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September 29, 2023

VIA ELECTRONIC FILING

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

Re: Pennsylvania Public Utility Commission v. Pittsburgh Water and Sewer Authority;
Docket Nos. R-2023-3039920 (Water), R-2023-3039921 (Wastewater) and R-2023-
3039919 (Stormwater); **CITY OF PITTSBURGH MOTION TO EXCLUDE
AND OBJECTION TO ADMISSION OF SCHOOL DISTRICT OF THE
CITY OF PITTSBURGH TESTIMONY THAT VIOLATES DUE PROCESS
RIGHTS AND PUC PROCEDURAL REGULATIONS**

Dear Secretary Chiavetta:

Enclosed for filing with the Pennsylvania Public Utility Commission is the City of Pittsburgh's Motion to Exclude and Objection to Admission of School District of the City of Pittsburgh Testimony That Violates Due Process Rights and PUC Procedural Regulations in the above-referenced proceedings. Copies have been served in accordance with the attached Certificate of Service.

Rosemary Chiavetta, Secretary
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If you have any questions regarding this filing, please contact the undersigned.

Very truly yours,

/s/ Whitney E. Snyder

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WES/
Enclosures

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Per Certificate of Service

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the forgoing document upon the persons listed below in accordance with the requirements of § 1.54 (relating to service by a party).

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DATED: September 29, 2023

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission, <i>et al.</i>	:	R-2023-3039920 (Water)
	:	C-2023-3040785
	:	C-2023-3040845
	:	
	:	R-2023-3039921 (Wastewater)
	:	C-2023-3040780
v.	:	C-2023-3040846
	:	
	:	R-2023-3039919 (Stormwater)
	:	C-2023-3040789
Pittsburgh Water and Sewer Authority	:	C-2023-3040847

**CITY OF PITTSBURGH MOTION TO EXCLUDE AND OBJECTION TO ADMISSION
OF SCHOOL DISTRICT OF THE CITY OF PITTSBURGH TESTIMONY THAT
VIOLATES DUE PROCESS RIGHTS AND PUC PROCEDURAL REGULATIONS**

Pursuant to 52 Pa. Code §§ 5.403 and 5.243(e), the City of Pittsburgh (“City”), by its undersigned counsel, requests Your Honor preclude from admission into the record portions of the Surrebuttal Testimony of the School District of Pittsburgh (“School District”) witness Callocchia that make new rate allocation and design proposals by alleging public rights of way should be subject to stormwater charges or that the City should be required to pay all stormwater charges for all customers because this testimony should have been in the School District’s case in chief and thus its inclusion in Surrebuttal Testimony violates the Commission’s regulations¹ and deprives the City of its due process right to be heard. School District St. No. 2-SR at 14:11-15:9, 15:21(starting at “However”)-16:8 should not be admitted into the record.

¹ 52 Pa. Code § 5.423(e) (“A party will not be permitted to introduce evidence during a rebuttal phase which: ... (2) Should have been included in the party’s case-in-chief or (3) Substantially varies from the party’s case-in-chief”).

I. INTRODUCTION AND SUMMARY OF ARGUMENT

1. The City moves to preclude School District St. No. 2-SR at 14:11-15:915:21(starting at “However”)-16:8, from entry into the record because this testimony raises new rate allocation and design proposals and takes new positions in Surrebuttal testimony that should have been included in the School District’s case in chief (Direct Testimony) and vary substantially from the School District’s Direct Testimony in blatant violation of 52 Pa. Code § 5.403(e).²

2. Specifically, the School District makes two rate allocation and design proposals for the first time in Surrebuttal Testimony that PWSA should modify its stormwater charges to either include the public rights of way in stormwater charges or charge all stormwater revenue requirement to the City. These new proposals also substantially vary from the School District’s Direct Testimony, which took no position on whether the City should incur these charges.

3. Had these allegations and positions been raised in Direct Testimony, the City would have been provided with its due process right to be heard on these issues in rebuttal testimony.

4. The School District’s gamesmanship in waiting to raise these new allegations and positions in Surrebuttal Testimony is in direct violation of the Commission’s procedural regulations and deprives the City of its due process right to be heard and submit countervailing evidence on these issues which pose serious detrimental impacts to the City’s rights and interests.

