

COMMONWEALTH OF PENNSYLVANIA



OFFICE OF CONSUMER ADVOCATE

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August 1, 2011

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street  
Harrisburg, PA 17101

In re: Hopkins & Reedy Water Company  
Docket No. A-211425

Dear Secretary Chiavetta:

Enclosed for filing please find the Comments of the Office of Consumer Advocate in the above-referenced proceeding.

Copies have been served as indicated on the enclosed Certificate of Service.

Respectfully Submitted,

A handwritten signature in cursive script that reads "Erin L. Gannon".

Erin L. Gannon  
Assistant Consumer Advocate  
PA Attorney I.D. #83487

cc: Cheryl Walker Davis, OSA  
Stan Brown, Law Bureau  
Certificate of Service

Enclosure  
147254

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

In re: Hopkins & Reedy Water Co. : Docket No. A-211425

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COMMENTS  
OF THE  
OFFICE OF CONSUMER ADVOCATE

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DATED: August 1, 2011

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

In re: Hopkins & Reedy Water Co. : Docket No. A-211425

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COMMENTS  
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The Office of Consumer Advocate (OCA) files these Comments to the Tentative Order published in the Pennsylvania Bulletin on July 2, 2011, in the above-referenced docket. 41 Pa.B. 3655. The OCA does not oppose the Commission's intention to cancel the Hopkins & Reedy Water Company certificate of public convenience. The OCA does have concerns, however, regarding the content of the Tentative Order and respectfully submits that the Final Order should be modified to address these concerns.

**I. Introduction**

Hopkins & Reedy Water Company (Hopkins & Reedy or the Company) was certificated to provide water service at Docket No. A-211425. Since then, ownership and operation of the utility has been transferred without Commission approval. Tentative Order at 2-3. Effective April 1, 2011, Hopkins & Reedy stopped directly charging customers for service "with the understanding that any repairs or maintenance necessary to the system will be the responsibility of the individual homeowners affected." Tentative Order at 3. Customers were also required to pay the monthly electric bills to run the wells and pay all costs for new or upgraded equipment. Id. On its own motion and based on the facts provided in the Joint Affidavit of Adam Spotts and

Ella Stamm, dated April 19, 2011, the Commission deemed the provision of water service by Hopkins & Reedy to be non-jurisdictional because it is not service “to or for the public for compensation” within the meaning of Section 102 of the Public Utility Code, 66 Pa. C.S. § 102. Tentative Order at 6 (Ordering Paragraph 1).

As noted, the OCA does not oppose the Commission’s decision to cancel the Hopkins & Reedy certificate of public convenience. The OCA agrees that, pursuant to Section 102 of the Public Utility Code, if a utility provider is not charging for its services or providing service “to the public,” it is not a “public utility” as defined by the statute and does not require a Certificate of Public Convenience to provide service. 66 Pa. C.S. §§ 102, 1101, *et seq.* The Commission has found that Hopkins & Reedy is not providing service to the public because it serves – and holds itself out as serving – only a “defined, privileged, limited group” of trailer park residents, citing Pilot Travel Centers LLC v. Pa. P.U.C., 933 A.2d 123 (Pa. Commw. 2007) (Pilot); Hazelton Ass’n Fluidized Energy, Inc., 62 PaPUC 619 (1986); Drexelbrook Ass’n v. Pa. P.U.C., 212 A.2d 237, 40 (Pa. 1965); Waltman v. Pa. P.U.C., 596 A.2d 1221, 1223 (Pa. Commw. 1991). Tentative Order at 4-6. The OCA concurs with the Commission’s application of those cases to the facts of this case.

The OCA has no objection, therefore, to the Commission’s conclusion that Hopkins & Reedy “in its present operations, is not acting as a public utility” and its services will not be regulated by the Commission. Tentative Order at 6-7. As discussed below, however, the OCA has concerns with the Commission’s conclusion, based on the facts in the Tentative Order, that Hopkins & Reedy is not receiving compensation for purposes of defining status as a “public utility” under Section 102 of the Public Utility Code. 66 Pa. C.S. § 102. The OCA recommends that as the Commission’s conclusion regarding compensation is unnecessary to its determination

to cancel the Certificate of Public Convenience, that the Final Order eliminate any discussion of compensation.

The OCA also identifies a concern with language in the Tentative Order discussing the Policy Statement at 52 Pa. Code § 1401(c)(2). The language could be read as broader than the case law underlying the Policy Statement. As such, the OCA recommends that the brief discussion of the Policy Statement be eliminated from the Final Order or clarified to address this concern. Finally, the OCA submits that the Final Order should clarify that the Commission retains jurisdiction over service rendered in historic and prospective periods when the definition of “public utility” is met.

## **II. Comments**

### **A. The Commission’s Finding That Hopkins & Reedy Is Not Receiving Compensation May Be Inconsistent With Prior Commission Decisions and Should Not Be Used to Support the Commission’s Decision.**

In addition to its finding that Hopkins & Reedy is not providing service “to the public,” the Commission also found that Hopkins & Reedy is not a jurisdictional utility because it is not being compensated for its services. Tentative Order at 3-4. The Tentative Order and Joint Affidavit indicate, however, that the customers are paying the electric bills and are responsible for repairs, maintenance, and installation of new or upgraded equipment. Tentative Order at 3-4, Exh. A at 2. From the facts included in the Tentative Order, it is not clear to the OCA whether the Company is being “compensated” for its service as the Commission has previously defined “compensation” when assessing its jurisdiction. See *Burkhart v. Galen Hall Corp.*, 1994 Pa. PUC LEXIS 22, \*18-20 (customers’ assumption of expenses related to the provision of water service, including electric bills, repairs, equipment replacement and operation and maintenance, was considered to be “compensation” for purposes of deciding the utility was jurisdictional); Re

Leonard M. Smith, 49 PaPUC 488 (1975) (compensation exists even when payment for utility service has not yielded a profit margin for the utility but merely has covered the utility's expenses in providing service); Green Cab Co. v. Hajducho, 50 PaPUC 745, 751 (1977) (finding service to be "for compensation" when customers lessen "otherwise present expenses of operation."); Capitol Bus Co. v. Smith, 49 PaPUC 428 (1975) (compensation need not be in a monetary form but may be some benefit conferred on the utility in exchange for its provision of service).

