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November 14, 2013

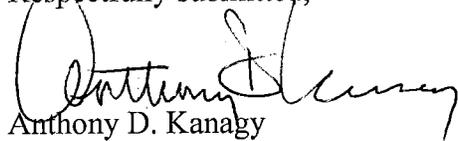
Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, 2nd Floor North  
P.O. Box 3265  
Harrisburg, PA 17105-3265

**Re: Pennsylvania Public Utility Commission, The Office of Consumer Advocate, The Office of Small Business Advocate, Larry L. Wolfe and John C. Eline v. The York Water Company - Docket Nos. R-2012-2336379, C-2013-2367038, C-2013-2375700, C-2013-2370416 and C-2013-2374421**

Dear Secretary Chiavetta:

Enclosed please find the Reply Brief of The York Water Company in the above-referenced proceeding. Copies will be provided as indicated on the Certificate of Service.

Respectfully submitted,



Anthony D. Kanagy

ADK/skr  
Enclosures

cc: Certificate of Service  
Honorable Kandace F. Melillo  
Honorable Joel H. Cheskis

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing has been served upon the following persons, in the manner indicated, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

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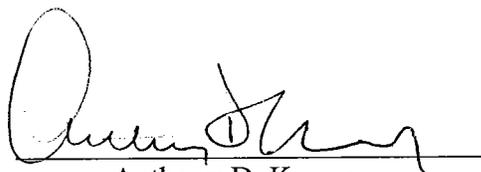
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Date: November 14, 2013

  
Anthony D. Kanagy

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission	:	Docket Nos.	R-2012-2336379
The Office of Consumer Advocate	:		C-2013-2367038
The Office of Small Business Advocate	:		C-2013-2375700
Larry L. Wolfe	:		C-2013-2370416
John C. Eline	:		C-2013-2374421
	:		
v.	:		
	:		
The York Water Company	:		

**REPLY BRIEF OF THE YORK WATER COMPANY**

**TO ADMINISTRATIVE LAW JUDGES**

**KANDACE F. MELILLO AND JOEL H. CHESKIS**

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Date: November 14, 2013

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**I. INTRODUCTION**

Pursuant to the procedural schedule adopted in the proceeding, The York Water Company (“York Water” or the “Company”), the Office of Consumer Advocate (“OCA”) and Mr. Larry L. Wolfe (“Mr. Wolfe”) filed Main Briefs in this proceeding on November 6, 2013. The Main Briefs are to address the one issue reserved for briefing in this proceeding, which concerns the allocation of a portion of the wastewater revenue requirement increase to water customers. The allocation is detailed in a Settlement Petition agreed to by the Company, the OCA, the Bureau of Investigation and Enforcement (“I&E”), and the Office of Small Business Advocate (“OSBA”) that was filed with the Public Utility Commission (“Commission”) on November 7, 2013. The allocation in the Settlement Petition totals \$58,826, and averages \$1.02 per residential water customer per year, or 8.5 cents per residential water customer per month. York Water hereby files its Reply Brief in response to the Main Brief filed by Mr. Wolfe. York Water will endeavor to avoid repeating arguments set forth in the Company’s Main Brief.

**II. ARGUMENT**

**A. MR. WOLFE RAISES ISSUES IN HIS BRIEF THAT WERE NOT RAISED DURING THE EVIDENTIARY PORTION OF THIS PROCEEDING, AND ARE UNSUPPORTED BY THE RECORD.**

Mr. Wolfe has raised a number of issues in his Main Brief that were not raised during the course of this proceeding. He submitted no testimony on these issues, and therefore the Company was not provided with any notice as to their existence, and was given no opportunity to submit testimony and evidence into the record to respond. In this first section of its Reply Brief, York Water will identify the arguments in Mr. Wolfe’s brief that are being raised for the first time in this proceeding. These are not disputes of law, and therefore record evidence is required to support the arguments. Further, some of the issues raised in Mr. Wolfe’s brief are outside the scope of the specifically identified issue that is the subject of these briefs, which is

the allocation of a portion of the wastewater revenue requirement increase to water customers. Thus, for reasons set forth below, these arguments should be rejected.

