

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120**

Commissioners Present:

Gladys Brown Dutrieuille, Chairman
John F. Coleman, Jr., Vice Chairman
Ralph V. Yanora

Implementation of Chapter 32 of the Public Utility
Code Regarding Pittsburgh Water and Sewer
Authority – Stage 1

M-2018-2640802
M-2018-2640803

Petition of Pittsburgh Water and Sewer Authority
for Approval of Its Long-Term Infrastructure
Improvement Plan

P-2018-3005037
P-2018-3005039

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Petition of the Pittsburgh Water and Sewer Authority (PWSA or Authority) to Separate Stormwater Issues from Other Stage 2 Compliance Plan Issues (Petition) filed on February 3, 2022.¹ PWSA requested expedited

¹ The Petition is filed pursuant to 52 Pa. Code § 5.41. In order to secure a just, speedy and inexpensive determination in this proceeding, pursuant to 52 Pa. Code § 1.2(a), we will consider the Petition under 52 Pa. Code § 5.572, relating to petitions for relief following the issuance of a final decision. Specifically, we will treat the Petition as a Petition for Amendment of the Commission’s May 20, 2021, Opinion and Order, at this docket.

consideration of the Petition. Petition at 1. For the reasons stated herein, we shall grant the Petition, in part, and deny it, in part, consistent with this Opinion and Order.

I. History of the Proceeding

On September 28, 2018, PWSA filed its Compliance Plan in response to the Final Implementation Order laying out the process for implementing Act 65 of 2017 (Act 65) and the amendments to Chapter 32 of the Public Utility Code (Code).²

On February 4, 2021, the Commission issued an Order addressing a Partial Settlement and resolving Stage 1 Compliance Plan issues. In that Order, the Commission also deferred certain issues to Stage 2 of the Compliance Plan proceeding and reiterated directives previously set forth in a Secretarial Letter dated January 24, 2020. Those directives set forth the process for Stage 2 of the Compliance Plan and included specific time frames and deadlines for the filing of the Stage 2 Compliance Plan by PWSA, comments by stakeholders, and the assignment of the Stage 2 Compliance Plan to the Office of Administrative Law Judge (OALJ), including Commission Staff's directed questions to PWSA compliance with Chapter 14 of the Code and Chapter 56 of the Commission's Regulations, and PWSA operations as a regulated stormwater utility, for the purpose of conducting evidentiary hearings and issuing a Recommended Decision. *Implementation of Chapter 32 of the Public Utility Code Regarding Pittsburgh Water and Sewer Authority*, Docket Nos. M-2018-2640802 and M-2018-2640803, *Petition of Pittsburgh Water and Sewer Authority for Approval of Its Long-Term Infrastructure*

² Pursuant to Act 65, the Commission has jurisdiction over the utility service of water, wastewater, and stormwater provided by Pennsylvania cities of the second class, and such jurisdiction is applicable to PWSA. *See* 66 Pa. C.S. § 3201, *et seq.*; *Implementation of Chapter 32 of the Public Utility Code Re Pittsburgh Water and Sewer Authority*, Tentative Implementation Order, Docket Nos. M-2018-2640802 and M-2018-2640803 (Order entered January 18, 2018).

Improvement Plan, Docket Nos. P-2018-3005037 and P-2018-30055039 (Order entered February 4, 2021) (*February 2021 Order*).

On April 9, 2021, PWSA filed its Stage 2 Compliance Plan for Customer Service Issues, and on April 12, 2021, PWSA filed its Stage 2 Compliance Plan for Stormwater Issues. Also, on April 9, 2021, PWSA filed a Petition to Amend the Commission's February 4, 2021, Final Order requesting a modified procedural process for customer service issues.

