COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE REFER TO OUR FILE

ISSUED: August 16, 2007

C-20055453
C-20055473
C-20065849
C-20055455
C-20065850

DOCUMENT FOLDER

KATHLEEN SYLVESTER
17 JEANNE DRIVE
TUNKHANNOCK PA 18657

Kathleen Sylvester et al
Pennsylvania Public Utility Commission – Law Bureau
Office of Consumer Advocate
v.
Washington Park Water Company
Washington Park Sanitary Company

RJP

TO WHOM IT MAY CONCERN:

Enclosed is a copy of the Initial Decision of Administrative Law Judge Ember S. Jandebeur. This decision is being issued and mailed to all parties on the above specified date.

If you do not agree with any part of this decision, you may send written comments (called Exceptions) to the Commission. Specifically, an original and nine (9) copies of your signed exceptions MUST BE FILED WITH THE SECRETARY OF THE COMMISSION 2ND FLOOR, KEYSTONE BUILDING, 400 NORTH STREET, HARRISBURG, PA OR MAILED TO P.O. BOX 3265, HARRISBURG, PA 17105-3265, within **twenty (20) days** of the issuance date of this letter. The signed exceptions will be deemed filed on the date actually received by the Secretary of the Commission or on the date deposited in the mail as shown on U.S. Postal Service Form 3817 certificate of mailing attached to the cover of the original document (52 Pa. Code §1.11(a)) or on the date deposited with an overnight express package delivery service (52 Pa. Code 1.11(a)(2), (b)). If your exceptions are sent by mail, please use the address shown at the top of this letter. A copy of your exceptions must also be served on each party of record. 52 Pa. Code §1.56(b) cannot be used to extend the prescribed period for the filing of exceptions/reply exceptions. A certificate of service shall be attached to the filed exceptions.

If you receive exceptions from other parties, you may submit written replies to those exceptions in the manner described above within **ten (10) days** of the date that the exceptions are due.

Exceptions and reply exceptions shall obey 52 Pa. Code 5.533 and 5.535 particularly the 40-page limit for exceptions and the 25-page limit for replies to exceptions. Exceptions should clearly be labeled as "EXCEPTIONS OF (name of party) - (protestant, complainant, staff, etc.)".

If no exceptions are received within **twenty (20) days**, the decision of the Administrative Law Judge may become final without further Commission action. You will receive written notification if this occurs.

Very truly yours,

James J. McNulty
Secretary

DOCKETED
AUG 17 2007

Encls.
Certified Mail
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MH

See attached list for additional parties of record.

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Kathleen Sylvester	:	C-20055453
William J. Finkler	:	C-20055473
James Pugh	:	C-20065849
Formal Complainants	:	
And	:	
PA PUC Law Bureau,	:	
And	:	
Office of Consumer Advocate	:	
Intervenors	:	
	:	
v.	:	
	:	
Washington Park Water Company	:	

Kathleen Sylvester	:	C-20055455
William J. Finkler	:	C-20055473
James Pugh	:	C-20065850
Formal Complainants	:	
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PA PUC Law Bureau,	:	
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Office of Consumer Advocate	:	
Intervenors	:	
	:	
v.	:	
	:	
Washington Park Sanitary Company	:	

INITIAL DECISION

Before
Ember S. Jandebeur
Administrative Law Judge

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I. HISTORY OF THE PROCEEDINGS

This Initial Decision grants in part and denies in part the relief requested by the three Formal Complainants, PUC Law Bureau, and Office of Consumer Advocate against Washington Park Water Company, Inc. and Washington Park Sanitary Company, Inc. A civil penalty is assessed against Washington Park Water Company, Inc., Washington Park Sanitary Company, Inc., and against Carl Kresge, president and Sandy Kresge, owner.

Formal complaints were filed by numerous individuals against Washington Park Water, Inc. and Washington Park Sanitary, Inc. ("WP Water" and "WP Sanitary" or "Company" or "Companies"). Two state agencies intervened by statutory right. The current owners, Carl and Sandra Kresge, acquired WP Water and WP Sanitary in 1985[1] and have operated the Companies since that time. (Respondent Exhibit E) Carl Kresge is president of the Companies; his wife, Sandra Kresge, is the purported and listed owner. The WP Water system currently serves approximately 150 single-family and apartment customers in a portion of Washington Township, Wyoming County, which is known as Washington Park. The Company holds a Pennsylvania Department of Environmental Protection (DEP) permit for water supply but does not have a valid NPDES (National Pollutant Discharge Elimination System) permit to discharge waste. Both Companies currently hold Public Utility Commission (PUC or Commission) certificates of public convenience.

On October 19, 2005, the following individuals filed complaints: Brian P. DeGroot against WP Water at Docket No. C-20055451, Cory Pries[2] against WP Water at Docket No. C-20055452, Kandi Jo Madill against WP Water at Docket No. C-20055454 and against WP Sanitary at Docket No. C-20055456, and Kathleen Sylvester against WP Water at Docket No. C-20055453 and WP Sanitary at Docket No. C-20055455. On October 20, 2005, Joseph Yakoski filed a complaint against WP Water at Docket No. C-20055460. On October 21, 2005, Leigh Powell filed a complaint against WP Water at Docket No. C-20055468. On October 24,

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[1] Mr. Kresge testified that the Companies were acquired in 1986; however, records indicated the Companies were acquired in 1985.

[2] Mr. Pries mailed a letter to PUC Secretary McNulty withdrawing his complaint on December 8, 2005

2005, William J. Finkler filed a complaint against WP Water at Docket No. C-20055473, and Lisa Higgins filed a complaint against WP Water at Docket No. C-20055472. On November 10, 2005, Fred T. Reibeling filed a complaint against WP Water at Docket No. C-20055556 and against WP Sanitary at Docket No. C-20055557. On January 9, 2006, James Pugh filed a complaint against WP Water at Docket No. C-20065849 and against WP Sanitary at C-20065850.

Complainants Sylvester, Finkler and Pugh filed single formal complaints[3] against WP Water and WP Sanitary that mirrored one another; i.e., the complaints combined the allegations against the two Companies into one formal complaint. Each complaint was docketed under two separate numbers to reflect the fact that the Companies have separate certificates of public convenience. (See Transcript February 27, 2006, at 124-126.)

The Companies filed Answers to the formal complaints.

On November 30, 2005, the PUC Law Bureau (Law Bureau) filed a Notice of Intervention.

On December 20, 2005, a Telephonic Prehearing Conference call was held with numerous Complainants, the Respondent, Law Bureau, and the Office of the Consumer Advocate (OCA) participating.

On January 4, 2006, OCA filed a Notice of Intervention.

On January 4, 2006, a Hearing Notice was mailed to all of the Parties[4] setting forth, among other things, the date, time, and location for the February 27, 2006 hearing regarding their Complaints.

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[3] The PUC formal complaint form has check off boxes for electric, gas water, steam heat, wastewater, motor carrier, and telephone. Complainants Sylvester and Finkler checked off water and wastewater. Complainant Pugh, as will be addressed later in this decision, had no complaint against WP Water.

[4] Mr. Pugh, having filed his complaint on January 9, 2006, did not receive the January 4, 2006 notice for the February 27, 2006 hearing. The matter was not docketed until February 8, 2006. The undersigned

On February 27, 2006, a hearing in the matter was held. Complainants Kathleen Sylvester and William Finkler appeared, as did the Respondent and Intervenors.

On March 10, 2006, the undersigned administrative law judge (ALJ), issued an Initial Decision dismissing the complaints of formal complainants who did not appear at the February 27, 2006 hearing pursuant to 52 Pa. Code § 5.345. That decision was made final without further action by the Commission on May 11, 2006.

Further hearings took place on May 23, 2006, and June 18 and 19, 2006. Complainant Pugh and witnesses for the Companies, the Law Bureau and the OCA testified. At my request, the OCA and the Law Bureau filed joint proposed findings of fact on August 9, 2006. Revised joint proposed findings were filed on August 29, 2006.

Main Briefs were filed on September 15, 2006, by OCA, and on September 20, 2006, by the Law Bureau. A Reply Brief was filed on October 4, 2006, by the Companies. Reply/Surrebuttal Briefs were filed by OCA and the Law Bureau on October 20, 2006.

The record in this matter was reopened by Interim Orders dated February 14 and April 4, 2007. The February Interim Order required additional documents to be submitted by the Companies. The April 4, 2007, Interim Order allowed a brief extension of time at the Companies' request. The record closed by that same Interim Order on April 6, 2007. The matter is ready for disposition.

On June 6, 2007, the Office of Consumer Advocate ("OCA") filed a Petition for a Commission Order Instituting a Proceeding to Order the Acquisition of W.P. Water Company, Inc. and W. P. Sanitary Company, Inc. ("W.P.") pursuant to 66 Pa. C.S. § 529. ("Petition")

ALJ sent him a letter on March 23, 2006 enclosing copies of the (then current) actions. He was allowed to join the proceeding belatedly, and testified at a later hearing.

Concurrently with the mandatory takeover Petition, OCA filed a separate petition for *ex parte* emergency relief under Commission regulations at 52 Pa. Code § 3.2. The petition for emergency order was docketed at P-00072312. Vice Chairman Cawley granted that petition, in part, by Emergency Order dated June 15, 2007. The Emergency Order was ratified at the Public Meeting of June 21, 2007.

On June 22, 2007, OCA filed a Motion to Consolidate the Application of W.P. Sanitary Co., Inc. for Approval of Abandonment of Service at Docket No. A-230550F2000 (the Application) and the Petition for a Commission Order Instituting a Proceeding to Order the Acquisition of W.P. Water Co. Pursuant to 66 Pa. C.S. § 529 at Docket No. P-00072313 (the Petition).

At the July 11, 2007 Public Meeting, the Commission ordered that an investigation be instituted into whether the Commission should order a capable public utility to acquire WP Water and WP Sanitary pursuant to 66 Pa. C.S. § 529. The same order consolidated the investigation at Docket No. I-00070114, and the Application proceeding at Docket No. A-230550F2000. The matter is currently in voluntary mediation.

II. STIPULATED FINDINGS OF FACT

The following findings of fact have been stipulated to by the Companies, OCA and the Law Bureau.

1. Currently, bills do not include the following:

   a. beginning and ending dates of the billing period;

   b. a statement directing the ratepayer to "register any question or complaint about the bill prior to the due date" with the address and telephone number where the ratepayer may initiate the inquiry or complaint with the Companies;

   c. a statement that a rate schedule, an explanation of how to verify the accuracy of a bill and an explanation of the various charges is available for inspection in the local business office of the Companies;

   d. a customer account number, rather than an invoice number. (OCA Statement No. 2 at 2-3, Appendix II.)

2. The Companies agree to modify bills to comply with 52 Pa. Code § 56.15 and 52 Pa. Code § 69.251. (Statement No. K-11 at 3-4; Tr. July 19, 2006, (Kresge) at 108.)