Mr. Wolfe asserts that the Company bears the burden to prove that the allocation of a portion of the wastewater increase to water customers is just and reasonable. (Wolfe M.B., p. 2, ¶1). The Company acknowledges this burden, and for reasons explained in its Main Brief, has met its burden of proof to support the allocation. However, in meeting that burden, the Company's initial responsibility is to set forth a *prima facie* case. If the party with the burden of proof sets forth a *prima facie* case, then the burden shifts to the opponent. *MacDonald v. Pa. Railroad Co.*, 348 Pa. 558, 36 A.2d 492 (1940). Establishing a *prima facie* case requires either evidence sufficient to make a finding of fact permissible or evidence to create a presumption against an opponent which, if not met, results in an obligatory decision for the proponent. Once a *prima facie* case has been established, if contrary evidence is not presented, there is no requirement that the applicant produce additional evidence in order to sustain its burden of proof. *District of Columbia's Appeal*, 343 Pa. 65, 21 A.2d 883 (1941); *Application of Pennsylvania Power & Light Co.*, Docket Nos. A-110500F0196, *et al.*; 1994 Pa. PUC LEXIS 65 (Oct. 21, 1994). As demonstrated below, Mr. Wolfe offered no substantial evidence to rebut the Company's *prima facie* case.

Mr. Wolfe argues that "some number" of water customers with "lesser financial means" will subsidize "some number" of wastewater customers with greater financial means. (Wolfe M.B., p. 3, ¶4). Mr. Wolfe further asserts that "some number" of low income residential water customers are aged, disabled or infirm. Based on these assertions, Mr. Wolfe argues that no portion of the wastewater increase should be allocated to water customers. Similarly, at page 5 of his Main Brief, Mr. Wolfe asserts that the allocation will harm "the poor." However, Mr.

Wolfe never raised this issue in testimony, and offered no record evidence to support any conclusions regarding the relative income levels of York Water's wastewater and water customers. Fact finding must be based exclusively on the evidence admitted to the record in the proceeding. *Kyu Son Yi v. State Board of Veterinary Medicine*, 960 A.2d 864, 870-871 (Pa. Cmwlth. 2008) (holding that extra-record evidence cannot sustain an adjudication). Mr. Wolfe attempts to argue that disparate incomes will result in unfairness to customers, but he has not provided any record evidence that this is true. However, York Water does have a Low Income Customer Assistance Program to aid low income, payment troubled customers. (York Water St. No. 2, p. 10). If the payment of an additional \$1.02 per year becomes a burden to a low income water customer, they may obtain assistance through the Customer Assistance Program. Mr. Wolfe's argument that the allocation will harm low income customers is not supported by any evidence in this proceeding, and should be rejected.

Mr. Wolfe further argues that the allocation should be rejected because wastewater customers are not subject to a volumetric rate design. (Wolfe M.B., p. 3, ¶5). This argument should be rejected for several reasons. First, wastewater rate design is outside the scope of the issue set for briefing. The issue to be addressed in briefs is whether the allocation of a portion of the wastewater revenue requirement increase to water customers is appropriate. Rate design is an issue separate from revenue allocation. Whether a rate is a flat rate or a volumetric rate is an issue of rate design. Rate design is the process of developing rates to recover a class revenue requirement. *Rate Case Handbook: A Guide to Utility Ratemaking Before the Pennsylvania Public Utility Commission*, James H. Cawley and Norman J. Kennard, pp. 263-269 ("*Rate Case Handbook*"). Thus, assertions about wastewater rate design are irrelevant to the issue reserved for litigation.

Second, the amount of the resulting rate increase to wastewater customers after allocation, which is the complement of the issue of whether the proposed allocation of a portion of the wastewater increase to water customers is in the public interest, would be the same whether a flat rate or volumetric rate was used. Stated differently, under a flat wastewater rate, all wastewater customers are equally apportioned the increase under the settlement, whereas under a volumetric allocation some wastewater customers would pay more and others less depending on metered water usage. In total, the wastewater rates would recover the entire revenue requirement identified in the Settlement under either rate design. Thus, Mr. Wolfe's proposal has no impact on the issue of the overall revenue requirement increase to wastewater customers or the appropriate allocation of a portion of the wastewater increase to water customers. Finally, Mr. Wolfe never raised the proposal of moving wastewater customers to volumetric rates, and thus there is no record evidence to support such a proposal. York Water proposed to retain the existing flat rate design of wastewater rates, rather than adopt a substantial change in rate design so soon after York Water's acquisition of the Asbury Pointe wastewater system. (York Water St. 108, p. 8). No party objected to this proposal during the evidentiary phase of the proceeding. Due process requires that parties have an opportunity to examine a proposal during the evidentiary stages of a proceeding. *Enron Capital & Trade Resources Corporation v. The Peoples Natural Gas Company, et al.*, Docket No. R-00973928C0001, 1998 Pa. PUC LEXIS 199, p. 46 (August 24, 1998). Mr. Wolfe's arguments concerning wastewater rate design should be rejected.