On April 13, 2021, PWSA filed a combined base rate case at Docket Nos. R-2021-3024773 (water), R-2021-3024774 (wastewater), and R-2021-3024779 (stormwater), which included a proposed stormwater tariff and a request to implement stormwater rates for the first time (collectively, 2021 Rate Case). PWSA also filed a Motion to Hold in Abeyance the Stage 2 Stormwater Compliance Plan pending resolution of the 2021 Rate Case to allow for the full range of stormwater issues to be addressed as part of that case, and then to proceed with any remaining issues regarding the Stormwater Compliance Plan after the 2021 Rate Case was concluded.

The Commission issued an Order on May 20, 2021, suspending PWSA's stormwater tariff until January 12, 2022, and issuing the Technical Staff Report and Directed Questions on Stage 2 stormwater issues. Also, that same day, the Commission entered a separate Opinion and Order granting the Motion to hold the Stormwater Compliance Plan in abeyance, directing PWSA to file a revised Stormwater Compliance Plan, and providing revised deadlines for the filing of the revised Stormwater Compliance Plan, a second set of Directed Questions from the Commission's Bureau of Technical Utility Services (TUS) identifying any remaining issues, and the assignment to OALJ with a Recommended Decision due by May 25, 2022. *Implementation of Chapter 32 of the Public Utility Code Regarding Pittsburgh Water and Sewer Authority*, Docket Nos. M-2018-2640802 and M-2018-2640803, *Petition of Pittsburgh Water and*

Sewer Authority for Approval of Its Long-Term Infrastructure Improvement Plan, Docket Nos. P-2018-3005037 and P-2018-30055039 (Order entered May 20, 2021) (May 2021 Order).

On August 5, 2021, the Commission issued a Secretarial letter assigning the Stage 2 Compliance Plan for Customer Service Issues to the OALJ, including the Commission's Bureau of Consumer Services' (BCS) Report and Directed Questions Stage 2, which focused only on customer services issues.

A Prehearing Order dated September 28, 2021, established a litigation schedule for Stage 2, which included dates for the submittal of testimony and briefs, evidentiary hearings, and a Recommended Decision. The schedule also included estimated dates for PWSA's revised Stormwater Compliance Plan filing, TUS Directed Questions on the Stormwater Compliance Plan, and a Prehearing Conference to address Stormwater Compliance Plan litigation.

On November 18, 2021, the Commission approved a full settlement of the 2021 Rate Case, including approval of PWSA's initial stormwater tariff, stormwater rates, stormwater credit program, and a broad range of items related to stormwater service. PWSA's stormwater rates and stormwater tariff became effective on January 12, 2022.

On January 20, 2022, PWSA submitted its revised Stormwater Compliance Plan, which reflected stormwater-related issues addressed through the 2021 Rate Case and provided updated information on remaining issues to be addressed through the Stage 2 proceeding.

As stated, *supra*, on February 3, 2022, the instant Petition was filed by PWSA. No response to the Petition has been filed.³

On February 22, 2022, TUS submitted its Technical Staff Report and Directed Questions Stage 2, Set 2, as directed by the Commission. That same day, a Secretarial Letter (*February 2022 Secretarial Letter*) was also issued, assigning the review of PWSA's Revised Stormwater Compliance Plan from TUS to OALJ, pursuant to the *May 2021 Order*. The *February 2022 Secretarial Letter* directed the OALJ to incorporate the Stage 2, Set 2 Report into its Prehearing Order and to conduct evidentiary hearings to address matters raised therein, culminating with a Recommended Decision to be issued by OALJ on the PWSA Stage 2 Compliance Plan issues pertaining to stormwater compliance by May 25, 2022.

II. Discussion

A. Legal Standards

Before addressing the Petition, we are reminded that we are not required to consider, expressly or at great length, each and every contention raised by a party to our proceedings. *University of Pennsylvania, et al. v. Pa. PUC*, 485 A.2d 1217, 1222 (Pa. Cmwlth. 1984). Any argument that is not specifically addressed herein shall be deemed to have been duly considered and denied without further discussion.