It is not necessary for the Commission to decide whether the customers' payments are "compensating" the Company for providing water service in this case since the facts clearly show that Hopkins & Reedy is not jurisdictional because it serves a defined, privileged and limited group and does not provide water "to the public." See Tentative Order at 4-6 ("Even if the company was charging customers for its water, however, we believe that there are other grounds to support the conclusion that Hopkins & Reedy is not a public utility"). Accordingly, the OCA suggests that the Commission's discussion of "for compensation" as a basis for its finding that Hopkins & Reedy is not jurisdictional be removed from the Final Order.

B. The Commission's Reference to the Policy Statement Should Not Be Construed to Expand the Types of Utilities that Are Non-Jurisdictional.

The OCA is concerned that the Tentative Order could be construed to broaden the criteria for establishing that an entity is not a public utility. Specifically, the OCA is concerned with the language at the bottom of page 5 of the Tentative Order, which states that "an entity is not a public utility if the facility is designed and constructed only to serve a specific group of persons or entities and others cannot feasibly be served without a significant upgrade in the facilities." This language is taken from a Policy Statement, 52 Pa. Code § 69.1401(c)(2), and is based on the decision in Hazelton Ass'n Fluidized Energy, Inc., 62 PaPUC 619 (1986) and Borough of

Ambridge, 108 Pa. Super. 298, 304, 165 A. 47, 49 (1933), allocatur denied, 108 Pa. Super. xxiii (1933) (Ambridge).<sup>1</sup> The specific facts underlying the Hazelton case supported findings that the customers constituted a “defined, privileged and limited group” in addition to the finding that others could not feasibly be served without a major overhaul of the system. Hazelton at 621-22. Hazeleton involved a high temperature hot water (HTHW) system intended to serve three commercial customers pursuant to contracts for 20-year terms. As stated in Hazelton:

Unlike, for example, an entity providing electrical energy that could, with relative ease, install additional generating capacity or enter into a wholesale purchased power agreement to accommodate additional customers, HAFE physically would not be able to serve any significant, additional load without a major overhaul and upgrading of its system’s capacity. Consequently, HAFE’s proposed HTHW System would not lend itself easily to classification as a public utility facility. We therefore conclude that there is a definite and restricted quality to the proposed HTHW System which gives it a private, as opposed to a public character. Therefore, we hold that the three (3) previously identified customers constitute a defined, limited and privileged group.

Id. Likewise, in Ambridge, the Court recognized that not only was the system designed only to sell excess water by one manufacturer to a neighboring manufacturer, but that the seller did not hold itself out as serving or ready to serve the public. Ambridge, 108 Pa. Super. at 301-04, 165 A. 47 at 48-49.

The Tentative Order presents language from the Policy Statement and discusses it in a general manner without reference to the case law that language is intended to summarize. The OCA is concerned that the Tentative Order could be construed to adopt the guidelines from the Policy Statement as legal criteria absent the specific facts in the case law underlying the Policy Statement and, thus, make more utility service non-jurisdictional. The OCA submits, for example, that the language of the Tentative Order could suggest that any developer who sizes a system to serve a development could avoid Commission regulation on the premise that serving

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<sup>1</sup> Implementation of the Alternative Energy Portfolio Standards Act of 2004, Docket No. M-00051865, Final Policy Statement (Nov. 30, 2006).

additional customers would require “significant upgrade” – without reference to cases like Pilot, Hazelton or Ambridge to determine if the required upgrades are “significant.”

To avoid such misinterpretation, the OCA submits that either (1) the paragraph addressing the Policy Statement could be deleted or (2) language could be added to that paragraph to make clear that the Commission’s discussion (of Hopkins & Reedy’s status as a “public utility” if it were charging for service) is consistent with the Policy Statement because the Policy Statement summarizes the applicable legal precedent.

C. The Company’s Current Status Does Not Limit or Preclude Commission Jurisdiction Over Prior or Future Service Rendered While the Company Is a “Public Utility.”

As discussed above, the OCA agrees with the Commission’s conclusion that Hopkins & Reedy is non-jurisdictional “in its present operations.” Tentative Order at 6. The OCA submits that the Final Order should make clear, however, that it retains jurisdiction over the service provided by Hopkins & Reedy during all historic periods when the utility did meet the definition of a “public utility” or all prospective periods if it again meets the definition. 66 Pa. C.S. §§ 501, 502, 1312, 3301, *et seq.*

WHEREFORE, the Office of Consumer Advocate respectfully submits that the above-identified clarifications should be incorporated in the Final Order.

Respectfully Submitted,



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DATE: August 1, 2011  
147472

CERTIFICATE OF SERVICE

In re: Hopkins & Reedy Water Company  
Docket No. A-211425

I hereby certify that I have this day served a true copy of the Comments of the Office of Consumer Advocate upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code §1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 1<sup>st</sup> day of August 2011.

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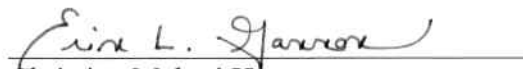
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