Mr. Wolfe also argues that the notice provided by the Company to its customers to inform them of this proceeding was inadequate and misleading. (Wolfe M.B., p. 3, ¶6). Mr. Wolfe did not raise this issue in his testimony, and thus the Company did not have an

opportunity to submit any responsive evidence or testimony on the issue. Mr. Wolfe did not produce any evidence that York Water's customers did not understand the notice. Moreover, such contention is clearly without merit, as York Water's notice unambiguously stated that the Company proposed to charge a portion of its wastewater increase to water customers. The Company would note that Mr. Wolfe clearly understood the notice and has participated in this proceeding on the issue of the allocation. Mr. Wolfe's contentions regarding adequacy of notice should be rejected, because they are unsupported by any record evidence and are contradicted by his own participation.

At page 4 of his Main Brief, Mr. Wolfe argues that the allocation of a portion of the wastewater increase to water customers is not in the public interest because the Commission failed to hold a public input hearing. (Wolfe M.B., p. 4, ¶7). Again, Mr. Wolfe never raised this issue in his testimony. Further, had Mr. Wolfe participated in the Prehearing Conference, which he had every opportunity to do as an active party to this proceeding, then he could have requested a public input hearing at that time.<sup>1</sup> In addition, Mr. Wolfe's argument that, without a public input hearing, the Commission cannot know whether the allocation of a portion of the wastewater increase to water customers is in the public interest is misguided. Mr. Wolfe has not offered any evidence in this proceeding that a public input hearing would have provided any information on the wastewater allocation not already presented in evidence. Mr. Wolfe's claim that the "public interest" cannot be determined without a public input hearing is without merit and should be rejected.

It is fundamentally unfair for Mr. Wolfe to raise issues for the first time in his Main

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<sup>1</sup> York Water notes that ALJs in rate proceedings regularly make a determination regarding the need for public input hearings, often based in substantial part upon recommendations of the statutory parties (I&E, OCA and OSBA) and the demonstrated degree of consumer interest. In this case, counsel for OCA indicated at the Prehearing Conference that OCA had received no requests for public input hearings. (Tr. 10).

Brief. Due process requires that the Company be given notice and an opportunity to respond on the record. *See Dee-Dee Cab, Inc. v. Pa. P.U.C.*, 817 A.2d 593, 598 (Pa. Cmwlth. 2003), *appeal denied*, 575 Pa. 698, 836 A.2d 123 (2003) (“For matters coming before an administrative agency, procedural due process, however, requires that a party be afforded reasonable notice of the issues raised....so that the party has an opportunity to present any response or objection.”). Consequently, it would be improper and contrary to the requirements of due process for the ALJs to rely upon the extra-record issues presented for the first time in Mr. Wolfe’s Main Brief. Moreover, as explained above, such issues are either unsupported by the record in this case, or are not relevant to the specifically identified scope of these briefs, which is to address only the issue of the allocation of a portion of the wastewater revenue requirement increase to water customers. Mr. Wolfe’s arguments should be rejected.

**B. THE ALLOCATION OF A PORTION OF THE WASTEWATER REVENUE REQUIREMENT INCREASE TO WATER CUSTOMERS IS IN THE PUBLIC INTEREST AS IDENTIFIED BY THE GENERAL ASSEMBLY AND THE COMMISSION.**

Mr. Wolfe contends that the allocation proposed by York Water is a “tax-like transfer of wealth.” (Wolfe M.B., pp. 4-5, ¶8). Based upon such contention, Mr. Wolfe asserts that “public interest” must be defined by the “strictest interpretation.” While he offers no definition, it is evident from Mr. Wolfe’s argument that his interpretation of “public interest” would effectively write out of existence the provisions of Act 11 that authorize an allocation of wastewater revenues to water customers. Such interpretation is unsupported and should be rejected.

