

COMMONWEALTH OF PENNSYLVANIA



OFFICE OF CONSUMER ADVOCATE

555 Walnut Street, 5th Floor, Forum Place  
Harrisburg, Pennsylvania 17101-1923  
(717) 783-5048  
800-684-6560

FAX (717) 783-7152  
consumer@paoca.org

December 15, 2014

Rosemary Chiavetta, Secretary  
PA Public Utility Commission  
Commonwealth Keystone Bldg.  
400 North Street  
Harrisburg, PA 17120

Re: Tanya J. McCloskey,  
Acting Consumer Advocate  
v.  
Columbia Water Company  
Docket No. C-2014-2452991

Dear Secretary Chiavetta:

Enclosed for filing is the Office of Consumer Advocate's Reply to Columbia Water Company's New Matter, in the above-referenced proceeding.

Copies have been served per the attached Certificate of Service.

Respectfully submitted,

A handwritten signature in cursive script that reads "Christine Maloni Hoover".

Christine Maloni Hoover  
Senior Assistant Consumer Advocate  
PA Attorney I.D. #50026

Enclosure

\*199016

CERTIFICATE OF SERVICE

Re: Tanya J. McCloskey, :  
Acting Consumer Advocate :  
v. : Docket No. C-2014-2452991  
Columbia Water Company :

I hereby certify that I have this day served a true copy of the foregoing document, the Office of Consumer Advocate's Reply to New Matter, 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 15<sup>th</sup> day of December, 2014.

SERVICE BY E-MAIL AND FIRST CLASS MAIL, POSTAGE PREPAID

John R. Evans  
Office of Small Business Advocate  
Suite 202, Commerce Building  
300 N. Second Street  
Harrisburg, PA 17101

Vincent E. Collier, III  
3287 Horizon Drive  
Lancaster, PA 17601

Thomas J. Sniscak  
William E. Lehman  
Hawke McKeon & Sniscak, LLP  
100 North Tenth Street  
Harrisburg, PA 17101

Sandra Shaub  
3282 Horizon Drive  
Lancaster, PA 17601



Christine Maloni Hoover  
Senior Assistant Consumer Advocate  
PA Attorney I.D. #50026  
Email: [CHoover@paoca.org](mailto:CHoover@paoca.org)  
\*199017

Counsel for Office of Consumer Advocate  
555 Walnut Street, 5th Floor, Forum Place  
Harrisburg, PA 17101-1923  
Phone: (717) 783-5048  
Fax: (717) 783-7152

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Public Utility Commission	:	
	:	
v.	:	Docket No. R-2014-2445660
	:	
Columbia Water Company	:	
	:	
Office of Consumer Advocate	:	
	:	
v.	:	Docket No. C-2014-2452991
	:	
Columbia Water Company	:	

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Reply To New Matter

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Pursuant to Section 5.63 of the Pennsylvania Public Utility Commission’s (Commission) regulations regarding Replies to New Matter, 52 Pa. Code § 5.63, the Office of Consumer Advocate (OCA), provides the following Reply to the New Matter of Columbia Water Co. (Columbia or Company), in the above-captioned proceeding. The OCA incorporates herein all paragraphs and allegations in its Complaint filed in this action and avers the following:

1. Admitted in part; denied in part. In response to Columbia’s Answer to Paragraph 7, which it incorporates in Paragraph 1 of its New Matter, it is admitted that the Company filed Tariff Supplement No. 68 requesting that the Commission approve a reconcilable surcharge to recover Pennvest principal and interest payments pursuant to Section 1307(a).

Columbia states in its Answer that it does not request the Commission approve the inclusion of the Pennvest-funded rate base in base rates at the end of the Pennvest surcharge period. Page 5 of the proposed tariff states: “The surcharge is solely designed to begin timely recovery of PENNVEST principal and interest loan obligations(s), and will remain in effect until

included by the Company in general base rates of the Company.” The OCA submits that the proposed tariff is not clear and should be made clear. If the purpose of mentioning base rates is to show that the Pennvest loan will not be included in base rates because it is being recovered through a surcharge, the OCA submits that the tariff should so state.

For the reasons stated in its Formal Complaint, which the OCA incorporates herein as if set forth in full, the OCA denies that Columbia may recover principal and interest payments through a Section 1307(a) surcharge.

2. Admitted in part; denied in part. It is admitted that Columbia filed a tariff supplement and supporting data on September 30, 2014. The OCA is without information or belief whether the filtration plant upgrade is necessary to provide and continue water service that continuously meets DEP requirements.

