines due to circumstances described in the Partial Settlement at ¶ III.VV.1.b.i;

(c) That within 90 days of the entry of this Opinion and Order, the Pittsburgh Water and Sewer Authority shall file with the Commission’s Secretary’s Bureau and shall serve upon the Parties the compliance proposal to address the issues set forth in this Ordering Paragraph;

(d) That the Parties shall have a 25-day comment period following the service of the compliance proposal, consisting of 15 days for comments and 10 days for reply comments, to provide comments regarding the compliance proposal; and

(e) The Commission shall address the compliance proposal submitted by the Pittsburgh Water and Sewer Authority and any filed comments and reply comments in a subsequent Opinion and Order.

5. That our Opinion and Order entered on March 26, 2020, on page 161 is: (a) amended to delete the sentence: “Should the PWSA propose to continue its income-based reimbursement program without modification in its March 31, 2021 plan, we direct the PWSA to address the effectiveness of the income-based reimbursement program based on the information available to the PWSA at that time.” and (b) to insert in its place the sentence: “In the March 31, 2021 plan, we direct the PWSA to address the effectiveness of the income-based reimbursement program based on the information available to the PWSA at that time.”

6. That, except as otherwise subsequently modified and/or amended consistent with this Opinion and Order, our Order entered on March 26, 2020, remains in full force and effect.

**BY THE COMMISSION,**

Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: June 18, 2020

ORDER ENTERED: June 18, 2020

1. Additional comments were submitted by Michelle Naccarati Chapkis on behalf of the Mayor’s Blue Ribbon Panel on Restructuring the PWSA and other individuals. [↑](#footnote-ref-2)
2. The Joint Petition for Partial Settlement was filed by the PWSA, I&E, the OCA, the OSBA, UNITED, and PAWC (collectively, Joint Petitioners). [↑](#footnote-ref-3)
3. We did not address the City Reconsideration Petition but held it in abeyance pending our ruling on the Intervention Petition. [↑](#footnote-ref-4)
4. Four additional issues were no longer open due to either the passage of time and/or the resolution of other related matters. [↑](#footnote-ref-5)
5. The Partial Settlement terms are set forth on pages 20-64 of the Recommended Decision. *See also* Partial Settlement at 17-57. [↑](#footnote-ref-6)
6. The PWSA estimated there are presently approximately 200-400 municipal buildings, 500 flat rate customers, and 300-400 municipally owned fountains, pools, etc. that are not metered. Partial Settlement at § III.G. [↑](#footnote-ref-7)
7. The PWSA originally filed an LTIIP on September 28, 2018, as part of the CP. The revised LTIIP dated August 21, 2019, was admitted at the evidentiary hearing as PWSA Hearing Exh. 3. Pursuant to the *March 2020 Order*, the PWSA filed an Amended LTIIP on March 27, 2020. [↑](#footnote-ref-8)
8. For a summary of the Statement of the Issue, the Settlement Terms, and the Statements in Support for each of these issues, see pages 85-114 of the *March 2020 Order*. [↑](#footnote-ref-9)
9. With the exception of the Partial Settlement provisions addressing partial replacements, as discussed below, we found that the reasons offered in the Parties’ Statements in Support of the Settlement were supported by substantial evidence in the record. We found that the terms of the Settlement pertaining to the PWSA’s plan to remedy residential lead service lines existing in and connecting to its water distribution system were reasonable and in the public interest. Additionally, we directed the Authority to file a compliance filing and an Amended LTIIP. *March 2020 Order* at 126‑129. [↑](#footnote-ref-10)
10. In our disposition, we also denied the Exceptions of UNITED pertaining the ALJs’ findings related to PWSA’s lead remediation programs. *March 2020 Order* at 168-170. [↑](#footnote-ref-11)
11. **(b) Acts which may impose liability.--**The following acts by a local agency or any of its employees may result in the imposition of liability on a local agency:

    ….

    (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.