Initially, it is to be noted that there is no evidence in the record to support Mr. Wolfe’s assertion, and Mr. Wolfe provides no legal citations to support his claim that the allocation is “tax-like.” His analysis, that serving any customer at less than the cost of service is an improper tax-like transfer of wealth, would impugn many utility rates which have been authorized by the

Commission and upheld by the courts of the Commonwealth of Pennsylvania. Such interpretation would remove from the Commission its discretion in setting or evaluating a utility's rates. *Peoples Natural Gas Co. v. Pa. P.U.C.*, 409 A.2d 446, 456 (Cmwlth Ct. 1979) (“There is no set formula for determining proper ratios among the rates of different customer classes. What is reasonable under the circumstances, the proper difference among rate classes, is an administrative question for the Commission to decide.”). Such interpretation also would effectively eliminate the provisions of Act 11 that authorize such allocation, which would violate the statutory presumption that all provisions of a statute are intended to be effective. 66 Pa. C.S. §§1921(a), 1922(1). The principle of gradualism, which was explained in detail in York Water's Main Brief and which has been embraced by the Commission and the courts, allows customers to pay less than the full cost of service, and to allocate the remainder to other customers, when doing so is in the public interest. (York Water M.B., p. 13). This is not taxation; this is utility ratemaking. Mr. Wolfe's argument that this is a tax-like transfer of wealth is unsupported by the record, is contrary to the ratemaking process, and clearly ignores that the Commission is vested with the authority to make these determinations by the General Assembly. Mr. Wolfe's arguments in Paragraph 8 of his Main Brief should be rejected.

**C. THE SMALL IMPACT UPON WATER CUSTOMERS, RESULTING FROM THE ALLOCATION, COMPARED TO THE LARGE IMPACT UPON WASTEWATER CUSTOMERS WITHOUT THE ALLOCATION, IS A RELEVANT FACTOR IN ASSESSING PUBLIC INTEREST.**

Mr. Wolfe asserts that the relatively insignificant effect of the wastewater allocation upon water customers' rates should not factor into the determination regarding the public interest. (Wolfe M.B., p. 5, ¶9). York Water disagrees. As explained in York Water's Main Brief, one of the considerations in deciding whether to apply principles of gradualism in allocating a rate increase among customer classes is the relative magnitude of an increase among customer

classes. (York Water M.B., p. 13). This includes the percentage increase and the impact such an increase would have on customers. While the Commission encourages utilities to move customer classes to the full cost of service, it may not be appropriate to do so in a particular proceeding. Part of the Commission's analysis of what is in the public interest involves the financial impact of the revenue allocation upon customers.

In this instance, without the allocation, wastewater rates would increase by 77.6% in a single proceeding under the revenue requirement established in the Settlement Petition. This would increase wastewater rates from \$40.00 per month to more than \$70.00 per month per customer. (York Water M.B., p. 13). By allocating a portion of the wastewater revenue requirement increase to water customers, the Company has limited the impact of the rate increase to wastewater customers while still taking a significant step to move them towards the cost of service. Under the Settlement, wastewater rates will increase by 25%, or \$10.00, which is a significant amount and more than double the percentage increase to the water residential class. However, the allocation results in less than a 0.3% additional rate increase for water customers, which still leaves their total percentage increase at approximately half of the increase experienced by wastewater customers. Further, the total bill for the average residential water customer will continue to be significantly lower than the flat rate of \$50.00 per month that will be charged to wastewater customers. (York Water M.B., p. 14).

Mr. Wolfe is wrong to assert that the Commission should not look at the dollars and cents impact of moving a class to full cost of service, and to use that information to inform its determination about whether this allocation is in the public interest. The allocation arrives at just and reasonable rates for both wastewater and water customers. It should be approved.