³ In the Petition, PWSA represents that the Commission's Bureau of Investigation and Enforcement supports the Petition, and the Office of Consumer Advocate, the Office of Small Business Advocate, Pittsburgh United, and the City of Pittsburgh, who are all parties to the proceeding, do not oppose the Petition. Petition at 1-2.

The Code establishes a party's right to seek relief following the issuance of our final decisions pursuant to 66 Pa. C.S. §§ 703(f) and (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.

“Petitions for rescission or amendment may be filed at any time according to the requirements of Section 703(g) of the act (relating to fixing of hearings).” 52 Pa. Code § 5.572(d). Our standard of review in determining whether to allow a petition for special relief is discretionary. *West Penn Power v. Pa. PUC*, 659 A.2d 1055 (Pa. Cmwlth. 1995) (*West Penn Power*).

Under Section 5.572(d), a party may seek relief from a final Commission order at any time by petition for rescission or amendment. In such cases, the petition must allege circumstances which warrant disturbing the finality of orders to grant special relief. *Feleccia v. PPL Electric Utilities Corp., et al.*, Docket No. C-20016210 (Order entered March 7, 2003) at 2.

As previously noted, the legal standard of review in determining whether to allow a petition for special relief is discretionary. *West Penn Power* (Commission has discretion whether to act on petition for rescission or amendment of prior order). Therefore, under the discretionary standard of review, we will exercise our discretion to disturb a final order only under circumstances deemed appropriate. *City of Pittsburgh v. Pa. Department of Transportation*, 416 A.2d 461 (Pa. 1980).

While a Section 5.572(d) petition may raise any matter to persuade us to exercise our discretion to amend or rescind a prior Commission order, it is not appropriate to allow parties to relitigate matters already decided. “Parties . . ., cannot be permitted [a second opportunity] . . ., to raise the same questions which were specifically

considered and decided against them.” *Duick v Pennsylvania Gas and Water Co.*, 56 Pa. P.U.C. 553 (Order entered December 17, 1982) (*Duick*) (quoting *Pennsylvania Railroad Co. v. Pennsylvania Public Service Commission*, 179 A. 850, 854 (Pa. Super. 1935)). Exercise of Commission discretion to disrupt the finality of prior Commission orders is appropriate only where a Section 5.572(d) petition raises “new and novel arguments” not previously heard or considerations which appear to have been overlooked or not addressed by the Commission. *Duick* at 559.

B. *May 2021 Order*

In our *May 2021 Order* at issue here, the Commission modified its *February 2021 Order*. Specifically, the Commission extended the time period, by seventy-five days, for discovery and workshops among the parties and with BCS. The Commission amended the procedural schedule previously established to assign to the OALJ for the resolution of any matters “relating to PSWA compliance with Chapter 14 of the Public Utility Code and Chapter 56 of the Commission’s Regulations and issues deferred from the final Stage 1 Compliance Plan Order but excluding stormwater issues” by conducting evidentiary hearings and issuing a recommended decision no later than May 25, 2022. *May 2021 Order* at 18-21.

Additionally, the Commission granted PWSA’s Motion to hold the Stormwater Compliance Plan in abeyance, and directed PWSA to file its revised Stormwater Compliance Plan after the entry of a final Commission Order resolving the 2021 Rate Case, but no later than January 31, 2022, incorporating any changes or requirements resulting from the 2021 Rate Case. To the extent that any issues remain pending in the Stormwater Compliance Plan, the Commission directed TUS to issue a second set of Directed Questions identifying the remaining issues within thirty days of PWSA filing the revised Stormwater Compliance Plan. Finally, the Commission directed

that the OALJ shall issue a Recommended Decision on the Stormwater Compliance Plan by May 25, 2022. *Id.* at 21-22.