5. School District St. No 2-SR at 14:11-15:9, 15:21(starting at “However”)-16:8 should not be admitted into the record consistent with the Commission’s regulations and the City’s due process rights.

² 52 Pa. Code § 5.423(e)

II. LEGAL STANDARDS

6. The Commission's regulations expressly prohibit a party from entering evidence into the record that was presented in a rebuttal phase that should have been presented in a party's case-in-chief or evidence that varies substantially from a party's case-in-chief:

A party will not be permitted to introduce evidence during a rebuttal phase which:

- (1) Is repetitive.
- (2) *Should have been included in the party's case-in-chief.*
- (3) *Substantially varies from the party's case-in-chief.*

52 Pa. Code § 5.243(e)(emphasis added).

7. Moreover, the Commission, in its 2006 Order adopting revisions to Chapters 1, 3 and 5 of the Pennsylvania Code, noted that § 5.253(e) "reinforces a party's right to prevent the inappropriate or abuse of presentation rights." Final Rulemaking for the Revision of Chapters 1, 3 and 5 of Title 52 of the Pennsylvania Code Pertaining to Practice and Procedure Before the Commission, Docket No. L-00020156 (Order Entered January 4, 2006).

8. An ALJ's right and duty to strike and/or disregard rebuttal evidence that violates 52 Pa. Code § 5.243(e) is clear. The Commission has disregarded rebuttal evidence that should have been included in the utility's case-in-chief. *In Pa.P.U.C. v. Total Environmental Solutions, Inc. – Treasure Lake Water Division*, Docket No. R-00072493, et al. (Order Entered July 30, 2008), the Commission upheld the ALJ's disregard of rebuttal testimony supporting a wage and salary claim based on 52 Pa. Code § 5.243(e). The ALJ in that case concluded that "it would therefore not be equitable to permit it [the utility] to have a second chance to present direct testimony, or to allow it to supplement inadequate direct testimony during the rebuttal phase of this case." The ALJ also cited the Commission's statement of the purpose of 52 Pa. Code § 5.243(e) articulated in a 1994 rate proceeding: "[t]he clear purpose of it [52 Pa. Code § 5.243(e)] is to avoid trial by ambush and

the prevention of surprise can only be achieved if the parties are confined to the scope of their direct case.” *Pa.P.U.C. v. UGI Utilities, Inc.*, 1994 Pa. PUC LEXIS 138.

9. Due process in matters before the Commission requires that a party be afforded reasonable notice of the nature of the allegations against it so that the party can prepare a suitable defense and that parties have meaningful time to be heard in a meaningful manner. *Pocono Water Co. v. Pa. Pub. Util. Comm'n*, 630 A.2d 971, 973 (Pa. Cmwlth. 1993) (citing *Duquesne Light Co. v. Pa. Pub. Util. Comm'n*, 507 A.2d 433 (Pa. Cmwlth. 1986)); *Cresco, Inc. v. Pennsylvania Pub. Util. Comm'n*, 622 A.2d 997, 1000 (Pa. Cmwlth. 1993) (the “fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.”).

III. ARGUMENT

10. The School District’s Surrebuttal Testimony raised two issues/proposals for the first time that could and were required to be raised in Direct Testimony. Specifically, the School District proposed for the first time in Surrebuttal Testimony that PWSA should change its stormwater rates to include public rights of way in stormwater charges or, in the alternative, the City should be responsible for all PWSA stormwater charges. School District St. No 2-SR at 14:11-15:9, 15:21(starting at “However”)-16:8.

11. There is no reason the School District could not have stated these proposals in its Direct Testimony. As demonstrated in its Direct Testimony, the School District was aware that PWSA does not include public rights of way in stormwater charges. School District St. No. 2, at 26:6-8. Moreover, there is no reason the School District could not have made the proposal that PWSA charge all stormwater costs to the City in its Direct Testimony.

12. Thus, while the School District could have raised these proposals and related allegations in its Direct Testimony, it chose not to. This gamesmanship is colloquially known as “sandbagging”. The Oxford English Dictionary explains that the verb “sandbag” comes from the

game of poker and means “[t]o refrain from raising at the first opportunity in the hope of raising by a greater amount later.” The School District refrained from submitting all of its rate proposals in Direct Testimony so it could make such proposals, which pose substantial potential negative outcomes to the City, in Surrebuttal Testimony and deprive the City of the right to present countervailing evidence.³ These proposals are also a substantial deviation from the School District’s case-in-chief, which did not make either of these proposals.