**D. THE PROPOSED ALLOCATION IS CONSISTENT WITH ACT 11 AND COMMISSION PRACTICE.**

Mr. Wolfe is incorrect when he asserts that this proceeding is not the proper forum to discuss the merits of Title 66. (Wolfe M.B., p. 4, ¶8). That is the very subject that must be discussed in this proceeding. Title 66 provides the Commission with the specific authority to evaluate and approve utility rates, including the allocation proposed in the Settlement Petition. The allocation, as proposed in the Settlement Petition, is consistent with the Commission's principles of ratemaking, and will result in just and reasonable rates. Therefore, the allocation should be approved.

While this is the first litigated case on the additional language added by Act 11 to Section 1311(c) of the Public Utility Code, 66 Pa.C.S. §1311(c), it is important to note that the Company's proposal is consistent with the Commission's ratemaking principles. The Commission and the courts have recognized that the principle of gradualism can have a place in utility ratemaking. *See, e.g., Sharon Steel Corp. v. Pa P.U.C.*, 468 A.2d 860 (Cmwlth Ct. 1983); *Pa P.U.C. v. Philadelphia Suburban Water Company*, Docket No. R-891270 (December 29, 1989). That principle allows the Commission to allocate less than the full cost of service to a specific customer class, and to allocate the remaining portion of that cost of service to other customer classes, in order to avoid sharp increases in rates where it is in the public interest to do so. *Rate Case Handbook*, p. 266. The amendments to Section 1311(c) now provide the Commission with the authority to make a similar allocation between wastewater customers and water customers. The General Assembly has made this allocation a part of normal utility ratemaking. Therefore, the Commission should be instructed by its past practices, including gradualism, and approve the allocation set forth in the Settlement.

**E. THE COMPANY'S ALLOCATION IS PROPERLY LIMITED TO RESIDENTIAL WATER CUSTOMERS IN THIS CASE.**

Mr. Wolfe contends that the allocation is improperly limited to residential customers, and does not include commercial and industrial customers. However, the record is clear that Asbury Pointe wastewater customers are exclusively residential customers. (York Water M.B., p. 12; Exhibit No. FII-3W). Under such circumstances, it is entirely reasonable to limit the allocation to similarly situated, i.e., residential, water customers. During the course of the proceeding, no party, including in particular Mr. Wolfe, raised an objection to the allocation being limited to residential water customers, and OSBA's, OCA's and I&E's witnesses either did not oppose or specifically supported such allocation. (OSBA St. No. 1, p. 3; OCA St. No. 3, pp. 21, 23; I&E St. No. 2, p. 25). Mr. Wolfe has offered no evidence to support an alternative allocation among the water customer classes.<sup>2</sup> Mr. Wolfe's proposal must be rejected.

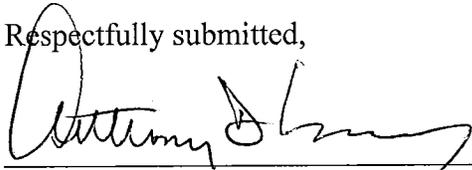
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<sup>2</sup> In his brief, Mr. Wolfe attempts to link his proposal to an argument about environmental impacts, which is another issue not raised in this proceeding. It would be inappropriate for the Commission to make any determination on whether environmental impacts factor into the public interest determination where no party has raised this issue or provided evidence regarding this issue during the evidentiary portion of this proceeding. While the Company has presented evidence that the Asbury Pointe wastewater system was not in compliance with Department of Environmental Protection ("DEP") regulations, that argument is distinctly different from an argument directly addressing environmental impacts, including clean streams and pollution issues. Further, Mr. Wolfe's argument that other customers in other wastewater situations are paying their "fair share" is unsupported by the record. There is no evidence showing that these customers pay a fair share to adequately protect environmental concerns. Mr. Wolfe should not be allowed to rely on an argument that is not supported by the evidence he presented in this case. His arguments in Paragraph 10 should be rejected.

**III. CONCLUSION**

WHEREFORE, for the foregoing reasons, the York Water Company requests that Administrative Law Judges Kandace F. Melillo and Joel H. Cheskis and the Pennsylvania Public Utility Commission deny the Formal Complaint of Larry L. Wolfe, and approve the Settlement Petition filed in this proceeding in its entirety.

Respectfully submitted,



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Post & Schell, P.C.

Date: November 14, 2013

Attorneys for The York Water Company