3. Admitted, upon information and belief.

4. Admitted.

5. Admitted in part, denied in part. This is how a Section 1307 surcharge functions. A surcharge established in a Section 1308 proceeding is recalculated in every base rate case to account for updates to depreciation reserve, depreciation methods, ADIT and granted rate of return. See, e.g., Pa. PUC v. The Columbia Water Co., Docket R-2013-2360798, OCA R.B. at 7; OCA St. 1-S at 44; Attachment A, hereto (tariff of Reynolds Disposal Co.).

6. Admitted, upon information and belief.

7. Admitted, in part. This is an accurate quotation from 35 P.S. § 751.14. Section 29.361, *et seq.* is a policy statement. The Company’s quotation is from an Order adopting a policy statement. By way of further answer, the proposed 1307(a) surcharge is not required by the Pennsylvania Infrastructure Investment Authority Act, 31 P.S. § 751.14 (Pennvest). Appellate

law has addressed the interplay of the Pennvest Act and the Public Utility Code in the context of the application of traditional ratemaking principles. Barasch v. Pa. PUC, 562 A.2d 414 (Pa. Commw. Ct. 1989). Appellate court decisions have established that it is not lawful to file a Pennvest surcharge under Section 1307(a). Masthope Rapids Property Owners Council v. Pa. P.U.C., 135 Pa. Commw. 437, 581 A.2d 994 (1990). The Section 1308 base rate procedures facilitate and accomplish repayment of Pennvest loans.

8. Admitted, in part. The Commission approved a policy statement that allows for water companies to establish a Pennvest surcharge under 66 Pa. C.S. § 1307(a). By way of further answer, to the OCA's information and belief, the Commission has not approved a Pennvest principle and interest surcharge outside of a Section 1308 base rate proceeding. Further, the appellate courts may reverse a Commission decision where the petitioner demonstrates an error of law. Energy Pipeline, Inc. v. Pa. P.U.C., 726 A.2d 1128, 1130 & n.6 (Pa. Commw. 1999) citing W.C. McQuaide, Inc. v. Pa. P.U.C., 137 Pa. Commw. 282, 287, 585 A.2d 1151, 1154 (1991). The appellate courts have established that it is not lawful to file a Pennvest surcharge under Section 1307(a). Masthope Rapids Property Owners Council v. Pa. P.U.C., 135 Pa. Commw. 437, 581 A.2d 994 (1990).

9. Denied. Following Columbia's logic, the Commission has no authority to review a Company's proposed Pennvest 1307(a) surcharge prior to its implementation. This is neither consistent with nor required by the Pennsylvania Infrastructure Investment Authority Act, 31 P.S. § 71.14.

Given the applicable case law, the Company should have filed a Section 1308 rate case in April 2014, which would have allowed new rates to be in place by January 1, 2014.

Further, this issue is moot because the Commission allowed Columbia's proposed Section 1307(a) surcharge to go into effect on January 1, 2015. Pa. P.U.C. v. The Columbia Water Co., R-2014-2445660, Order (Dec. 4, 2014).

The OCA filed a Formal Complaint in this proceeding raising the legal question whether Columbia's proposed rate increase constitutes a general rate increase pursuant to Section 1308. The OCA was denied due process because the Commission acted before hearing the OCA's complaint under Section 1308. 66 Pa. C.S. § 1308.

10. Admitted in part. The OCA received a copy of the proposed tariff and supporting data by mail on October 2, 2014.

11. Admitted in part. The OCA received a copy of the proposed tariff and supporting data by mail on October 2, 2014.

12. Admitted. By way of further answer, first, the OCA's was one of three complaints filed against the proposed surcharge. Second, the OCA filed a timely complaint against a proposed rate. Third, the Commission allowed Columbia's surcharge to go into effect on its proposed effective date, making the timing of timely complaints filed by the OCA and other parties moot. Pa. P.U.C. v. The Columbia Water Co., R-2014-2445660, Order (Dec. 4, 2014).

As noted above, the OCA was denied due process because the Commission acted before hearing the OCA's complaint under Section 1308.

13. Denied. The OCA's position is that the surcharge is unlawful and, therefore, any alleged potential breach of its loan agreement is due to Columbia's failure to seek approval of the surcharge under Section 1308, 66 Pa. C.S. § 1308.

14. Denied. The OCA's position is that the surcharge is not permitted under Section 1307(a). While other facts may or may not exist with regard to the calculation of the surcharge, the lawfulness of the surcharge itself is a matter of fact rather than law.

Columbia's concern that the OCA's complaint will delay implementation of its surcharge is moot because the Commission allowed Columbia's proposed Section 1307(a) surcharge to go into effect on January 1, 2015. Pa. P.U.C. v. The Columbia Water Co., R-2014-2445660, Order (Dec. 4, 2014).