C. Petition

In its Petition, PWSA requests that the Commission modify its existing Orders to separate any remaining stormwater issues, which were not yet identified when the Petition was filed, from the customer service and collections issues that are currently being addressed in the Stage 2 Compliance Plan litigation, and to provide additional time for a review of those remaining stormwater issues as part of the Stage 2 Compliance Plan proceeding. PWSA argues that this is necessary to provide the Parties and the Commission with adequate time to identify and address the remaining stormwater compliance issues without delaying resolution of the litigation on customer service and collections issues which is underway. Petition at 1-2, 8.

PWSA reiterates the current litigation procedural schedule noting evidentiary hearings scheduled on February 15-16, 2022, and a Recommended Decision due by May 25, 2022, as well as the issuance of a second set of Directed Questions, to the extent that any stormwater compliance issues remain pending, to be referred to the Stage 2 Compliance Plan proceeding by TUS, that are due on February 21, 2022, but after the evidentiary hearings on the Stage 2 customer service and collection issues.⁴ PWSA avers that it supports continuing to move forward regarding the customer service and collections issues consistent with the litigation schedule already established for the current phase of the ongoing Stage 2 proceeding. However, PWSA states that it is concerned with the difficulties caused by folding Stage 2 stormwater issues into the current Stage 2 litigation because the hearing stage is almost completed, and given that

⁴ The deadline for submission was actually February 22, 2022, since the Commission was closed in observance of a State Holiday on February 21, 2022.

the Commission's directive that a Recommended Decision must be issued by May 25, 2022. PWSA argues that the current litigation and Commission-directed Recommended Decision schedule does not provide sufficient time to address any remaining issues on stormwater service as may be identified by TUS, particularly because some stormwater issues could be addressed by the Parties and the Commission here for the first time. *Id.* at 8-9.

In addition to requesting that the stormwater issues be separated from the customer service and collections issues currently being addressed in the ongoing Stage 2 litigation, and that an extension of time be provided to investigate any remaining stormwater issues, PWSA also requests that additional time be provided for TUS to identify any issues to be addressed through a second set of Directed Questions, and for interested stakeholders to have an opportunity to comment on the revised Stormwater Compliance Plan. In addition, prior to scheduling evidentiary hearings, PWSA requests that the Commission schedule one or more workshops to provide an opportunity for stormwater issues to be resolved through a collaborative approach. If issues that would be subject to litigation remain, PWSA requests that those issues be forwarded to the OALJ with instructions to establish a litigation schedule that is not constrained by the existing deadlines. PWSA avers that these modifications will allow the Parties and the Commission to efficiently identify and address any remaining stormwater compliance issues without delaying the ongoing Stage 2 litigation on customer service and collections issues. *Id.* at 2-3, 9-10.

Finally, PWSA requests expedited consideration of the Petition to provide guidance as soon as possible and prevent any disruption or delay in the ongoing Stage 2 litigation on customer service and collections issues. *Id.* at 1, 10.

D. Technical Staff Report and Directed Questions Stage 2, Set 2 (Stage 2, Set 2 Report)

In its Stage 2, Set 2 Report, TUS notes that its purpose is to assist in the development of an adequate record for the Commission to approve a Stormwater Compliance Plan that is consistent with 66 Pa. C.S. § 3204(b). TUS provided Directed Questions to be reviewed and addressed as the Parties consider the issues associated with the Stormwater Compliance Plan. TUS Technical Staff Report and Directed Questions Stage 2, Set 2 at 2-3.

TUS' Directed Questions consist of approximately twenty-five discussion points (some including sub-parts) in the following eight general categories:

- 52 Pa. Code § 53.53 – Information to be furnished with proposed general rate increase filings in excess of \$1 million;
- 52 Pa. Code §§ 65.8 – Meters & 6.14 – Measurement;
- 52 Pa. Code § 65.16 – System of Accounts;
- 52 Pa. Code § 65.19 - Filing of Annual Financial Reports;
- 52 Pa. Code § 65.22 – Customer Advance Financing, Refunds and Facilities on Private Property;
- 52 Pa. Code § 73.3 – Annual Depreciation Reports;
- PWSA's Relationship with the City of Pittsburgh; and
- Bulk Stormwater Agreements.