3. The Companies agree to provide status reports to the Commission and the OCA on a monthly basis for the first six months following entry of a Commission Order in this case and on a quarterly basis thereafter, which include a representative sample of actual customer bills for the previous month (with customer names and account numbers deleted) to ensure that the necessary modifications are made to the bill format pursuant to 52 Pa. Code § 65.3. (Tr. July 19, 2006, (Kresge) at 99; OCA Statement No. 2 at 6; Statement No. K-11 at 3-4.)

4. The number given to customers calls the Kresge family's home, which is approximately 46 miles or one hour driving time from the Washington Park system. (Tr. May 23, 2006, (Kresge) at 123, 125.)

5. On October 15 and 16, 2005, the answering machine did not properly record customer calls. (Statement No. K-8 at 4.)

6. The Companies agree to maintain customer complaint records in compliance with 52 Pa. Code § 56.15 and 52 Pa. Code § 69.251. (Tr. July 19, 2006, (Kresge) at 97-98.)

7. The Companies agree to provide status reports to the Commission and the OCA on a monthly basis for the first six months following entry of a Commission Order in this case and on a quarterly basis thereafter, which include a list of all customer complaints and the Company's resolution of each for the previous month/quarter. (Tr. July 19, 2006, (Kresge) at 99; OCA Statement No. 2 at 6.)

8. The Company has elected to provide written notice of the start and end of all boil water advisories via an electronic sign installed on Washington Park Road viewable to drivers entering Washington Park. (Tr. July 19, 2006, (Kresge) at 90.)

9. The Companies agree to provide status reports to the Commission and the OCA on a monthly basis for the first six months following entry of a Commission Order in this case and on a quarterly basis thereafter, which include a copy of all boil water advisories (both declaring and lifting the advisory). (Tr. July 19, 2006, (Kresge) at 99; OCA Statement No. 2 at 6.)

10. Well No. 3, not shown on the system map (Schedule TLF-2), is located on Debbie Drive. (Tr. July 19, 2006, (Kresge) at 187, July 18, 2006, (Fought) at 145.)

11. There are currently approximately 150 customers served by the WP Water system. (OCA Statement No. 1 at 4; Tr., July 18, 2006, (Fought) at 133.)

12. The topography of the Washington Park service area is not level. In general, the higher elevations in the development are to the west and to the north. (Tr. February 27, 2006, (Sylvester) at 65; OCA Statement No. 1 at 4.)

13. Between October 5 and October 15, 2006, well no. 2 was offline for replacement of a motor and pump. (Statement No. K-8 at 3.)

14. On October 15, 2006, well no. 3 shut down due to mechanical failure. (Statement No. K-8 at 3.)

15. Well no. 2 was put back online on October 15, 2006, and it took approximately one day for water pressure to build back up on that line. (Statement No. K-8 at 4.)

16. At least twenty new homes have been added to the system since 1993. (Tr. February 27, 2006, (Sylvester) at 45, 61; Schedule TLF-4 at 5.)

17. New homes are currently being added on Debbie Drive. (Tr., February 27, 2006, (Finkler) at 128.)

18. When the water levels in the wells are very low, sediment and air may enter the distribution system. (Statement K-9 at 3)

19. The Company agrees that additional finished water storage should be constructed to improve pressure on the system. (Schedule TLF-3; OCA Statement No. 1 at 8; Tr. July 19, 2006, (Kresge) at 176-178, 188.)

20. Customers' water usage is not metered and customers are charged flat rates for service. (Statement No. K-10 at 2-3; OCA Statement No. 1 at 4, Tr., July 19, 2006, (Kresge) at 103.)

21. In its Order in Docket No. M-82038[5], entered April 26, 1991, the Commission directed WP Water to provide metered service to its existing 52 customers by March 1995 and further directed the Company to meter all new customers as their services are connected. (Tr. July 19, 2006, (Lash) at 29-30; Exhibit PS-6.)

22. The Company agrees that meters should be installed for all customers. (Schedule TLF-3 at 2; Tr. July 19, 2006, (Kresge) at 187.)

23. A rough cost estimate for constructing a new water well source and finished water storage tank and installing customer water meters in 2006 is $700,000. (OCA Statement No. 1 at 9; Schedules TLF-4, TLF-5.)

24. On July 15, 2006, WP Water's electric utility experienced a power outage and as a result, WP Water customers were without electricity and water. (Tr. February 27, 2006, (Lash) at 24, 26, 55.)

25. The Washington Park system has no back up generation equipment in service. (Tr. July 19, 2006(Kresge) at 142, 186.)

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[5] The correct Docket is No. 820308.

26. The Company agrees that a back-up generator should be installed. (Tr., July 19, 2006, (Kresge) at 186.)

27. The collection sewer mains installed in several streets, including Thomas Drive, are made of vitreous clay with tar joints. (Tr. May 23, 2006, (Kresge) at 84, 104.)

28. The wastewater system is subject to excessively high flows from infiltration/inflow. (OCA Statement No. 1 at 11, Schedule TLF-10; Statement No. K-10 at 3.)

29. WP Sanitary Company (WP Sanitary) has not obtained bids or cost estimates for an infiltration/inflow study. (Tr. July 18, 2006, (Fought) at 158-159; Statement No. K-10 at 2.)

30. Tree roots grow into the joints in the vitreous clay pipe and can block the flow of wastewater. (Tr. May 23, 2006, (Kresge) at 82, 92, 109, 113; (Pugh) at 33-34.) This has been an ongoing problem. (Tr. May 23, 2006, (Kresge) at 96, 100-101, 102, 113.)

31. Waste sludge has not been hauled from the treatment plant since at least 2001. (OCA Statement No. 1 at 13; Tr. July 18, 2006, (Kresge) at 46.)

32. If sludge is not hauled away, it is discharged to the receiving stream. (OCA Statement No. 1 at 13; Tr. July 18, 2006, (Kresge) at 54-58 and (Holmes) at 96, 99.)

33. When the flow into the treatment plant greatly exceeds its capacity, sludge is washed through to the receiving stream. (Tr. July 18, 2006, (Kresge) at 54-58, May 23, 2006, (Holmes) at 181, July 18, 2006, (Holmes) at 96, 99.)

34. Each day, the plant experiences a peak flow rate that is greater than it can effectively treat. (Tr. July 19, 2006, (Kresge) at 180.)

35. Excessive infiltration/inflow deposits solids in the treatment tanks, which displaces volume and reduces capacity for treatment. (Tr. July 18, 2006, (Fought) at 161, May 23, 2006, (Holmes) at 182-183.)

36. A measurement of flow coming into the wastewater treatment plant is required to obtain information for an infiltration/inflow study. (Tr. July 19, 2006, (Fought) at 211-213, 218-220, May 23, 2006, (Holmes) at 181.)

37. Estimating flow into the wastewater treatment plant based on measurements from wells is insufficient due partly to significant infiltration/inflow on the system. (Tr. July 19, 2006, (Fought) at 211-213, 219.)

38. An improperly operated wastewater treatment plant can result in the plant becoming septic. (OCA Statement No. 1 at 13.)

39. Inadequate or improper operation and maintenance accelerate deterioration and necessary replacement of plant. (Tr. July 18, 2006, (Fought) at 160.)

40. Septic plants have a strong hydrogen sulfide smell, similar to rotten eggs. (OCA Statement No. 1 at 13. Tr. July 18, 2006, (Fought) at 146, and May 23, 2006, (Holmes) at 217.)

41. The Company agrees that the sources of excessive infiltration/inflow must be studied and corrected. (OCA Statement No. 1 at 17, Schedule TLF-10 at 3.)

42. The Company agrees that an equalization tank should be installed, with necessary DEP approvals. (OCA Statement No. 1 at 17, Schedule TLF-10 at 3.) The size of the equalization tank should be determined as part of an infiltration/inflow study. (Tr July 18, 2006, (Fought) at 197.)

43. The Company agrees that tertiary treatment should be installed or the plant size should be increased, with necessary DEP approvals. (OCA Statement No. 1 at 17, Schedule TLF-10 at 3; Tr. July 18, 2006, (Kresge) at 31.)

44. The Company agrees that the splitter box (diverter) should be replaced. (OCA Statement No. 1 at 17, Schedule TLF-10 at 3; Tr. July 19, 2006, (Kresge) at 169.)

45. The Company agrees to adjust diffusers to improve roll in the treatment plants. (Tr. July 19, 2006, (Kresge) at 170.)

46. The Company agrees that, during dry weather, the treatment plant tanks should be emptied, cleaned of sediment, repainted and repaired as necessary. (OCA Statement No. 1 at 18.)

47. The Company agrees that a working flow meter should be installed, which measures both treatment plant trains. (OCA Statement No. 1 at 18, Schedule TLF-10 at 3; Tr., July 19, 2006, (Kresge) at 174-175; Statement No. K-9 at 5.)

48. The Companies cannot afford to make necessary improvements to its systems without outside financing. (Statement No. K-9 at 2-3; Schedule TLF-3 at 1; Holmes Exhibit 2; Tr., July 18, 2006, (Kresge) at 19, 28, 43, 59, 61, 76, and July 19, 2006, (Kraus) at 118-119.)

49. WP Water operated at a loss in 2004, 2003, 2002 and 2001 and at a gain of $1,226 in 2005. (Exhibit PS-4; Annual Report of WP Water Company, Inc. for the years ended December 31, 2005, 2004, 2003 and 2002; Tr. July 19, 2006, (Kraus) at 118.)

50. WP Sanitary operated at a loss in 2005, 2004 and 2003 and at a gain of $959 and $1,771 in 2002 and 2001, respectively. (Exhibit PS-7; Annual Report of WP Sanitary Company, Inc. for the years ended December 31, 2005, 2004, 2003 and 2002, at 35; Tr. July 19, 2006, (Kraus) at 118.)

III. FINDINGS OF FACT

51. WP Water and WP Sanitary are regulated utilities that provide water and wastewater services, respectively, to residents of the Washington Park subdivision in Tunkhannock, Pennsylvania.

52. The current owners, Carl and Sandra Kresge, purchased WP Water and WP Sanitary from a Mr. Thomas; they have owned and operated the systems since that time. Statement No. K-9 at 2; Tr. May 23, 2006, (Kresge) at 78.

53. Carl Kresge is president of the Companies; his wife, Sandra Kresge, is the listed owner. 2005 PUC Annual Report of WP Water at 3, 11; 2006 PUC Annual Report of WP Sanitary at 3, 9.

54. WP Water and WP Sanitary are managed out of the Kresges' residence, as is Mr. Kresge's well drilling company and the remains of another Kresge endeavor, the now bankrupt Wilbar Realty, Inc.

55. All WP customers are currently billed $38.25 per month for water and sewage service. It is a flat rate billing; the customers are not metered.

56. Installation of meters and metered rates may encourage WP Water customers to conserve water and thereby help address customers' water pressure problems.

57. It is possible to implement metered rates through a revenue-neutral rate filing. Tr. July 19, 2006, (Kraus) at 115-116.