    42 Pa. C.S. § 8542(b)(5). [↑](#footnote-ref-12)
12. The Authority’s filing and service of the Compliance Plan Supplement reinforces this rationale. In it, the PWSA stated that it will “[f]ormally notify the City of Pittsburgh *of the record and outcome of this case*, that the Cooperation Agreement is being reviewed by the [Commission] in the Compliance Filing proceeding, and that PWSA’s LTIIP Filing is pending with the Commission.” Compliance Plan Supplement at 26 (emphasis added). [↑](#footnote-ref-13)
13. We also referenced *Lower Chichester* in the *March 2020 Order* at page 79. [↑](#footnote-ref-14)
14. In the *March 2020 Order*, we referenced the Authority’s acknowledgment that “the domicile requirement is problematic because 300,000 people live in the City, compared to 2.36 million people in the Pittsburgh metropolitan area, leaving the PWSA access to less than *sixteen percent* of the greater metropolitan population as a pool of potential employment unless an individual is willing to relocate to the City or otherwise receives an exception not the residency requirement.” *March 2020 Order* at 75 (citing PWSA M.B. at 48-49) (emphasis added). Accordingly, our reference to 86% of the qualified working population on page 82 is an apparent error and the correct reference should be 84%. Nonetheless, this correction does not alter our disposition. [↑](#footnote-ref-15)
15. Regarding the PWSA’s objection to the finding that the residency requirement is arbitrary and capricious, we highlight our reference to the authority found on page 79 of the *March 2020 Order*. Additionally, the Authority cites to no record evidence challenging our determination that the “PWSA has not presented any evidence nor advanced any argument to indicate that its board of directors had the public interest in mind when deciding to implement the residency requirement. The only argument that has been raised by the Parties in this proceeding was I&E suggesting that the PWSA adopted the residency requirement to appease the City.” *March 2020 Order* at 83 (citing I&E M.B. at 61-64). [↑](#footnote-ref-16)
16. In all four situations, the PWSA committed to making reasonable attempts to obtain a property owner’s consent to the replacement and providing residents with information regarding the risks of lead exposure from partial LSL replacements, testing kits and a National Sanitation Foundation (NSF)-certified pitcher (not tap) filter and three replacement cartridges. *March 2020 Order* at 99; *see also March 2020 Order* at 196-197, 198-199; Partial Settlement at ¶ III.UU.1, ¶¶ III.TT.1-3. [↑](#footnote-ref-17)
17. Filed on February 28, 2019, in compliance with the Commission’s Order entered February 27, 2019, at Docket No. R-2018-3002645, canceling and superseding the PWSA’s Official Prior Tariff filed on March 30, 2018 at Docket No. M‑2018‑2640802. [↑](#footnote-ref-18)
18. We recognize that UNITED’s Petition further expands its position by explaining its concerns with property owners and customers receiving adequate notice related to the service termination. Its arguments related thereto will be considered more fully below. For the purposes of this section, however, we rely solely on the part of UNITED’s Petition that is relevant to the question of the Commission’s jurisdiction. [↑](#footnote-ref-19)
19. Also, the PWSA’s arguments serve the purpose of preserving the PWSA’s position for appellate litigation. Should the PSWA decide to appeal, the Commission would likely be an opposing party in such appellate litigation. Accordingly, since the PWSA’s Petition raises arguments challenging our jurisdiction, we are compelled to address it here. [↑](#footnote-ref-20)
20. Citing 66 Pa. C.S. § 316, *Kossman v. Pa. PUC,* 694 A.2d 1147 (Pa. Cmwlth. 1997); *Stiteler v. Bell Telephone Co. of Pennsylvania*, 379 A.2d 339 (Pa. Cmwlth. 1977) (a public utility’s Commission-approved tariff is *prima facie* reasonable, has the full force of law and is binding on the utility and the customer). [↑](#footnote-ref-21)
21. A chief rationale in support of approving tariff provisions that dictate the specifications or location of a customer’s facilities is to eliminate any harm such facilities may cause to the utility’s facilities or service. Another key rationale is to allow the utility to control costs for ratemaking purposes to avoid either unreasonable scenario of ratepayers being forced to subsidize costs that are more fairly borne by the cost-causer, or the utility shareholders being forced to bear stranded costs caused by the connecting customer facilities that are not recoverable in utility rates. Finally, a key rationale is to ensure the utility’s ability to provide or render reasonable, safe, adequate, and reliable utility service. Indeed, Section 65.15(c) of our Regulations recognize a public utility’s right to refuse to serve an applicant if the installation of the piping to the applicant “is reasonably regarded as hazardous or of a character that satisfactory service cannot be given.” 52 Pa. Code § 65.15(c). [↑](#footnote-ref-22)