13. This improper evidentiary presentation violates the Commission’s regulations and the protections of due process rights that these regulations provide. 52 Pa. Code § 5.423(e) (“A party will not be permitted to introduce evidence during a rebuttal phase which: ... (2) Should have been included in the party’s case-in-chief or (3) Substantially varies from the party’s case-in-chief”).

14. Making proposals to change rate allocation and design in Surrebuttal Testimony to the detriment of a party that has no meaningful time or opportunity to respond or be heard is exactly the type of “inappropriate” “abuse of presentation rights” that these regulations were enacted to prevent and provide opportunity to harmed parties to enforce. Final Rulemaking for the Revision of Chapters 1, 3 and 5 of Title 52 of the Pennsylvania Code Pertaining to Practice and Procedure Before the Commission, Docket No. L-00020156 (Order Entered January 4, 2006) (Section § 5.253(e) “reinforces a party’s right to prevent the inappropriate or abuse of presentation rights.”).

15. Allowing these portions of the School District’s Surrebuttal Testimony into the record inappropriately gives the School District a second bite at the apple – to present proposals

³ Only PWSA, the party with the burden of proof, is entitled to file rebuttal testimony. 52 Pa. Code § 5.242(a) (“In a proceeding, the party having the burden of proof, shall open and close unless otherwise directed by the presiding officer. In a hearing on investigations and in proceedings which have been consolidated for hearing, the presiding officer may direct who will open and close. Oral rejoinder, if proposed by the party with the burden of proof, shall be completed before any cross-examination of the witness is conducted.”).

in a rebuttal stage that should have been presented in Direct Testimony. Further, the School District's Surrebuttal Testimony constitutes trial by ambush and unfair surprise where the party harmed by the testimony has no meaningful time or opportunity to respond. The Commission's regulations prohibit exactly this type of gamesmanship. *In Pa.P.U.C. v. Total Environmental Solutions, Inc. – Treasure Lake Water Division*, Docket No. R-00072493, et al. (Order Entered July 30, 2008) ("it would therefore not be equitable to permit it [the utility] to have a second chance to present direct testimony, or to allow it to supplement inadequate direct testimony during the rebuttal phase of this case."); *Pa.P.U.C. v. UGI Utilities, Inc.*, 1994 Pa. PUC LEXIS 138 ("[t]he clear purpose of it [52 Pa. Code § 5.243(e)] is to avoid trial by ambush and the prevention of surprise can only be achieved if the parties are confined to the scope of their direct case.").

16. Moreover, allowing these portions of the School District's Surrebuttal Testimony into the record in this scenario deprives the City of its due process rights to notice of allegations against it and meaningful time and manner to be heard on these new proposals. The School District's Surrebuttal Testimony for the first time makes rate allocation and design proposals that would obviously have significant detrimental impacts to the City were such proposals to be adopted – the City would face millions of dollars of increased stormwater fees each year if these proposals were approved. The School District's actions in making these proposals in Surrebuttal Testimony clearly deprives the City of notice that these allegations would be made and any opportunity to be heard in response, let alone the meaningful time and opportunity to be heard that due process requires. *Pocono Water Co. v. Pa. Pub. Util. Comm'n*, 630 A.2d 971, 973 (Pa. Cmwlth. 1993) (citing *Duquesne Light Co. v. Pa. Pub. Util. Comm'n*, 507 A.2d 433 (Pa. Cmwlth. 1986)); *Cresco, Inc. v. Pennsylvania Pub. Util. Comm'n*, 622 A.2d 997, 1000 (Pa. Cmwlth. 1993) (the

“fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.”).

IV. CONCLUSION

Your Honor has the power and duty to ensure a fair and just opportunity for presentation of evidence in this proceeding that complies with the Commission’s regulations and protects due process rights. The School District’s Surrebuttal Testimony as identified above violates the Commission’s regulations and the City’s due process rights. Such gamesmanship and violation of rights cannot be allowed, and the identified portions of the School District’s Surrebuttal Testimony should not be entered into the record.

WHEREFORE, the City of Pittsburgh respectfully requests that School District St. No. 2SR at 14:11-15:9, 15:21(starting at “However”)-16:8 not be entered into the record.

Respectfully submitted,

/s/ Whitney E. Snyder

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