58. Carl and Sandra Kresge are the primary customer contacts for emergency calls. In their absence, calls are picked up by a family member or a voice message machine. OCA Statement No. 2-S at 2, Appendix III-S; Tr. February 27, 2006, (Sylvester) at 59.

59. Mr. Kresge indicated he kept copies of written complaints in a file, but did not keep oral complaints. Tr. May 23, 2006, (Kresge) at 120.

60. WP Water and WP Sanitary do not maintain written service complaints showing the name and address of the complainant, the date and character of the complaint and the final disposition of the complaint. Tr. May 23, 2006, (Kresge) at 118-120.

WP Water

61. WP Water applied for a PENNVEST loan in 1994 to develop a new water well source, construct a finished water storage tank and install customer water meters. OCA Statement 1 at 8, 9; Schedule TLF-4; Statement No. K-9 at 2, 3; Tr. July 18, 2006, (Kresge) at 73-75.

62. Mr. Kresge was preliminarily notified that his application for PENNVEST loans for WP Water was approved around November 29, 1994. Tr. July 18, 2006, (Kresge) at 73.

63. Mr. Kresge believed his PENNVEST application (WP Water only) was "hampered" or sabotaged by a DEP employee. Tr. July 18, 2006, (Kresge) at 70-71.

64. The loan for WP Water was never finalized; WP Water did not receive PENNVEST funds. Tr. July 18, 2006, (Kresge) at 71-75.

65. On February 21, 1997, PENNVEST notified Mr. Kresge, via certified mail, that due to issues regarding Wilbar Realty, Inc., numerous obligations would have to be met by the Kresges and WP Water before the loan could be consummated. The obligations were not met. Fought at TLF-5, Tr. July 18, 2006, (Kresge) at 75-76.

66. Wilbar Realty, Inc., a company owned by the Kresges, and referred to in the PENNVEST letter cited in the Findings of Fact 66, filed for bankruptcy protection. Tr. July 18, 2006, (Kresge) at 52.

67. How Wilbar Realty, Inc. is faring since the bankruptcy filing was not made part of the record in this proceeding.

68. Complainants Sylvester and Finkler live on opposite sides of Jeanne Drive.

69. Complainant Sylvester has never received any notice prior to a water outage. Tr. February 27, 2006, (Sylvester) at 45.

70. Complainant Sylvester estimated that she lost all water twice per year for periods lasting from one day to three or four days. Tr. February 27, 2006, (Sylvester) at 58.

71. Complainant Sylvester experienced water outages approximately twice per year in the past few years, which last from one day to three or four days. Tr. February 27, 2006, (Sylvester) at 58.

72. Complainant Sylvester never received notice of a boil water advisory by mail or television. She received only one notice by mail regarding the lifting of a boil water advisory, dated October 31, 2005. Tr. February 27, 2006, (Sylvester) at 45-46; Exhibit KS-2.

73. Complainant Finkler did not receive notice of the one to two day outage in summer 2005. Tr. February 27, 2006, (Finkler) at 101.

74. Complainant Finkler did not receive notice of the October 2005 water outage. Tr. February 27, 2006, (Finkler) at 103. Complainant Finkler did receive notice by television that the boil water advisory was lifted, followed by a mailed notice confirming the same. Tr. February 27, 2006, (Finkler) at 103-104.

75. Complainant Finkler experienced outages in summer 2005 and October 2005. Tr. February 27, 2006, (Finkler) at 101-102.

76. WP Water experienced lengthy outages in summer 2005, October 2005 and July 2006. Tr. February 27, 2006, (Sylvester) at 36-37, 73, and (Finkler) at 101-02, 111 and July 19, 2006, (Lash) at 24, 26, 55.

77. During outages, customers must buy water to meet their household needs. Tr. February 27, 2006, (Sylvester) at 37, 85.

78. The WP Water distribution system consists of approximately 23% 2-inch diameter pipe, 24% 3-inch diameter pipe, 15% 4-inch diameter pipe and 38% 6-inch diameter pipe. Tr. July 18, 2006, (Fought) at 142; Schedule TLF-2.

79. Pipe diameter is inversely related to pressure loss due to friction, such that pressure loss is greater in smaller diameter pipe. OCA Statement No. 1 at 8; Tr. July 18, 2006, (Fought) at 174-175.

80. Depending on the flow rate, the friction loss in a 3-inch diameter pipe is approximately 25 to 30 times greater than the friction loss in a 6-inch diameter pipe for the same flow rate. OCA Statement No. 1 at 8.

81. Customers residing on streets with larger diameter mains may still receive water that flowed through smaller diameter pipe. Tr. July 18, 2006, (Fought) at 143-144.

82. Water pressure varies inversely with pipe elevation, such that customers who reside at lower elevations on the system have greater water pressure than customers who reside at higher elevations. OCA Statement No. 1 at 4.

83. Complainants Sylvester and Finkler reside at higher elevations in Washington Park. Tr. February 27, 2006, (Sylvester) at 30 and (Finkler) at 100; Statement No K-8 at 4.

84. WP Water customers, particularly those residing at higher elevations, experience periodic low pressure and water outages. Statement No. K-12; Tr. February 27, 2006, (Sylvester) at 30, 32, 36-39; (Finkler) at 100-102, 106, and July 19, 2006, (Kresge) at 179.

85. Complainants Sylvester and Finkler have experienced severe, recurrent occurrences of low pressure and water outages in the last two to three years. Tr. February 27, 2006, (Sylvester) at 30, 32, 36-39; (Finkler) at 100-102, 106.

86. Due to low water pressure, WP Water customers are frequently unable to take showers, do laundry, wash dishes or flush toilets. Tr. February 27, 2006, (Sylvester) at 33, 54, 58, 63, (Finkler, Sylvester) at 105-06.

87. Complainant Sylvester's water pressure is lower before and after work, on weekends and in the spring and summer. Tr. February 27, 2006, at 32.

88. Complainant Finkler's water pressure is constantly low. Tr. February 27, 2006, at 113.

89. Complainant Sylvester testified that during the summer of 2005, water pressure was the worst she has experienced. Tr. February 27, 2006 at 32.

90. The average daily water demand on the system is approximately 29,000 gallons or 20.14 gallons per minute. OCA Statement No. 1 at 4, Schedule TLF-1, Tables 1w, 3w.

91. The WP Water system's maximum day demand is estimated to be 36.25 gallons per minute. WP Water's three wells produce a safe yield of 31 gallons per minute. Accordingly, the system's total source capacity is 5.25 gallons per minute less than the estimated maximum day demand. OCA Statement No. 1 at 5, Schedule TLF-1, Table 2w, 3w.

92. With the largest producing well out of service, the system's safe yield is 19 gallons per minute or 1.14 gallons per minute less than its average daily water demand. OCA Statement No. 1 at 4, Schedule TLF-1, Tables 2w, 3w.

93. WP Water does not have sufficient water sources to consistently satisfy its customers' needs. OCA Statement No. 1 at 5; Tr. July 18, 2006, (Kresge) at 74-75, and July 19, 2006, (Kresge) at 176.

94. The severity of low-pressure problems has increased over the years. Tr. February 27, 2006, (Sylvester) at 58, 61.

95. Complainant Finkler's low water pressure is a daily problem. Tr. February 27, 2006, at 106, 111.

96. No party provided test results for water psi. Complainants Finkler and Sylvester have been completely without water numerous times, sometimes for days, establishing that on those occasions, WP Water was not providing water at 25 psi. Mr. Kresge does not dispute this. Tr. July 19, 2006 at 179.

97. The WP Water system should have at least 7,380 gallons to 15,660 gallons of finished water storage. WP Water has only one 3,000 gallon tank. OCA St. 1 at 6.

98. A 3,000 gallon hydro-pneumatic tank actually contains less than 3,000 gallons of water because air takes up part of the volume. OCA St. 1 at 6.

99. Additional finished water storage would help address pressure issues caused by the insufficient well capacity. OCA Statement No. 1 at 8, Schedule TLF-3, Tr. July 18, 2006, (Fought) at 143.

100. For six months or more, WP Water had a strong chlorine smell and a mossy smell. Tr. February 27, 2006 (Sylvester) at 40-42, (Finkler) at 106, 117-18; May 23, 2006, (Pugh) at 48.

101. Following the October 2005 outage, water was cloudy. (Tr. February 27, 2006, (Finkler) at 118.) At times there is "stuff floating in" the water. Tr. February 27, 2006, (Sylvester) at 40.

102. At times, sediment is left in the sink after the water drains out. Tr., February 27, 2006, (Finkler) at 105, 118.

103. Both Complainants Sylvester and Finkler filter their water. Tr. February 27, 2006, (Sylvester) at 76-77, (Finkler) at 111.

104. Complainant Finkler provides bottled water for his daughter to drink and brush her teeth. Tr. February 27, 2006, at 111.

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105. Complainant Pugh lives on Thomas Drive in the Washington Park subdivision. Tr. May 23, 2007, (Pugh) at 32.

106. In December 2005, Mrs. Pugh called the Kresges, spoke to Mr. Kresge's daughter, and told her that she (Mrs. Pugh) had an emergency because wastewater levels were rising in the manhole. Mrs. Pugh did not receive any response to her call. Tr. May 23, 2006, (Mrs. Pugh) at 71.

107. Mr. Kresge had allowed Mr. and Mrs. Pugh to call Roto-Rooter on their own behalf as well as on the behalf of their (Pugh's) neighbors prior to 2000. The Kresges and Pughs had a falling out over a tree in the Pughs' yard; after that, the Pughs no longer called Roto-Rooter directly. Tr. May 23, 2007, (Mrs. Pugh) at 74.

108. A tree on the Pugh's property is within 50 feet of the centerline of the Washington Township Road named Thomas Drive. Tr. May 23, 2006, (Kresge) at 88, 93.

109. Tree roots in the WP Sanitary mains can cause wastewater to back up into customers' service laterals. Tr. May 23, 2006, (Kresge) at 81, 113.

110. Complainant Pugh and Mr. Kresge have had numerous conversations and disagreements concerning a tree in Complainant Pugh's yard and whether the tree's roots interfere with WP Sanitary's underground lines. Tr. May 23, 2006, (Pugh) at 9, 59, 103-104.

111. Complainant Pugh maintains his tree is not within any right-of-way. (Tr. May 23, 2007, at 20.) Complainant Pugh thinks that his tree's roots are "more than likely" within a right-of-way. Complainant Pugh's testimony regarding this tree is contradictory. Tr. May 23, 2007, at 57.

112. Mr. Kresge told Complainant Pugh that the October 2005 flooding was caused by Complainant Pugh's tree roots. Tr. May 23, 2007, (Pugh) at 39.

113. Mr. Kresge spoke to Washington Township about tree roots infiltrating the WP Sanitary system. Tr. May 23, 2006, at 86.

114. Mr. Kresge asked Washington Township to remove trees within its (the Township's) right-of-way. Tr. May 23, 2006, at 112.