22. *See e.g. Pennsylvania-American Water Company, Tariff-Water – Pa. P.U.C. No. 5*, effective January 5, 2020 (PAWC Water Tariff), Rule 4.1, Page 46, Rules 12.1-12.2, Page 60; *Aqua Pennsylvania, Inc., Tariff-Water – Pa. P.U.C. No. 2*, effective December 10, 2019 (Aqua Water Tariff), Rules 21, 54, Pages 42, 52, Rule 56, Page 53; *Suez Water Pennsylvania Inc., Water – Pa. P.U.C. No. 7*, effective January 1, 2020 (Suez Water Tariff), Rules 6, 12B, Pages 40, 41, Rule 32, Page 47; *Pa. PUC v. UGI Utilities, Inc. – Gas Division*, Docket No. R-2015-2518438, *et al.* (Order entered October 14, 2016) (approving Rule 2.3 of the utility’s tariff which requires the customer to submit all design and construction specifications and drawings to the utility in advance of construction to ensure compliance with all applicable requirements as to gas main and service construction and pipeline safety); *United States Steel Corporation v. Duquesne Light Co*., Docket No. C-00850141 (Order entered September 29, 1986); *PPL Electric Utilities Corporation, Tariff Electric Pa. P.U.C. No. 201*, effective January 1, 2011 (PPL Electric Tariff), Rule 2.G, Page 6B (Company may refuse to commence or continue service when, in Company’s opinion, customer’s installation is not in proper operating condition or does not conform to this tariff), Rule 10.B.(2)(b),(c), Page 14 (proving the utility the right to terminate service to the customer, upon notice to the customer when appropriate, if the customer’s installation, in the utility’s judgment, has become dangerous or defective or Company has received notice of such a condition, or the customer's equipment or use thereof may impair the equipment of Company or the service to the other customers); *PECO Energy Company, Tariff Electric Pa. P.U.C. No. 6*, effective March 29, 2019, Rules 13.2-13.7, Page 23 (requiring, *inter alia*, motor and other installations connected to the utility’s line to be of a type to use minimum starting current and to conform to the requirements of the Company as to wiring, character of equipment, and control devises). [↑](#footnote-ref-23)
23. At this time, we question UNITED’s position that the rights of tenants pursuant to Chapter 15, subchapter B apply to this situation of a termination of service to a tenant-occupied property. Under Chapter 15, subchapter B, a tenant (also referred to as a “Protected Tenant” in the PWSA’s Tariff) may exercise the right to maintain service by paying the service bill directly to the utility. 66 Pa. C.S. § 1527(b). Since the reason for service termination is unrelated to bill payment, we are not convinced that these specific rights of tenants under Chapter 15, subchapter B apply here. Thus, we encourage the Parties to further address this issue as part of the Stage 2 Compliance Plan proceedings. [↑](#footnote-ref-24)
24. Specifically, Section 1523(a) states that “Except when required to prevent or alleviate an emergency as defined by the commission or except in the case of danger to life or property, before any termination of service to a landlord ratepayer for nonaccess as defined by the commission in its rules and regulations or nonpayment of charges, a public utility shall…” and then it continues to define the advanced notice obligations of the public utility. 66 Pa. C.S. § 1523(a). [↑](#footnote-ref-25)
25. UNITED explains that, in the event that the PWSA is not able to provide actual and verified notice to the landlord, the PWSA should not terminate service. UNITED Answer at 5, n. 11 (citing UNITED Petition at 7-8). However, UNITED expects that such circumstances will be rare because “If tenants know where to send their rent, then PWSA can likely find where to send notice.” UNITED Answer at 5, n.11. [↑](#footnote-ref-26)
26. UNITED Answer at 6 (citing Urban Redevelopment Authority of Pittsburgh, Housing Opportunity Fund*,* *available at* https://www.ura.org/pages/housing-opportunity-fund-programs (last visited Apr. 20, 2020) (describing assistance for home repairs available through the Homeowner Assistance Program and Homeowner Assistance Program PLUS)). [↑](#footnote-ref-27)
27. With respect to arguments that it is “unfair” to terminate service to customers in certain Requested Exception Situations, we could also argue that it is *unconscionable* for any property owner or customer to be requested to consent (*i.e.*, as proposed in the Partial Settlement, that is by refusing the PWSA’s offer to replace the private-side LSL, then to ask that customer to sign a document stating they understand the risks of lead exposure, and then to allow that lead line to reconnect to the PWSA’s system) – on their own behalf and/or the behalf of occupants residing in their home (who may have no knowledge or awareness of these issues) – to the exposure to the harm of elevated lead levels in water. Regardless, we are not a court of equity and it is not our realm to decide what is just, equitable or fair. Our jurisdiction is limited to deciding what is adequate, efficient, safe, and reasonable public utility service and facilities. [↑](#footnote-ref-28)
