

COMMONWEALTH OF PENNSYLVANIA



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April 25, 2016

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

Re: Tanya J. McCloskey, Acting Consumer Advocate
v.
Hidden Valley Utility Services, L.P. –
Water and Wastewater
Docket Nos. C-2014-2447138
C-2014-2447169

Dear Secretary Chiavetta:

Attached for electronic filing is the Objections of the Office of Consumer Advocate to Respondent's Supplemental Brief in the above-referenced proceeding.

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

Respectfully submitted,

/s/ Erin L. Gannon

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Attachment

cc: Honorable Jeffrey A. Watson
Certificate of Service
220026

CERTIFICATE OF SERVICE

Tanya J. McCloskey, Acting Consumer Advocate :
: v. : Docket Nos. C-2014-2447138
: C-2014-2447169
Hidden Valley Utility Services, L.P. – :
Water and Wastewater :

I hereby certify that I have this day served a true copy of the following document, Objections of the Office of Consumer Advocate to Respondent’s Supplemental Brief, 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 25th day of April 2016.

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Tanya J. McCloskey, Acting Consumer Advocate	:	
	:	
v.	:	Docket Nos. C-2014-2447138
	:	C-2014-2447169
Hidden Valley Utility Services, L.P. –	:	
Water and Wastewater	:	

OBJECTIONS OF THE OFFICE OF CONSUMER ADVOCATE
TO RESPONDENT’S SUPPLEMENTAL BRIEF

The OCA submits these objections pursuant to the Interim Order issued in the above-captioned proceeding on April 5, 2015.

I. INTRODUCTION

On December 15, 2015, the Presiding Officer issued an Interim Order Admitting into Evidence Certain Exhibits and Setting Forth Various Briefing Requirements. The Order directed that all briefs shall include:

proposed findings of fact with specific references to the line and page number of the transcript to support each such proposed finding, proposed conclusions of law with the legal citation of the authority to support each such proposal, and proposed ordering paragraphs.

December 15 Order at 9. In Ordering Paragraph 4, the ALJ stated further that “The failure to comply with these provisions may result in the failure to consider the brief filed by the non-compliant party.” On January 20, 2016, the Respondent, Hidden Valley Utility Services (HVUS or the Companies), served its Main Brief. The Respondent served its Reply Brief on February 10, 2016. Neither brief included proposed findings of fact or conclusions of law.

On April 5, 2016, the Presiding Officer issued an Order Requiring Supplemental Brief. The Order required the Respondent, Hidden Valley Utility Services, L.P. to “file a supplemental brief limited to providing proposed findings of fact and conclusions of law with citations to the transcript and exhibits admitted into the record, a thorough legal analysis of the issues raised in the case and proposed ordering paragraphs specifically identifying the relief sought in this proceeding.” The Order also directed any objections to any supplemental briefs to be filed on or before April 25, 2016.

II. OBJECTIONS

On April 17, 2015, HVUS filed Supplemental Brief, in which it proposed 49 findings of fact and 17 conclusions of law. The OCA objects, first, to the Companies’ failure to comply with the Interim Order. The Companies are represented by Counsel, who had notice of the briefing requirement and did not comply. The Companies also failed to object to any Findings of Fact or Conclusions of Law attached to the OCA’s Main Brief, submitted on January 20, 2016.¹ Nor did the Company propose any counter Findings of Facts or Conclusions of Law in its Reply Brief. As stated in the December 15 Order, the Presiding Officer has discretion to disregard the Respondent’s briefs in their entirety. The OCA submits that it is reasonable, therefore, for the ALJ to disregard the proposed findings and conclusions in Respondent’s Supplemental Brief.

To the extent that the ALJ considers the Supplemental Brief, the OCA submits the following additional proposed findings and conclusions, which respond to those proposed by the Respondent.

¹ A copy of the OCA’s Proposed Findings of Fact, Conclusions of Law and Ordering Paragraphs is attached hereto.

Additional Proposed Findings of Fact

1. HVUS operated the water and wastewater systems without Certificates of Public Convenience as a de facto utility until a customer complaint was filed in 2002. See Boyter and Pa. Office of Trial Staff v. Hidden Valley Resort, L.P., Docket Nos. C-20028823 and C-20039320, Order (Nov. 14, 2003).
2. In compliance with the requirements of the settlement of those complaint proceedings, in February 2004, HVUS submitted applications to the Commission seeking approval to provide water and wastewater service in Hidden Valley and to establish initial rates. Joint Application of Hidden Valley Public Utility Services, LLC and Hidden Valley Utility Services, L.P., Docket Nos. A-2008-2039498, A-2008-2039504, A-2008-2039518 and A-2008-2039521, Applications (Feb. 12, 2004).
3. A comprehensive settlement was reached and approved, which (1) established initial rates and (2) required HVUS to make a variety of improvements to its water and wastewater systems. ALJ Exh. 2 (2005 Settlement).
4. The required improvements addressed long-term problems including brown or rust-colored water, low water pressure, and high levels of unaccounted-for water, which existed at the time that the Company's applications were filed. ALJ Exh. 2 (2005 Settlement).
5. The HVUS customer referenced in the Company's proposed Finding of Fact nos. 8-12 continues to experience incidents of brown water even after the main serving his house was replaced in summer 2015 - 3 to 4 incidents prior to the hearing on November 17, 2015. Tr. 257, 262.
6. The Company cites to the testimony of only one customer to support its claim that "customers" drink the water and think HVUS has good water. See HVUS proposed Finding of Fact no. 9. That customer testified that he would not drink the water when it was tea-colored. Tr. 263.
7. More customer witnesses testified that they do not drink the water and do not use it for cooking unless it is boiled first. Tr. at 45, 58, 70-71, 76, 78, 91, 102, 108, 127, 149, 194, 212, 224, 234.
8. Additional customers testified that they do not drink the water unless it is filtered at least once through filters they purchased to treat the water in their homes. Tr. 50-51, 55, 64, 83, 90, 101, 126, 199, 218, 225, 229.
9. The Company cites to the testimony of only one customer to support its claim that "customers, especially full-time residents" use the water for bathing and laundry. See HVUS proposed Finding of Fact no. 10.
10. Other full-time customers testified that they bathe and do laundry with the water because they have no choice. Tr. 74, 77, 111.
11. The Resort, another full-time customer, does laundry away from Hidden Valley; it hauled approximately 143,000 pounds of laundry to another facility to avoid the risk of the laundry being ruined by brown water. Tr. 270-71, 277-78.