115. Mr. Kresge believes the Pugh tree and other trees on Thomas Drive are within the Washington Township right-of-way. According to Mr. Kresge, the Township denies the trees are in the Township's right-of-way. Tr. May 23, 2006, at 86.

116. Mr. Kresge has recommended to Mr. Pugh that the Pughs have the controversial tree removed. Tr. May 23, 2006, at 98.

117. In 2001, when Mr. Kresge examined and performed work on his sanitary lines crossing Thomas Drive, he found roots that he believed were from Mr. Pugh's tree in the sanitary lines. Tr. May 23, 2006, at 104.

118. Most people have roots in their lateral lines. Tr. May 23, 2006, at 105

119. Mr. Kresge understands and agrees that he must pay to have tree roots removed from the WP Sanitary lines. Tr. May 23, 2006, at 111.

120. Approximately every other year WP Sanitary must clear roots from its lines. Tr. May 23, 2006, at 113.

121. No Party followed through to determine ownership of the trees that are believed to have caused WP Sanitary infiltration problems.

122. Tar joints are conducive to infiltration and inflow. (Tr. May 23, 2006, (Kresge) at 84, and July 18, 2006,(Kresge) at 36-37.) For this reason, clay pipe with tar joints are no longer commonly installed in collection systems. Instead, "O-ring" joints, with a tighter seal, have been commonly used for sanitary sewers since the late 1950's. Tr. July 18, 2006, (Fought) at 165-166, 195, 207, (Holmes) at 98-99.

123. WP Sanitary has the authority to direct customers to disconnect any sump pumps and footer drains from the system, which if present, would contribute to inflow. OCA St. 1 at 11; WP Sanitary Tariff, 2nd revised p.5; Tr. July 19, 2006, (Fought) at 144-45.

124. Complainant Pugh has a manhole cover near his yard. He stated that two days before, and one day before, the May 23, 2006 hearing, there was sewage sludge around the outside of the manhole cover. He did not provide any other dates of this occurring, nor did he provide any pictures or corroborating statements from other witnesses. Tr. May 23, 2006 at 23.

125. Complainant Pugh has seen sewage and toilet paper on the outside of the manhole cover since the Kresges have owned WP Sanitary. Tr. May 23, 2006, at 44, 65.

126. Complainant Pugh takes the cover off the manhole in his yard and looks inside it. Tr. May 23, 2007, at 24, 44-45, 62.

127. The Pughs check the level of sewage in the manhole because when it rises, they telephone the Kresges to tell them (the Kresges) that there might be a blockage. Tr. May 23, 2006, at 63-64.

128. After the Pughs called the Kresges to report high levels in the manhole, they (the Pughs) would see Roto-Rooter out working on the lines. Tr. May 23, 2006, at 69.

129. Excessive infiltration and inflow can contribute to wastewater backing up into customers' service laterals. OCA Statement No.1 at 15.

130. Control of infiltration and inflow is part of the normal operation of any wastewater system. Tr. July 18, 2006, at 166-68.

131. WP Sanitary has "manholes that need to be repaired." Tr. May 23, 2006, (Kresge) at 82.

132. Customers located upstream of blockages in the WP Sanitary mains are subject to flooding if check-valves are not installed and working properly. Tr. May 23, 2006, (Kresge) at 117, and July 19, 2006, (Fought) at 220-221.

133. Rising wastewater levels in the manhole near Complainant Pugh's home indicated that there was a blockage in the WP Sanitary lines that caused the wastewater to back up. Tr. May 23, 2006, (Kresge) at 100, 102.

134. On October 13, 2005, Complainant Pugh's basement was flooded with wastewater. Tr. May 23, 2006, (Pugh) at 26-28.

135. Complainant Pugh's basement flood amounted to 2-3" of wastewater. Tr. May 23, 2006, (Pugh) at 41.

136. Complainant Pugh's basement is 3 or 4 times larger than the Commission's Scranton hearing room, which is about 16x33'. Tr. May 23, 2006, at 42.

137. Complainant Pugh's wife telephoned WP Sanitary after the October 13, 2005, wastewater flood in their basement. On October 14, 2005, Mr. Kresge went to the Pughs' home. Tr. May 23, 2006, (Pugh) at 39, 58.

138. Roto-Rooter responded to the October 13, 2005 wastewater flood in the Pughs' basement. Tr. May 23, 2006, (Pugh) at 59.

139. After the October 13, 2005 flood, Mr. Kresge had Roto-Rooter cut tree roots from one end of Thomas Drive to the other. Three manholes were accessed and cleared of tree roots. Tr. May 23, 2006, (Kresge) at 99.

140. Complainant Pugh indicated that the quantity of sewage in his basement was more than the quantity of waste produced by his home alone. Tr. May 23, 2006, (Pugh) at 16, 41-42; Exh. P-3 A-D.

141. Complainant Pugh has a check valve on the service lateral entering his home. The check valve is part of what Mr. Pugh calls a grinder pump and was installed two days after his basement flooded in October 2005. Tr. May 23, 2006, (Pugh) at 51-52, 61, (Kresge) at 94.

142. There was no rainfall in the days prior to Complainant Pugh's basement being flooded. Tr. May 23, 2006, (Pugh) at 28.

143. Complainant Pugh and his family checked levels in the manhole near his property on a frequent basis. When levels rise, they move everything out of their basement because they fear that sewage will back up into their home. Tr. May 23, 2006, at 44-46, 51.

144. In 2005, Mrs. Pugh called Mr. Kresge numerous times to warn him that the sewage levels in the manhole were rising. Tr. May 23, 2006, at 71.

145. Each time Mr. or Mrs. Pugh called, Mr. Kresge or his wife called Roto-Rooter and had blockages in the collection mains cleared. Tr. May 23, 2006, (Kresge) at 80-81, 96, 104, 111,117, (Pugh) at 64, 66, 69, (Pugh) at 70-71, 73.

146. No party subpoenaed or otherwise provided Roto-Rooter as a witness to appear and provide evidence on the number of times or the reasons why Roto-Rooter serviced the Washington Park subdivision.

147. Complainant Pugh's testimony was difficult to follow. He indicated that due to his medication he becomes confused. Tr. May 23, 2006, at 6, 13, 33-35, 77.

148. Only Complainant Pugh's testimony that appeared cogent and reliable is used in this Initial Decision. (See also FoF 154.)

149. When the mixed liquor in the WP Sanitary aeration tanks do not have a proper roll, it indicates improper aeration. OCA Statement No. 1 at 12.

150. James Holmes, a witness for OCA, has a Bachelor of Science degree in Agriculture and a Master of Science degree in Microbiology. Mr. Holmes has worked for the Department of Environmental Protection (DEP) in the Water Quality Bureau (WQB) since 1980 and, specifically, in the WQB's Operations Section since 1985. As a field inspector and a supervisor, he has monitored WP Sanitary (not WP Water) since 1986. Tr. May 23, 2006, (Holmes) at 127-28.

151. Mr. Holmes was subpoenaed at the request of the OCA and testified on behalf of OCA.

152. From May 23, 2005 to May 23, 2006, Mr. Holmes inspected WP Sanitary over 15 times. That level of frequency is not typical. Tr. May 23, 2006, at 129.

153. Mr. Holmes inspected WP Sanitary from outside its fence. Tr. May 23, 2006, at 129.

154. From outside the WP Sanitary fence, Mr. Holmes can perform the following inspection tasks: observe the aeration tanks and clarifiers and take a sample of the discharged effluent. Tr. May 23, 2006, at 130.

155. During Mr. Holmes' September 8, 2005 inspection of WP Sanitary, he noticed a "very severe" sewage/septic odor. Tr. May 23, 2006, at 133.

156. During Mr. Holmes' September 13, 2005 inspection of WP Sanitary, he noticed a "severe strong septic odor." Tr. May 23, 2006, at 134.

157. The malodor was detected at the plant itself and at the receiving stream. Tr. May 23, 2006, at 139, 175.

158. Mr. Kresge blamed the September 2005 malodors on the season; i.e., it "is a constant summer problem. The stream goes dry, the stream begins to get an odor." "This has been a terrible, long, on-running thing." Tr. July 18, 2006, (Kresge) at 27.

159. The malodor Mr. Holmes detected at WP Sanitary's treatment plant was worse than the odors he has detected at other treatment plants. Mr. Holmes did not conduct any air pollution analyses. Tr. May 23, 2006, (Holmes) at 190-191.

160. Even a properly run wastewater treatment plant has odors, but the odors would not be categorized as a "terrible, long, on-running thing" nor as "severe malodors." Tr. July 18, 2006, (Kresge) at 27, (Fought) at TLF-7 Holmes investigation 08/22/2005.

161. No treatment was being provided at the treatment plant on September 8, 2005, and September 13, 2005. Tr. May 23, 2006, (Holmes) at 175.

162. Mr. Holmes' September 8, 2005 inspection resulted in a DEP Compliance Order being issued to Carl Kresge. Tr. May 23, 2006, (Holmes) at 135, Holmes Exh. 1.

163. On September 8, 2005, the splitter box was directing flow to one treatment train, providing unequal distribution. Overload on one side or the other can cause malfunction. Tr. May 23, 2006, (Holmes) at 184-185.

164. The Kresges provided a written response to the DEP Compliance Order, consisting of denials, a "limited funds" excuse, and a request for help. Holmes Exh. 2.

165. On October 19, 2005, Mr. Holmes provided a written response to the Kresges' letter informing the Kresges that proper operation of WP Sanitary within its [NPDES] permit was clearly the responsibility of the Kresges. Holmes Exh. 3.

166. At the time of the hearing in 2006, WP Sanitary had not complied with the DEP Compliance Order issued September 8, 2005. Tr. May 23, 2006, (Holmes) at 137-138.

167. Mr. Holmes concluded that the WP Sanitary plant was in disrepair, provided no treatment to its effluent, and described the stream to which the plant discharged as "atrocious" and stated he had never seen "a stream worse in 27 years." Tr. May 23, 2006, at 137.

168. Mr. Holmes, having worked for DEP since 1980, and as a supervisor since 1996, and as a water quality specialist, understands proper sewage treatment plant operations well.

169. Based upon Mr. Holmes' sworn testimony and exhibits, WP Sanitary is neither operated nor maintained properly.

170. On April 18, 2006, 34 days prior to the May 23, 2006 hearing, DEP employees (Holmes and L. Narocki) conducted an inspection of WP Sanitary and took a series of photographs. Those photographs comprise Holmes Exhs. 4-1 through 4-21. Tr. May 23, 2006, (Holmes) at 139, 152.

171. A splitter box receives all raw sewage from the community connected to it. Tr. July 18, 2006, at 7.

172. Holmes Exh. 4-1 shows a splitter box with an accumulation of solids and paper.

173. When Mr. Kresge bought WP Sanitary, there was only one splitter box; he added another in 1992 as the customer base increased. Tr. July 18, 2006, at 7.