15. Admitted, in part; denied in part. This is an accurate quotation of a phrase from 35 P.S. § 751.14. By way of further answer, the proposed 1307(a) surcharge is not required by the Pennsylvania Infrastructure Investment Authority Act, 31 P.S. § 751.14 (Pennvest). Appellate law has addressed the interplay of the Pennvest Act and the Public Utility Code in the context of the application of traditional ratemaking principles. Barasch v. Pa. PUC, 562 A.2d 414 (Pa. Commw. Ct. 1989). Appellate court decisions have established that it is not lawful to file a Pennvest surcharge under Section 1307(a). Masthope Rapids Property Owners Council v. Pa. P.U.C., 135 Pa. Commw. 437, 581 A.2d 994 (1990).

16. Admitted in part; denied in part. The OCA's reply is the same as its reply to Paragraph 15.

17. Admitted in part; denied in part. Section 751.14 requires the Commission to approve rate increase requests as "necessary and appropriate" and to "establish such expedited practices, procedures and policies as necessary to facilitate and accomplish repayment of the loans." 35 P.S. § 751.14 The proposed 1307(a) surcharge is not required by the Pennvest statute.

18. Admitted in part; denied in part. The Commission's policy statement allows for water companies to establish a Section 1307(a) surcharge subject to Commission approval. 52 Pa.

Code §§ 69.361, 69.363. Appellate court decisions, however, have established that it is not lawful to file a Pennvest surcharge under Section 1307(a). Masthope Rapids Property Owners Council v. Pa. P.U.C., 135 Pa. Commw. 437, 581 A.2d 994 (1990).

19. This paragraph contains legal conclusions and arguments to which no response is required. By way of further answer, the appellate courts may reverse a Commission decision where the petitioner demonstrates an error of law. Energy Pipeline, Inc. v. Pa. P.U.C., 726 A.2d 1128, 1130 & n.6 (Pa. Commw. 1999) citing W.C. McQuaide, Inc. v. Pa. P.U.C., 137 Pa. Commw. 282, 287, 585 A.2d 1151, 1154 (1991).

The Commission's policy statement does not provide for used and useful review prior to the effectiveness of rates, as required by Masthope. Masthope Rapids Property Owners Council v. Pa. P.U.C., 135 Pa. Commw. 437, 581 A.2d 994 (1990) (holding that rate increases required for repayment of Water Act loans had to be thoroughly reviewed prior to implementation, as is done in every base rate case. By contrast, a surcharge involves, at most, a "preliminary and cursory" review); see also Popowsky v. Pa. P.U.C., 869 A.2d 1144 (Pa. Commw. Ct. 2005); see also Popowsky v. Pa. P.U.C., 13 A.3d 583, 591-92 (Pa. Commw. Ct. 2011) (Contrasting the "used and useful" review required for recovery of capital costs, like collection system improvements and principal and interest recovery, to the purely "mathematical review" required for surcharges that recover expenses).

20. This paragraph contains legal conclusions and arguments to which no response is required.

21. Denied. Following Columbia's logic, the Commission has no authority to review a Company's proposed Pennvest 1307(a) surcharge prior to its implementation. This is neither

consistent with nor required by the Pennsylvania Infrastructure Investment Authority Act, 31 P.S. § 751.14.

Further, this issue is moot because the Commission allowed Columbia's proposed Section 1307(a) surcharge to go into effect on January 1, 2015. Pa. P.U.C. v. The Columbia Water Co., R-2014-2445660, Order (Dec. 4, 2014).

22. Denied. The OCA has presented one, consistent position with regard to allowable methods of recovery of Pennvest obligations. Columbia's allegations are without factual support and the OCA is not estopped from pursuing its objections to Columbia's recovery of principal and interest payments on a Pennvest loan through a Section 1307(a) surcharge.

23. Denied. As demonstrated by Columbia's quotation from the OCA's Main Brief in its 2013 base rate case, the OCA's position was that, historically, the Commission has allowed recovery in base rates or in a surcharge. The OCA also recognized that the Commission's policy statement allows surcharge recovery. Columbia Water 2013 Rate Case, OCA Main Brief at 10-11, OCA St. 1 at 38. The important distinction, which Columbia ignores, is that the OCA did not address a Section 1307(a) surcharge. In fact, had the Company more closely reviewed the OCA's Main Brief, Reply Brief and exceptions, it would note that none of these documents mention Section 1307(a). The OCA addressed the distinction between recovery in rate base and recovery in a surcharge. That is entirely consistent with the OCA's position in this proceeding – that the Company must file its surcharge request under Section 1308 of the Public Utility Code and, specifically under Section 1308(d) due to the amount of the proposed increase. 66 Pa. C.S. §§ 1308(a), (d).