12. To avoid stained laundry, part-time customers do not do laundry at Hidden Valley; they transport it to their primary residence. Tr. 45, 72, 83, 91, 129, 199, 222, 234.
13. The Company cites to the testimony of only one customer to support its claim that “Problems with water discoloration can be cleared up by running the water for a few minutes.” See HVUS proposed Finding of Fact no. 12.
14. Other customers testified that they have to regularly run the water for much longer until it becomes clear – 30 minutes, 2 hours, 6 to 8 hours. Tr. 82, 180, 187, 190, 224.
15. The Pennsylvania Safe Drinking Water Act sets a Maximum Contaminate Level (MCL) of 0.3 milligrams per liter (mg/l) for iron and 0.05 mg/l for manganese. OCA St. 2 at 4.
16. The water provided by HVUS exceeds the MCL for iron and manganese. OCA St. 2 at 4.
17. HVUS measures its compliance with the iron and manganese limits at the water source, rather than at the storage tank or in the distribution system; test results of water leaving the storage tank show higher iron and manganese concentrations than tests of water leaving the treatment plant. OCA St. 2 at 7-8.

Additional Proposed Conclusions of Law

1. The water provided by HVUS is unsuitable for all domestic purposes and a violation of Section 1501, even though it is considered safe to drink. Pa. P.U.C. v. Lake Latonka Water Co., 71 Pa. PUC 507, 522 (1989); see Kessler v. Shickshinny Water Co., 64 Pa. PUC 290, 296-97 (1987); Ashbaugh v. Fitz Henry Water Co., 51 Pa. PUC 287, 291 (1977).
2. The evidentiary record, including testimony by thirty-two individuals regarding recurrent brown or rust colored water, establishes a significant failure on the part of HVUS to provide water that is fit for cooking, drinking, washing and bathing. Pa. P.U.C. v. Pennsylvania Gas and Water Co., 61 Pa. PUC 409, 416, 74 PUR4th 238, 245 (1986).
3. HVUS’s failure to properly operate and maintain its collection system and treatment plants constitutes a failure to provide safe, adequate, and reasonable service, for which its customers are paying rates. See Sutter v. Clean Treatment Sewage Co., 2009 Pa. PUC LEXIS 7, *24-27; PG&W 1986, 61 Pa. PUC at 415-16; Pa. P.U.C. v. Pennsylvania Gas and Water Co., 61 Pa. PUC 409, 415-16, 74 PUR4th 238, 245 (1986). A *quid pro quo* relationship exists between the utility and its ratepayers. In return for providing safe and adequate service, the utility is entitled to recover, through rates, these enumerated costs. Pa. P.U.C. v. Pennsylvania Gas and Water Co., 61 Pa. PUC 409, 74 P.U.R.4th 238 (1986).
4. The constitution requires only that rates fixed by the Commission be higher than a confiscatory level. FPC v. Texaco, Inc., 417 U.S. 380, 94 S. Ct. 2315, 41 L. Ed. 2d 141 (1974).
5. A utility’s fulfillment of its service commitment is a sine quo non to constitutional protection under confiscation principles. To hold otherwise would mean that regardless of the level of service provided by a utility, or if the utility provided no service, the PUC would be required to give the utility a reasonable rate of return solely because it exists.

National Utilities, Inc. v. Pa. P.U.C., 709 A.2d 972, 979 (Pa. Commw. 1998). In this case, there is ample evidence of an inadequate level of service that justifies a rate reduction.

6. In Pa. P.U.C. v. Pennsylvania Gas & Water Co., 61 Pa. PUC 409, 74 P.U.R.4th 238 (1986), the Commission denied a utility's request to increase its rates and thereby allowed a lesser return than proposed by the utility. Similarly, in the present case, a rate reduction will allow a lesser return, which is justified by the evidence of inadequate service.

The remainder of HVUS's supplemental proposed findings and conclusions are already addressed in Appendix B to the OCA's Main Brief.

III. CONCLUSION

WHEREFORE, the OCA respectfully requests that these Objections be sustained and that the ALJ to disregard the proposed findings and conclusions in Respondent's Supplemental Brief. To the extent that the ALJ considers the Supplemental Brief, the OCA requests that the ALJ adopt the OCA's additional proposed findings and conclusions.

Respectfully Submitted,


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