174. Mr. Kresge admits there are overflows of WP Sanitary's splitter box. Tr. July 18, 2006, at 10.

175. Holmes Exh. 4-2 showed the splitter box with paper debris outside the box indicating at one point the splitter box had overflowed or that a WP Sanitary employee put the debris there and did not clean it up. Tr. July 18, 2006, at 10, 13-14.

176. Mr. Kresge did not want flow going to "one train." When the splitter box screens are clean, the flow runs evenly to both trains. Tr. July 18, 2006, at 15.

177 It is not disputed that flow from the community to the sewage plant should flow equally between WP Sanitary's two treatment trains. Tr. July 18, 2006, (Kresge) at 15, and May 23, 2006, (Holmes) at 175, 185.

178. WP Sanitary has problems with toweling being clogged in the splitter boxes. Tr. July 18, 2006, (Kresge) at 16.

179. Toweling came apart in pieces, went over the weir, through the clarifier, and into the receiving stream. Tr. July 18, 2006, (Kresge) at 34.

180. The WP Sanitary employee, "Mike," was scheduled to clean the splitter boxes daily. No proof was offered that Mike consistently met the cleaning schedule. Tr. July 18, 2006, (Kresge) at 17.

181. Solids flowing through to the contact tank can occur twice daily. Tr. July 18, 2006, (Kresge) at 27.

182. When high usage occurred daily, the solid material passed through WP Sanitary's process directly into the receiving stream. Tr. July 18, 2006, (Kresge) at 28.

183. Overflow occurred when the pipes took in more water than they could handle, such as occurred during a rain, or something would block the pipes. Tr. July 18, 2006, (Kresge) at 45.

184. Mr. Kresge blames DEP for not helping him remodel his plant. Tr. July 18, 2006, at 29.

185. DEP does not provide engineering consulting or remodeling for private parties. Tr. July 18, 2006, (Holmes) at 93.

186. According to Mr. Kresge, WP Sanitary needs tertiary treatment in the form of a sand filter. Tr. July 18, 2006, (Kresge) at 30.

187. Mr. Kresge did not investigate the cost of tertiary treatment. Tr. July 18, 2006, (Kresge) at 30.

188. Mr. Holmes' opinion is that tertiary treatment is "more treatment than actually is needed at this plant." If WP Sanitary was operated properly, it would meet permit limits without tertiary treatment. Tr. July 18, 2006, (Holmes) at 91.

189. Mr. Kresge testified that a device that would "move and let water flow through and the refuse go through, let the toweling would (*sic*) come up and drop off into a container that you would haul away" would alleviate the problems with the clogging splitter boxes. Tr. July 18, 2006, at 19.

190. WP Sanitary had and continues to use equipment that cannot effectively handle the waste coming into WP Sanitary's two treatment trains.

191. Holmes Exh. 4-3 shows a chlorinator.

192. Holmes Exh. 4-4 shows contact tanks.

193. WP Sanitary's chlorine contact tank gets "loaded" with green slime because of toweling going past the splitter boxes or the comminuter. Tr. July 18, 2006, at 10, 20.

194. Mr. Kresge replaced the comminuter with screens because the comminuter ground up towels and allowed the towel fragments to pass into the treatment process. Tr. July 18, 2006, at 10, 22.

195. The "fluffy" material [toweling or toweling fragments] will not settle out. Tr. July 18, 2006 at 20.

196. A quantity of "fluffy" material ended up in the chlorine tanks that should never have passed into the chlorine tanks. Tr. July 18, 2006 at 20, 22.

197. There are solids in WP Sanitary's chlorine contact tank. Tr. July 18, 2006 at 25.

198. Mr. Kresge blamed the solids in the WP Sanitary system on toweling that he alleged the WP Sanitary customers are flushing. It is not toilet paper. Tr. July 18, 2006, at 25.

199. WP Sanitary is overloaded on a daily basis. Tr. July 18, 2006 at 26.

200. Mr. Kresge blames the WP Sanitary overload on DEP. Tr. July 18, 2006, at 26.

201. DEP is neither the owner nor operator of WP Sanitary, and therefore, not responsible for the mismanagement of WP Sanitary.

202. More homes are being built in Washington Township and the new homes hook into WP Sanitary. WP Sanitary "can't handle it." Tr. July 18, 2006, at 26.

203. Holmes Exh. 4-5 showed WP Sanitary's discharge pipe at the receiving stream. Mr. Holmes testified that the sunshine area in the picture shows the deposition of solids.

204. Holmes Exh. 4-6 shows clear water.

205. Holmes Exh. 4-7 shows a reflection of WP Sanitary's fence, and the discharge pipe at the top of the picture. Mr. Holmes testified that the picture showed cloudy water to the left indicating a buildup of solids in the stream. Tr. May 23, 2006, at 145.

206. Holmes Exh. 4-8 showed a brownish buildup of solids in the receiving stream. "Very disgusting" was Mr. Holmes' testimony concerning the buildup. Holmes Exh. 4-8 shows a line of solids, i.e., human feces, or sewage sludge on the rocks. Tr. May 23, 2006, (Holmes) at 145-146.

207. Holmes Exh 4-9 is a depiction of the receiving stream downstream from WP Sanitary's discharge pipe. The picture showed the solids being mixed into the receiving stream. Tr. May 23, 2006, at 145.

208. Both Holmes Exh. 4-8 and 4-9 are photographs downstream from the WP Sanitary discharge pipe. Tr. May 23, 2006, at 145.

209. Holmes Exh. 4-10 shows human feces or solids in the receiving stream. Tr. May 23, 2006, at 146-147.

210. Holmes Exh. 4-11 shows solids in the receiving stream. The photograph also shows a stringy product known as *Sphaerotilus* that grows in sewage sludge. Mr. Holmes called *Sphaerotilus* a fungus, which is incorrect; *Sphaerotilus* is a bacteria. The tubular appearance of *Sphaerotilus* is a distinctive characteristic. Tr. May 23, 2006, at 147, 148.

211. Holmes Exh. 4-12 shows the WP Sanitary discharge pipe. At the left corner of the photograph are solids collecting in the receiving stream. Tr. May 23, 2006, at 148.

212. Holmes Exh. 4-13 shows the discharge pipe at the top of the picture, and solids in the receiving stream. Tr. May 23, 2006, at 148.

213. Holmes Exh. 4-14 is a close picture of WP Sanitary wastewater going into the contact tank. According to Mr. Holmes, the flow visible in this picture should be "basically clear." The WP Sanitary wastewater is not clear. Tr. May 23, 2006, at 149.

214. Holmes Exh. 4-15 showed two pipes with unequal flow. The pipe in the top left of the photograph has noticeably more discharge than the pipe on the right of the photograph, evidencing unequal loading. Transcript (May 23, 2006) Holmes at 149-150.

215. Holmes Exh. 4-16 evidenced unequal aeration in the tank in the fore of the photograph. Unequal aeration causes improper aeration of the wastewater. Tr. May 23, 2006, at 150.

216. Holmes Exh. 4-17 shows the WP Sanitary splitter box and clear evidence of overflow and spillage of paper products.

217. Holmes Exh. 4-18 is the same splitter box as in Exh. 4-17, but showed a different side and additional overflow of debris and paper products.

218. Holmes Exh. 4.17 and 4.19 show improper operation of WP Sanitary.

219. Holmes Exh. 4-19 is a photograph downstream of the plant. The stream is a mixed shade of gray across the width of the stream. Tr. May 23, 2006, at 151.

220. Holmes Exh. 4-20 was taken ¼ mile downstream of WP Sanitary. It showed a deposition of solids, that the stream was grey at least 1000 feet downstream of the treatment plant and that the stream continued to be affected. Tr. May 23, 2006, at 151.

221. Holmes Exh. 4-21 was taken on the other side of the road from where Exh. 4-20 was taken and showed water flowing from the pipe creating a hole. The water in the hole is a murky grey from sewage. Tr. May 23, 2006, at 152.

222. Mr. Holmes instructed Len Narocki of his (Holmes') staff to conduct a site visit at WP Sanitary on May 4, 2006, 19 days before the hearing in this matter. That site visit resulted in a series of photographs marked as Holmes Exhs. 5-1 through 5-19. Tr. May 23, 2006, at 152-154.

223. Holmes Exh. 5-1 is a picture of the receiving stream, above the WP Sanitary discharge pipe, with an object in it. The stream above WP Sanitary's discharge is clear Mr. Holmes did not know who placed the object, or why it was there. Tr. May 23, 2006, at 154-155.

224. Holmes Exh. 5-6 is significant in that at the top right of the photograph, before reaching the WP Sanitary discharge pipe, the stream is clear; at the discharge pipe the stream becomes murky, and at the lower left corner of the photograph one can see sewage solids building up on the rocks in the stream. Tr. May 23, 2006, at 157.

225. Holmes Exh. 5-7 through 5-10 each evidence collection of sewage solids in the receiving stream downstream of WP Sanitary's discharge. Exh. 5-10 shows a significant quantity of sludge collecting on the floor of the receiving stream. Tr. May 23, 2006, at 158.

226. Holmes Exh. 5-11 is a shot taken looking upstream at clear water and in the fore of the photograph, one sees a pipe. WP Sanitary's actual discharge pipe is behind the pictured pipe and therefore not visible; below the pictured pipe, one can see the stream is cloudy. Tr. May 23, 2006, at 158.

227. Holmes Exh. 5-15 through 5-19 are direct photographs of built up sewage solids in the receiving stream. Tr. May 23, 2006, at 159-160.

228. An NPDES permitted receiving stream should not show any build up of solids. Tr. May 23, 2006, at 210.

229. The Holmes and Narocki photographs (Holmes Exhs. 4-1 through 4-21 and Holmes Exhs. 5-1 through 5-19) show that the WP Sanitary customers are not getting the service for which they pay a monthly service fee. Tr. May 23, 2006. at 172.

230. The water "expelled" from WP Sanitary's treatment plant goes into "somebody's water supply." Tr. May 23, 2006, at 185-186.

231. The unequally distributed load to the splitter box shows that the WP Sanitary customers do not get adequate service. Tr. May 23, 2006, at 185.

232. The WP Sanitary treatment plant is not operated properly. Tr. May 23, 2006, (Holmes) at 174.

233. WP Sanitary's discharge is not properly treated. Tr. May 23, 2006, (Holmes) at 210.

234. The stream to which WP Sanitary discharges is a perennial stream that gets low in the summer but still flows; it is not stagnant. Tr. May 23, 2006, at 193, 198, Tr. July 18, 2006, at 84.

235. It is not disputed that rocks can contribute to the collection of solids. Tr. May 23, 2006, at 199.

236. Mr. Kresge says he can fix the WP Sanitary plant if someone else provides the money. Tr. July 18, 2006, (Kresge) at 43.