28. In the prior rate case settlement, the Parties had agreed that “when a landlord who does not live at a property refuses to authorize [the] PWSA to replace a private-side lead service line, [the] PWSA may not perform a partial replacement.” UNITED Statement in Support at 24-25 (citing Rate Case Settlement approved in Docket Nos. R-2018-3002645, R-2018-3002647 (Order entered Feb. 27, 2019), at 15, ¶ C.1.b.). The Compliance Plan and LTIIP, however, did not commit the PWSA to continuing this policy for avoiding a partial replacement after 2019. According to UNITED’s Statement in Support, the Partial Settlement extends the bar on performing partials at residences that are not occupied by the property for the neighborhood-based program. *March 2020 Order* at 99 (citing UNITED Statement in Support at 25 (citing Partial Settlement at 49, ¶ VV.1.b.iii)). [↑](#footnote-ref-29)
29. Nothing in the Code authorizes the Commission to resolve a dispute between a landlord and tenant over the terms of a lease or the enforcement of landlord-tenant law. *Id*. The Commission, as a creation of the General Assembly, has only the powers and authority granted to it by the General Assembly contained in the Public Utility Code*. Tod and Lisa Shedlosky v. Pennsylvania Electric Co.*, Docket No. C‑20066937 (Order entered May 28, 2008); *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791 (Pa. 1977) (The Commission must act within, and cannot exceed, its jurisdiction); *City of Pittsburgh v. Pa. PUC*, 43 A.2d 348 (Pa Super. 1945) (Jurisdiction may not be conferred by the parties where none exists); *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967) (Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy); *Hughes v. Pennsylvania* *State Police*, 619 A.2d 390 (Pa. Cmwlth. 1992) *alloc. denied*, 637 A.2d 293 (Pa. 1993). [↑](#footnote-ref-30)
30. The PWSA proffers that since the installation of the new main disturbs the public-side LSL, the public-side lines should be replaced for water quality purposes. We note here that the PWSA’s use of the phrase “water quality purposes” is presumably done in effort to draw a distinction between the PA DEP’s authority to regulate lead levels in drinking water under the Lead and Copper Rule and our authority under Section 1501. PWSA Petition at 27. We view this as another attempt to challenge the jurisdictional questions addressed in this proceeding. However, as discussed, we decline to reconsider our conclusions as to our authority under Sections 1501 and 1505 of the Code. [↑](#footnote-ref-31)
31. UNITED notes that the PWSA already voluntarily exceeds the reporting requirement in the settlement by providing the CLRAC with the reasons for partial replacements and whether the properties receiving them are owned by the City of Pittsburgh or private individuals. UNITED Answer at 8, n.26. [↑](#footnote-ref-32)
32. In its Petition, the PWSA describes some of these outlier locations as follows: “At virtually all of the 75 locations, replacing the private lead service line presented an unacceptable risk to the health and safety of PWSA’s employees and construction staff, which lead to the Authority’s refusal. About two thirds of these 75 locations were properties owned by the City of Pittsburgh (e.g., taken for non-payment of taxes)” and due to the conditions of the properties, likely may be uninhabitable. *See* PWSA Petition at 28. [↑](#footnote-ref-33)
33. Based on our prior interpretation in the *FIO*, the exemption under 66 Pa. C.S. § 3202(a)(1) from the provisions of Chapter 11 likely does not apply to future abandonments of service by the PWSA. It is clear that the exemption applies to areas served by the PWSA as of April 1, 2018. However, we made it clear in the *FIO* that the provisions of Chapter 11 will apply to new areas that the PWSA wishes to serve after April 1, 2018. Specifically, we stated:

    While Chapter 32 provides that the Public Utility Code applies to PWSA in the same manner as a public utility, Chapter 32 provides for certain exemptions. Among these is the exemption from Chapter 11 of the Public Utility Code. However, that exemption is conditional; it applies only as to areas served by PWSA as of April 1, 2018. PAWC comments that should PWSA seek to expand its service area on or after that date, PWSA must adhere to Chapter 11 and all regulations and requirements imposed on other jurisdictional utilities. PAWC at 4. The Commission agrees with PAWC on this point. TIO at 7.

    *FIO* at 6. Thus, based on the *FIO* discussion, the exemption from Chapter 11 likely will *not* apply for existing locations or existing customers to which the PWSA wishes to surrender service after April 1, 2018. [↑](#footnote-ref-34)
34. UNITED specifically references our statement which provided: “Should the PWSA propose to continue its income-based reimbursement program without modification in its March 31, 2021 plan, we direct the PWSA to address the effectiveness of the income-based reimbursement program based on the information available to the PWSA at that time.” *March 2020 Order* at 161. [↑](#footnote-ref-35)