The OCA's position in this proceeding is also consistent with the OCA's position in the Emporium and TESI cases referenced by Columbia. Both cases were base rate proceedings. In

TESI, the proposed surcharge was filed under Section 1308. In Emporium, as here, the OCA addressed the options of rate base and surcharge recovery in the context of base rate cases, not Section 1307(a) cases. The OCA referenced the Policy Statement, 52 Pa. Code § 69.363(a) as support for its position that recovery is allowed in rate base or in a surcharge, but the OCA has always held the position that the surcharge must be established in a base rate proceeding. See Pa. P.U.C. v. Pennsylvania-American Water Co., Docket No. R-00984301, Order (Apr. 30, 1998) (noting the OCA's objection to establishing such an automatic adjustment clause to recover Pennvest principal and interest, rather than pursuing such a tariff change via Section 1308 and the OCA's right to challenge any proposal for a non-zero Section 1307(a) Pennvest surcharge.

Columbia's characterization of the OCA's position in its 2013 rate case (and the TESI and Emporium cases) is inaccurate, its allegations are without factual support, and the OCA is not estopped from pursuing its objections to Columbia's recovery of principal and interest payments on a Pennvest loan through a Section 1307(a) surcharge rather than a Section 1308 base rate proceeding.

24. Denied. The OCA's complaint is not barred by laches. Columbia's allegations are without factual support.

25. Denied. First, the OCA filed a timely complaint against a proposed rate. Second, in the interest of narrowing the issues raised in its complaint, the OCA filed its complaint eight days after receiving the Company's responses to TUS data requests. Third, the OCA's was one of three formal complaints filed against the proposed rate.

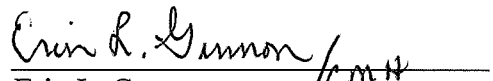
26. Denied. The OCA's position is that the surcharge is unlawful and, therefore, any alleged potential breach of its loan agreement is due to Columbia's failure to seek approval of the surcharge under Section 1308, 66 Pa. C.S. § 1308.

Further, Columbia's claims about potential harms are moot because the Commission allowed Columbia's surcharge to go into effect on its proposed effective date, making the timing of timely complaints filed by the OCA and other parties moot. *Pa. P.U.C. v. The Columbia Water Co.*, R-2014-2445660, Order (Dec. 4, 2014).

27. Denied. The OCA filed a timely complaint against a proposed rate. Columbia's claims about potential harms are moot because the Commission allowed Columbia's surcharge to go into effect on its proposed effective date, making the timing of timely complaints filed by the OCA and other parties moot. *Pa. P.U.C. v. The Columbia Water Co.*, R-2014-2445660, Order (Dec. 4, 2014).

Wherefore, the Office of Consumer Advocate respectfully requests that Columbia Water Company's affirmative defenses of judicial estoppel and laches be denied.

Respectfully submitted,

  
Erin L. Gannon  
Senior Assistant Consumer Advocate  
PA Attorney I.D. # 83487  
egannon@paoca.org

Office of Consumer Advocate  
555 Walnut Street 5th Floor, Forum Place  
Harrisburg, PA 17101-1923  
Phone: (717) 783 5048  
Fax: (717) 783-7152  
Date: December 17, 2014  
197712

Christine Maloni Hoover  
Senior Assistant Consumer Advocate  
PA Attorney I.D. # 50026  
Email: CHoover@paoca.org  
  
Counsel for:  
Tanya J. McCloskey

**Appendix A**  
Excerpt from Reynolds Disposal Co. Tariff

PENNVEST LOAN REPAYMENTAPPLICATION

This schedule applies to all customers regardless of service classification and is applied to all billing, whether based on gallons of usage or flat rate.

RATES

Metered	\$ 1.95 per 1,000 gallon	(I)
Unmetered: Residential and Commercial	\$31.20 per quarter	(I)
Industrial - Per Individual Employee	\$14.35 per quarter	(I)

STATE TAX ADJUSTMENT SURCHARGE

A surcharge of 0.0% will apply to all services rendered on or after January 1, 2008. (D)

The above surcharge will be recomputed, using the same elements prescribed by the Commission.

- (a) Whenever any of the tax rates used in calculation of the surcharge is changed.
- (b) Whenever the utility makes effective any increased or decreased rates.
- (c) And on March 31, 1986, and each year thereafter.

The above recalculation will be submitted to the Commission within 10 days after the occurrence of the event or date which occasions such recomputation, and that if the recomputed surcharge is less than the one in effect, the Utility will, and if the recomputed surcharge is more than the one then in effect, the Utility may submit with such recomputation, a tariff or supplement to reflect such recomputed surcharge the effective date which shall be 10 days after filing.

- (I) Indicates Increase
- (D) Indicates Decrease