237. A properly run wastewater treatment plant produces sludge that must be hauled away and disposed of properly.

238. Mr. Kresge testified that WP Sanitary is "finally getting some sludge." Tr. July 18, 2006, at 46.

239. The last time WP Sanitary hauled sludge away was in 2001. Tr. July 18, 2006, at 46.

240. WP Sanitary gets "gully washers" that wash WP Sanitary's collected sludge out to the receiving stream. Mr. Kresge estimated "99 percent of my sludge is somewhere down in Harrisburg." Tr. July 18, 2006, (Kresge) at 54, 57-58.

241. Sludge builds up daily; if WP Sanitary is not "wasting sludge" (i.e., having it hauled away and disposed of properly), the sludge goes into the receiving stream. Tr. July 18, 2006, at 96.

242. WP Sanitary discharges to "an unnamed tributary to the Susquehanna River" (Tr. July 18, 2006, (Holmes) at 94). Therefore, Mr. Kresge's assessment that "his" sludge is in Harrisburg is a probable observation.

243. WP Sanitary's certified operator is Joseph Bontrager. Tr. July 18, 2006, at 61.

244. Joseph Bontrager oversees operation of WP Sanitary wastewater treatment plant. Tr. July 18, 2006, at 61

245. Joseph Bontrager is not based at WP Sanitary; he lives in Clarks Summit. He may be at WP Sanitary on weekends for about three (3) hours; if needed he may be at the plant during the week. Tr. July 18, 2006, at 61.

246. During his site inspection on March 8, 2006, Mr. Fought, an expert witness for the OCA, noted an improper roll in the old and new treatment plant aeration tanks. OCA Statement No. 1 at 12.

247. During his site inspection on July 17, 2006, Mr. Fought noted an improper roll in the old treatment plant aeration tank. Tr. July 18, 2006, at 147-148.

248. During Mr. Holmes' site visit on July 17, 2006, he observed that incoming flow was still not equally distributed to the two splitter boxes. Tr. July 18, 2006, at 81.

249. During Mr. Holmes' site visit on July 17, 2006, the screen shown in Holmes Exhs. 4-2, 4-17, and 4-18 and Kresge Exh. K-3 was not on the splitter boxes. Tr. July 18, 2006, at 81.

250. The treatment plant has no operational flow meter. (Tr. July 19, 2006, at 172-175, and July 18, 2006, at 97-98.) The existing flow meter is only installed to measure one of the two treatment plant trains. Tr. July 19, 2006, at 173, and July 18, 2006, at 97-98.

251. In a properly operating treatment plant, solids are settled out from the liquid sewage and deposited in sludge holding tanks on a daily basis, dried and hauled away as necessary. Tr. July 18, 2006, at 46, 97, and 148.

252. Only suspended solids, that is, solids held in suspension, can be lawfully discharged from a treatment plant. Normal discharges are clear. Tr. July 18, 2006, at 86-87.

253. The WP Sanitary plant discharge to the receiving stream does not meet its NPDES[6] permit. Tr. July 18, 2006, at 88, 101-102; Schedule TLF-6.

254. Suspended solids are measured by weight, while settle-able solids are measured by biometrically determining how fast the solids settle. WP Sanitary's NPDES permit addresses suspended solids. Tr. May 23, 2006, at 215.

255. If WP Sanitary properly met its NPDES permit, one would not see solids in the receiving stream. Tr. May 23, 2006, at 211, 216.

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[6] National Pollution Discharge Elimination System

256. Even if the receiving stream were dry upstream of the WP Sanitary discharge pipe, there would not be a build up of solids in the receiving stream, if WP Sanitary met its NPDES permit. Tr. May 23, 2006, at 215.

257. WP Sanitary currently has no valid NPDES permit because DEP will not renew it due to compliance issues.

258. Complainant Sylvester complained of a pungent smell outside her home for a few days during the summer of 2005, which she believed to be coming from the wastewater treatment plant. Tr. February 27, 2006, at 89-90.

259. Complainant Finkler complained of a bad, potent smell coming from the direction of Debbie Drive and, specifically, the dirt road leading from there. He first noticed the smell in the summer of 2005 and continued to smell it as of the date of the hearing. Tr. February 27, 2006, at 128-130.

260. Mr. Holmes' testimony and that of the Complainants revealed that WP Sanitary is not managed and/or operated facility properly.

261. The cost of the necessary wastewater system improvements are considerable. OCA Statement No. 1 at 18, Schedule TLF-10 at 3.

262. Utility customer rates include fees for reasonable operation and maintenance expenses and depreciation on plant in service. Tr. July 18, 2006, (Fought) at 206, July 19, 2006, (Kresge) at 105, 121-122, 130.

263. It is unlikely that the Kresges or the Companies could obtain outside financing. Schedule TLF-5; Tr. July 19, 2006, (Kraus) at 118-119.

264. Even with financing, it is unlikely that the Companies could make the investment necessary to provide adequate service while maintaining reasonable rates for service. Tr. July 19, 2006, at 120-122.

265. Mr. Kresge is not credible.

266. Mrs. Kresge did not testify.

267. The management practices of the Kresges show that neither Carl nor Sandra Kresge can properly manage and/or operate a water supply utility or wastewater treatment utility.

268. Carl and Sandra Kresge are individually and collectively incapable of managing either a water supply utility or a wastewater treatment utility.

269. According to WP Water Company's 2005 Annual Report, the value of the water company was $61,958. Exhibit PS-4 at 15.

270. According to WP Sanitary Company's 2005 Annual Report, the value of the sanitary company was $35,218. Exhibit PS-7 at 13.

IV. DISCUSSION

A. Issues

These formal complaints and the intervention of the PUC's Law Bureau and the Office of Consumer Advocate (OCA) all relate to the complaints of the customers of WP Water and WP Sanitary and their ongoing service frustrations over numerous years. The complaints regarding WP Water are lack of pressure, outages, the company's consistent unresponsiveness, cloudy water, and sediment. Regarding WP Sanitary, the complaints are the comprehensive failure of the Company to provide safe, adequate, reasonable, and efficient service, sewage

backups, failure to maintain sanitary mains, tree blockages, and causing foul odors in the community. Two of the formal complainants specifically ask that the Commission "shut the company down" or take the company away from the Kresges. One complaint stridently asks that the Kresges be forbidden from operating any company "that has to do with public safety." A separate issue is the Kresges' ignoring a Commission Order to provide metered service.

The corporate entities WP Water and WP Sanitary comprise Carl Kresge and his wife Sandra. If any of the other named individuals that appear on the corporate filings have any day-to-day responsibilities in the management of the Companies, Mr. Kresge did not so indicate and the Parties in this case did not show it. Specifically, Carl Kresge testified under oath that he did *all* of the operational aspects of the Companies and that Sandra did the bookkeeping and administrative duties. (Tr. July 18, 2006, at 59.) Sandra Kresge, the purported owner of the Companies, did not testify at all.

The Kresges' defense regarding the water complaints are that no one would provide them funding so that they could upgrade the system, and that a DEP employee sabotaged their efforts to secure PENNVEST funding. Their defense to the wastewater complaints is that DEP would not help them remodel their plant, that their customers flush improper materials, and that customers will not remove problematic trees (roots infiltrating WP Sanitary's lines). The Kresges appear to accept no responsibility for the issues that have caused these formal complaints against WP Water and WP Sanitary.

B. Principles of Law

1. Burden of Proof

The proponent of a rule or order has the burden of proof. 66 Pa. C.S. § 332(a). Therefore, the complainants in this proceeding bear the burden of proving their case(s). The complainants must show that the Companies are responsible or accountable for the problems described in their formal complaints in order to prevail. Patterson v. Bell Telephone Company of Pennsylvania, 72 PA PUC 196 (1990); Feinstein v. Philadelphia Suburban Water Company, 50 PA

PUC 300 (1976). This must be shown by a preponderance of the evidence. Samuel J. Lansberry, Inc. v. PA PUC, 578 A.2d 600 (1990), *alloc. den.*, 602 A.2d 863 (1992). That is, by presenting evidence more convincing, by even the smallest amount, than that presented by the other party. Se-Ling Hosiery v. Marqulies, 70 A.2d 854 (1950). Additionally, any finding of fact necessary to support the Commission's adjudication must be based upon substantial evidence. Edan Transportation Corp. v. PA PUC, 623 A.2d 6 (1993); 2 Pa. C.S. § 704. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. Norfolk and Western Ry. v. PA PUC, 413 A.2d 1037 (1980); Erie Resistor Corp. v. Unemployment Compensation Bd. of Review, 166 A.2d 96 (1960); Murphy v. Commonwealth, Dep't. of Public Welfare, White Haven Center, 480 A.2d 382 (1984).

2. Statutory Obligations

Section 1501 of the Public Utility Code states:

> Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. Such service also shall be reasonably continuous and without unreasonable interruptions or delay. Such service and facilities shall be in conformity with the regulations and orders of the commission. Subject to the provisions of this part and the regulations or orders of the commission, every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service.
> 66 Pa. C.S. § 1501

The statutory and regulatory schemes allow great latitude in the methods companies can use to achieve the above requirements. However, pursuant to section 3301 of the Public Utility Code, failure to achieve these obligations can result in the assessment of a civil penalty. Section 3301 states:

> (a) **If any public utility, or any other person or corporation subject to this part, shall violate any of the provisions of this part**, or shall do any matter or thing herein prohibited; **or shall fail**, omit, **neglect**, or **refuse to perform any duty enjoined upon it by this part; or shall fail**, omit, **neglect** or **refuse to obey, observe, and comply with any regulation** or final direction, requirement,

determination **or order** made by the commission, or any order of the commission prescribing temporary rates in any rate proceeding, or to comply with any final judgment, order or decree made by any court, **such public utility, person or corporation for such violation, omission, failure, neglect, or refusal, shall forfeit and pay to the Commonwealth a sum not exceeding $1,000, to be recovered by an action of assumpsit instituted in the name of the Commonwealth.** In construing and enforcing the provisions of this section, **the violation, omission, failure, neglect, or refusal of any officer, agent, or employee acting for, or employed by, any such public utility, person or corporation shall, in every case be deemed to be the violation, omission, failure, neglect, or refusal of such public utility, person or corporation.**

(b) Each and **every day's continuance** in the violation of any regulation or final direction, requirement, determination, or order of the commission, or of any order of the commission prescribing temporary rates in any rate proceeding, or of any final judgment, order or decree made by any court, **shall be a separate and distinct offense.** If any interlocutory order of supersedeas, or a preliminary injunction be granted, no penalties, shall be incurred or collected for or on account of any act, matter, or thing done in violation of such final direction, requirement, determination, order, or decree, so superseded or enjoined for the period of time such order of supersedeas or injunction is in force. (Emphasis added.)

66 Pa. C.S. § 3301

Before a utility begins operation, typically, the utility must seek a certificate of public convenience, or license to operate. To receive such authority to operate, a utility's first obligation is to demonstrate that they have the technical and financial capacity to operate in accordance with the Public Utility Code ("Code"). The statutory and regulatory scheme exists in part to protect the public. Succinctly stated in Commission policy, "A viable water system is one which is self-sustaining and has the commitment and financial, managerial and technical capabilities to reliably meet Commission and Department of Environmental Resources (Department) requirements on a long-term basis." 52 Pa. Code § 69.701 (a)(2).