Id. at 3-8.

E. Disposition

Upon review, we shall exercise our discretion to modify the *May 2021 Order*, but only as it relates to PWSA's Stormwater Compliance Plan and any remaining stormwater issues associated with that plan. Importantly, we are not making any other changes or modifying any Orders as they relate to the customer service and collection issues currently being litigated in the ongoing Stage 2 Compliance Plan proceeding. We recognize and appreciate the Parties' and the OALJ's time and efforts diligently working towards resolving these significant issues, and we look forward to the issuance of a Recommended Decision by the presiding Administrative Law Judge regarding those issues, without further delay, by May 25, 2022.

Regarding the Stormwater Compliance Plan, it is in the public interest to resolve these issues as expeditiously as possible as well. However, we acknowledge the concerns raised in the Petition that there may not be adequate time to review, resolve and consider the remaining Stage 2 stormwater issues with the directed deadline for the issuance of a Recommended Decision on those issues by May 25, 2022. We note that PWSA timely filed its revised Stormwater Compliance Plan on January 20, 2022, and TUS timely submitted its Stage 2, Set 2 Report to that filing on February 22, 2022. Accordingly, while we are reluctant to delay resolution of the critical stormwater issues, we also understand that the current schedule to litigate any stormwater issues may make it impractical to provide sufficient time to address the remaining issues on stormwater service as identified by TUS.

Rather than truncate the development of the record addressing the stormwater issues in order to align it with the timeline to resolve the customer service and collections issues, we shall grant the Petition, in part, to provide a reasonable extension of time for the issuance of an additional Recommended Decision on the Stage 2 stormwater issues to provide for more time to address and consider the remaining stormwater issues.

We do not, however, support a process here that would provide for an open-ended timeline to address and consider these issues as proposed in the Petition; therefore, we will not remove the existence of a definitive deadline in the procedural schedule for the issuance of the Recommended Decision. Accordingly, we will modify the *May 2021 Order* and the *February 2022 Secretarial Letter* here by extending the previously directed deadline by 60 days for the Recommended Decision to be issued no later than July 25, 2022.

By granting an extension of time for the issuance of the Recommended Decision on the remaining stormwater issues, we are acting to preserve the Parties' ability, within a reasonable timeframe, to adequately identify issues and develop a comprehensive record for the Commission's consideration. Although the Commission encourages settlements, we recognize that some issues may remain in dispute throughout this proceeding. With the extended time frame provided herein for the issuance of the Recommended Decision, the presiding Administrative Law Judge (ALJ) will have the flexibility to establish a procedural schedule that will provide for the Parties to resolve issues informally, and if they are unable to do so, the ALJ can establish a litigation schedule, including evidentiary hearings as needed, to address the issues in a timely manner, concluding with the issuance of a Recommended Decision no later than July 25, 2022.

III. Conclusion

For the reasons set forth above, we shall grant the Petition, in part, and deny it, in part, consistent with this Opinion and Order; **THEREFORE**,

IT IS ORDERED:

1. That the Petition of the Pittsburgh Water and Sewer Authority to Separate Stormwater Issues from Other Stage 2 Compliance Plan Issues, filed on February 3, 2022, is granted, in part, and denied, in part, consistent with this Opinion and Order.

2. That the Commission's Order entered May 20, 2021, and the Secretarial Letter issued February 22, 2022, pertaining to the directed deadline for the issuance of a Recommended Decision by the OALJ pertaining to Stage 2 Stormwater Compliance Plan issues is extended 60 days, from May 25, 2022, to July 25, 2022.

3. That in all other respects the Commission's Order entered May 20, 2021, shall remain in full force and effect.

4. That a copy of this Opinion and Order be served on the Commission's Office of Administrative Law Judge and the Bureau of Technical Utility Services.

BY THE COMMISSION,



Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: March 7, 2022

ORDER ENTERED: March 7, 2022