C. Complaints Against WP Water

The Commission's standard for determining whether water service is safe and adequate in accordance with 66 Pa. C.S. § 1501 was set forth in Pa. P.U.C. v. Pennsylvania Gas and Water Co. concisely, as "every customer is entitled to water that is fit for the basic, domestic

purposes (e.g. cooking, drinking, washing and bathing)." 61 PA PUC 409, 416 (1986). Additionally, regulations set forth the minimum requirements for water pressure, which require WP Water to maintain normal operating pressures of not less than 25 pounds per square inch (psi) and not less than 20 psi during periods of peak seasonal loads at the time of hourly maximum demand. 52 Pa. Code § 65.6(a). DEP regulations parallel this requirement at 25 Pa. Code § 109.607 (b).

1. Low Water Pressure and Outages

Complainant Sylvester testified her water pressure is lower before and after work, on weekends and in the spring and summer. Complainant Finkler testified that his water pressure is constantly low. Complainant Sylvester additionally testified that during the summer of 2005, her water pressure was the worst she had experienced. She stated:

> Friday nights, there is no taking a shower. Saturday, as long as you get up early in the morning, and I mean early, 4:30, 5:30 in the morning to take a shower or if I need my hair washed...And by Sunday I have no water. This went on all summer in 2005. There was no water. It was every Sunday you had to go out to eat or cook on the grill. There was nothing to be used in the house everything had to be paper products because you couldn't wash it...we could, early in the morning Monday, take a shower. Tr. February 27, 2006, at 32.

According to the complainants, periods of low pressure became increasingly severe over the years. (Tr. February 27, 2006 at 30, 32, 58, 61.) Complainant Sylvester testified that in earlier years, she only had low pressure problems on holidays or other days when many customers were at home and using larger than usual quantities of water. However, she testified "[n]ow it's all the time." (Tr. February 27, 2006, at 61-62 and Tr. February 27, 2006, (Finkler) at 106, 111.)

WP Water customers endure frequent water outages. Lengthy outages occurred in summer 2005, October 2005 and July 2006. (Tr. February 27, 2006 (Sylvester) at 36-37, 73, (Finkler) at 101-02, 111, Tr. July 19, 2006 (Lash) at 24, 26, 55.) Complainant Sylvester estimated that she lost all water service twice each year for periods lasting from one day to three

or four days. During such outages, the WP Water customers must buy water elsewhere to meet their household needs. Consequently, the customers pay doubly; first, they pay WP Water for a service not received, and secondly, they must purchase the necessary water elsewhere.

Moreover, the Complainants never received notice from WP Water before an outage would occur. A utility company is required to (1) keep a record of each prolonged interruption of service affecting its entire system or part of its system (52 Pa. Code §65.5 (a)); (2) make scheduled interruptions at hours that will provide the least inconvenience to its customers 52 Pa. Code § 65.5 (b); and (3) adopt a number of steps to notify the Commission of unscheduled service interruptions. 52 Pa. Code § 67.1 (a)-(e). WP Water has not complied with these requirements. Despite no party providing test results for pressure, or psi, it is clear that on the occasions when customers had no water at all, sometimes for days, that WP Water was not meeting the 25 psi regulatory requirement. The customer complaints regarding low water pressure and outages were corroborated by expert testimony and facts in the record, were acknowledged by the Company, and were stipulated to in the Stipulated Findings of Fact. (Exh. KS-6; *see also* Tr. July 19, 2005 (Kresge) at 179; St. K-8 at 5; St. K-9 at 2-3.)

The experiences of Complainants Sylvester and Finkler constitute inadequate and unreasonable service. Due to low water pressure, WP Water customers are frequently unable to take showers, do laundry, and wash dishes or flush toilets. This means that the service provided by WP Water is not fit for basic domestic purposes and thus, constitues inadequate service.

The following Commission policy guidelines related to unscheduled water service interruptions became effective December 16, 2006, and are relevant to the experiences of the WP Water customers.

> § 69.1601. General.
>
> (a) The purpose of this statement of policy is to provide guidance to the water industry relating to unscheduled water service interruptions, particularly regarding the types of public notice and associated actions that will be deemed acceptable and appropriate for meeting the safe, reasonable and adequate standard in 66 Pa. C.S. § 1501 (relating to character of service and facilities) and for complying with

the Commission's regulation in § 56.71 (relating to interruption of service). It is imperative that affected ratepayers/occupants receive actual, timely and sufficient notice of unscheduled service interruptions whenever a situation affects water quality or quantity and particularly when the water is unsafe to drink.

(b) Affected ratepayers/occupants should be notified when 2,500 or 5%, whichever is less, of a utility's total ratepayers/occupants have an unscheduled service interruption involving any reduction in the quantity of water in a single incident of 6 or more consecutive hours. Timely notification of fewer customers, however, is recommended when practicable. When there is an unscheduled service interruption involving the quality of water, water utilities should follow the applicable Department of Environmental Protection regulations regarding the public notification requirements for events requiring Tier 1 notification under 25 Pa. Code § 109.408(b) (relating to Tier 1 public notice—form, manner and frequency of notice), or Tier 2 notification under 25 Pa. Code § 109.409(b). Timely notification of customers in other incidents affecting the quantity or quality of water, such as water in short supply, discolored or sediment-laden, however, is recommended when practicable. It is also recommended that utilities set as a goal the Tier 1 time frame of "as soon as possible" rather than "no later than 24 hours" and the Tier 2 time frame of "as soon as possible" rather than "but no later than 30 days."

(c) This statement of policy should not be considered to modify or replace in any way the public notice requirements of the Department of Environmental Protection found in 25 Pa. Code §§ 109.407-109.416 (relating to public notification.)

§ 69.1602. Public notification guidelines.

(a) In the event of an unscheduled water service interruption, the following acceptable methods of public notification should be considered and utilized as appropriate:

(1) Fax/e-mail notification to local radio and television stations, cable systems, newspapers and other print and news media as soon as possible after the event occurs. The notification must provide relevant information about the event, such as the affected location, its potential impact including possible adverse health effects and the population or subpopulation particularly at risk, and a description of actions affected ratepayers/occupants should take to ensure their safety, with updates as often as needed.

(2) Use of the utility's own Internet website and 24/7 emergency phone line and integrated voice response system to provide relevant information about the event, such as the affected location, its potential impact including possible adverse health effects and the population or subpopulation particularly at risk, and a description of actions affected ratepayers/occupants should take to ensure their safety, with updates as often as needed.

(3) Automated dialer system (outbound dialing) notification to affected ratepayers'/occupants' landline or wireless phones.

(4) Actual notice to affected health care and child care facilities and other facilities, for example, schools and restaurants, as determined by consultation with the Department of Environmental Protection, the Department of Agriculture, the Department of Health, the Department of Aging and other State agencies as necessary.

(5) Other types of direct or actual notice, such as doorknob flyers distributed to affected ratepayers/occupants, when feasible.

(6) E-mail and text message notification to affected customers who have opted to receive notice through use of these methods.

(7) Coordination with State and local emergency management agencies as needed to use the emergency alert system for qualifying situations.

(b) Utilities should have public notice templates prepared in advance to be available when needed to avoid wasting critical time developing materials when confronted with an unscheduled service interruption. The notices should cover all possible scenarios from water conservation to boil water alerts to contaminants of concern and associated health effects. Smaller utilities can look to resources that are available on the websites of the Department of Environmental Protection, the United States Environmental Protection Agency, the Pennsylvania Section of the American Water Works Association and the Pennsylvania Chapter of the National Association of Water Companies for assistance in developing public notice templates.

(c) To ensure that the public is informed, utilities should have a knowledgeable contact person stationed onsite during the emergency, if possible, to communicate to the public and media on behalf of the company.

§ 69.1603. Other associated actions.

(a) Water utilities need to make reasonable efforts to ensure that adequate quantities of alternative supplies of water essential for domestic use are made available in a sufficient number of conspicuous and predetermined locations relative to the number of ratepayers/occupants affected by the incident. This includes the use of water tankers or free bottled water, or both. Utilities should ensure that ratepayers/occupants are adequately notified of the times available and locations of alternative water supplies. When bottled water is used, utilities should have plans in place, based on prior coordination with local vendors, to have adequate supplies to last for the duration of the outage. The Commission encourages utilities to work proactively with community-based organizations

that would have readily available information on the location and special needs of affected elderly or homebound ratepayers/occupants in the area.

(b) Notice should be made to Commission personnel as soon as possible upon a utility becoming aware of an unscheduled service interruption. It should be noted that § 67.1(c) (relating to general provisions) already directs utilities to contact the Commission within 1 hour following preliminary assessment of conditions. Furthermore, jurisdictional utilities should maintain lists of appropriate Commission contact personnel, including current after-hour contact numbers.

2. Inadequate Supply and Storage

Mr. Fought, an expert witness testified on behalf of the OCA. He earned a Bachelor of Science in Civil Engineering and practices as a Professional Engineer. Mr. Fought explained that the primary cause of low pressure and outages is that WP Water does not have sufficient water sources to consistently meet its water demands. WP Water's three wells produce a safe yield of 31 gallons per minute. The average daily water demand on the system is approximately 20.14 gallons per minute. The water system's maximum day demand is estimated to be 36.25 gallons per minute. The wells may meet demands on a given average day, but the wells cannot meet peak demands. During peak demands, customers at higher elevations do not receive adequate pressure and flow. Under the DEP's formula for calculating the system's "safe yield," not even the average daily water demand can be met. The topography of the Washington Park service area is not level. Complainant Sylvester and Complainant Finkler are two of the customers who reside at higher elevations in Washington Park. In general, the higher elevations in the development are to the west and to the north. Water pressure varies inversely with pipe elevation, such that customers who reside at lower elevations on the system have greater water pressure than customers who reside at higher elevations.

Mr. Kresge, regarding adjusting the system pressure with a transducer, stated "I feel it's going to make a marked difference with Mrs. Sylvester's pressure area and any of the higher elevations that have had pressure problems there before that I've been so concerned about since 1993." (Tr. July 19, 2006 at 179.) But WP Water lacks sufficient finished water storage overall, so even if pressure is addressed, the problem of simply not having the water still persists.

Mr. Fought explained that the system should have at least 7,380 gallons to 15,660 gallons of finished water storage. WP Water has only one 3,000 gallon tank. A 3,000 gallon hydro-pneumatic tank actually contains less than 3,000 gallons of water because air takes up part of the volume. It is not in dispute, that WP Water has less than half of what is needed to service its paying customers. This state of affairs did not occur spontaneously. The situation at WP Water is one that Mr. Kresge knew of (or should have known of) early on in his tenure as its president. In spite of obvious indications that the water system could not take on new customers, the Kresges continued to add new customers. Aside from that, if WP Water had additional storage, it would likely have reduced the severity or duration of its customers' recent outages.

The October 2005 outage occurred because one well was being repaired when a second well failed. In July 2006, WP Water's electric utility experienced a power outage and because WP Water has no back up generation equipment in service, customers were without water for more than eleven hours. The Companies have backup electric generation equipment that Mr. Kresge asserted is available; however, the equipment is not kept at the WP Water plant, and this same equipment is the backup for all of the Kresge enterprises. If this equipment is needed elsewhere, then the WP customers have no backup. It is unreasonable that WP Water does not have dedicated generator backup for their customers. It is unreasonable that the Kresges presume one generator can reasonably provide backup for their numerous enterprises.

If WP Water had the recommended volume of water storage during these outage incidents, the stored water would have helped to meet customer needs. Mr. Kresge agreed that the system needs additional storage "to provide increased water pressure on a more consistent basis to its customers." One cannot help but wonder why Mr. Kresge did not arrive at that conclusion years earlier and set aside a portion of the collected tariff to work toward that goal. In the decades that the Kresges have owned and operated WP Water, a portion of the tariff was intended to be used for maintenance of the facility. The Kresges did not adequately do this.

3. Metering

WP Water customers' usage is not metered and customers are charged flat rates of $38.25 for water and sewage service. In its Order at Docket No. M-820308, entered April 26, 1991, the Commission directed WP Water to "provide metered service to [its] 52 customers...no later than March 1995" and directed the Company to "meter all new residential, commercial and industrial customers as their respective services are connected." The April 1991 Order was the Commission's response to a proposed metering plan submitted by WP Water on July 25, 1990. The metering plan was filed with the Commission pursuant to 52 Pa. Code § 65.7 that states: "a public utility shall provide a meter to each of its water customers...[7]" The Order noted that WP Water had stated it needed a year to meter its system after a PENNVEST loan was secured. The Order was issued in 1991 and granted WP Water not the one year requested, but rather, four years to meet the metering mandate for its 52 customers. The Order was not contingent upon a PENNVEST loan. Metering is a universal requirement that all water utilities have been required to meet. See 52 Pa. Code § 65.7(a)-(d). Not only did the Kresges ignore the Order regarding metering of their (then) 52 customers, but they connected 100 or more new customers without metering them, after the Commission's Order to meter all new connections. PUC witness Larry Lash explained that Commission staff likely did not become aware of the violation of the order because WP Water has not filed a rate case since the metering Order was entered.

Compliance with the Commission Order, by installation of the ordered meters and implementation of metered rates might have encouraged WP Water customers to conserve their water. Customers who have water pressure can water their lawns and gardens, fill pools, wash cars and perform other nonessential usage chores. Metering facilitates customers' awareness of their own consumption. Metering might have helped the higher elevation customers have pressure for their daily *essential* household needs, and it might have helped address WP Water's perennial pressure problems. Metered rates can be implemented without a revenue increase, through a revenue-neutral rate filing. Metering will not eliminate WP Water's pressure problems

[7] § 65.7(d) in full states: A public utility shall provide a meter to each of its water customers except fire protection customers and shall furnish water service, except fire protection service, exclusively on a metered basis; except that flat rate service may continue to be provided pending implementation of a reasonable metering program or under special circumstances as may be permitted by the Commission for good cause.

because the Company simply has woefully insufficient supply and storage as explained above, but metering could have supported a better water supply had the Kresges chosen to comply with the Commission's Order. WP Water's inadequate storage situation must be resolved. To that end, WP Water agreed at hearing that meters should be installed for all customers. Such agreement in 2006, after more than a decade[8] of ignoring a Commission Order, is of little use to the customers who have continued to pay the tariff every month.

Unilaterally, the Kresges decided they would not comply with the Commission's April 1991 Order. The Kresges chose to ignore the Order rather than enter a discussion with the Commission or the Commission's Fixed Utility Services staff. The appropriate way for the Kresges to have handled the directives of the Order, if they anticipated trouble complying, was to request a stay of its obligations pending discussions with staff as to how to accomplish the directives and how to provide adequate service to the customers. The Commission routinely works with utilities of all types in joint efforts to provide service that meets the mandates of the Public Utility Code. It is likely that the Kresges did not approach the Commission for either a rate increase or assistance deliberately to avoid attention to themselves and the various Company issues. The Commission cannot be everywhere, and it is not intended to be. The Code and regulations presume lawful compliance. The burden is on an owner and operator to know the applicable laws and to comply. Here, the Kresges chose to willfully ignore a Commission Order and avoid detection of the violation as long as possible. The Kresges' poor management decisions ensured that the inadequate service to the WP Water customers would be perpetuated.

There are two components to the WP Water and Kresges' violation of the April 1991 Order. The first is the violation of Paragraph 2 of the Order that required WP Water to meter its then 52 customers by March 1995. That violation subjects WP Water to a civil penalty. The second component is the violation of Paragraph 3 of the Order that directed WP Water to meter all new residential, commercial, or industrial customers as their respective services were connected. Under the directives of the Order, WP Water was not to connect any new users unless and until they were metered. At the time of these hearings, eleven years later, no WP

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[8] For the 52 customers' current in 1991, the failure to comply is from March 31, 1995 the date of this Initial Decision. For the 100 customers connected after the issuance of the Order on April 26, 1991, the number of years in violation varies with the date of their connections. These dates were not made part of the record.

Water customers were metered. All customers still pay flat rates for service. Thus, all connections made subsequent to the April 1991 Order without being metered constitute a violation of the Order that subjects WP Water to a civil penalty. A civil penalty for these violations will be addressed separately below.

4. Small Diameter Delivery Pipes

WP Water's small diameter delivering pipes servicing most WP customers contributes to the Company's pressure problems. Pipe diameter is inversely related to pressure loss due to friction. As the OCA witness, Mr. Fought explained, pressure loss is greater in smaller diameter pipe, which is one reason the Commission requires replacement mains to be no less than 6 inches in diameter. "The distribution system shall be of adequate size and so designed in conjunction with related facilities as to maintain the minimum pressures required by § 65.6 (relating to pressures). Pipe of a diameter of less than 6 inches shall not be used for distribution mains except in cul-de-sacs where the mains are not subject to being extended and are not more than 250 feet in length." 52 Pa. Code § 65.17. Depending on the flow rate, the friction loss in a 3-inch diameter pipe is approximately 25 to 30 times greater than the friction loss in a 6-inch diameter pipe for the same flow rate. Approximately 23% of the WP customers are served by 2-inch diameter pipe, 24% by 3-inch diameter pipe, 15% by 4-inch diameter pipe and 38% by 6-inch diameter pipe.

WP Water's inadequate pressure is exacerbated by allowing additional homes to be connected to the system. At least twenty new homes were added since 1993 and new homes are currently being built. It is anticipated that the new homes will hook up. Mr. Kresge gave no indication the Company intended to block any new paying customers regardless of impact on current users. The regulations provide that a utility company has the authority to decline to hook up additional customers when the company determines that to do so would be detrimental to the company. Indeed, based on the lack of pressure, outages, and need for updating infrastructure, WP Water was obligated to deny new service pursuant to section 65.15 that states:

> A public utility may decline to serve an applicant if it does not have adequate facilities to render the service desired or if such service is of a character that it is **likely to have a detrimental effect upon service to other customers.** (Emphasis added.) 52 Pa. Code § 65.15 (b)

Section 65.17 states:

> The quantity of water delivered to the distribution system from total source facilities **should be sufficient to supply adequately, dependably and safely the total requirements of all customers** under maximum consumption and should be determined so as to maintain the specified pressures as required by § 65.6. (Emphasis added.) 52 Pa. Code § 65.17

The substantial evidence provided in these proceedings demonstrated that WP Water has not had sufficient storage capacity to provide adequate, dependable service to its customers in many years. WP Water has always been in the best position to know the capacity of its own system. Therefore, the Kresges, as the owner and president of WP Water, should have determined without any prompting by the PUC or DEP that adding additional customers to their already beleaguered system was likely to have a "detrimental effect upon service to other customers." In addition to failing to meet the above, Mr. Kresge gives no indication that the Company intends to deny service to the newly built homes that will need water service. The record provides substantial evidence that WP Water does not provide safe, adequate, reasonable, or efficient service to its current customers. This record further provides substantial evidence that the Kresges', if allowed to, would continue their pattern of feckless management and service.

5. Commission Precedent

Low pressure has been a factor in findings of inadequate service in numerous PUC decisions. Pa. P.U.C. v. National Utilities, Inc., 87 PA PUC 1 (1997) ("NUI"); Zachary Ronald Matenkoski v. Kawon, Inc., 1994 Pa. PUC LEXIS 59 ("Kawon"); Kessler v. Shickshinny Water Co., 1987 Pa. PUC LEXIS 237. In Leon R. Dongelewicz v. Oneida Water Co., the Commission found that the company was providing inadequate service based in part on customers' receiving continuously low water pressure. 1994 Pa. PUC LEXIS 76, 25 ("Oneida"). Customers experienced frequent low pressure that caused difficulties in running household

appliances, taking showers and flushing toilets. Oneida at 6-8. In Kawon, customers had to schedule their normal household activities, like showering and doing laundry, to accommodate low water pressure. Kawon at 9-11. In both Oneida and Kawon, the Commission found that service was inadequate for basic household purposes.

In NUI, the Commission cited frequent outages as a factor leading to inadequate service. NUI, at 4-7. Water service in Oneida was not fit for common domestic purposes when customers experienced frequent outages typically lasting three to four hours and occasionally lasting for days. As in those cases, WP Water customers experience frequent lengthy water outages.

Mr. Fought identified the improvements necessary for WP Water to provide adequate pressure consistently to all customers, stating, "The necessary improvements consist of developing a new water well source, constructing a finished water storage tank, and installing customer water meters." WP Water applied for a PENNVEST loan to make each of these improvements and install a back-up electric generator in 1994 or there about. The PENNVEST loan was never approved. The record indicated that the decision makers at PENNVEST did not have confidence in the business dealings of the Kresges. This is indicated in PENNVEST's letter to the Kresges requiring certain information be submitted to PENNVEST by the Kresges. PENNVEST was concerned about the Kresges commingling of monies between the several Kresge enterprises and various other concerns. Whether the Kresges complied with the letter is not known, but the PENNVEST loan was never granted. Mr. Kresge's testimony regarding his PENNVEST application was disingenuous. See also PA PUC v. Wilbar Realty Company, Inc. and Carl Kresge, President, Docket No. C-00957541 Order entered January 16, 1998. In the January 1998 Order, the Commission ordered *inter alia*: (i) improperly collected PENNVEST surcharges refunded, (ii) separate banks accounts established to provide appropriate segregation of funds, (iii) staff to be hired to properly manage customer complaints, (iv) install meters and hire meter readers, (v) sanitize its mains, (vi) Wilbar Realty, Inc. to pay a civil penalty of $1000, and (vii) Carl Kresge to pay a civil penalty personally of $6000.

The testimony provided by Complainants Finkler and Sylvester and the testimony and exhibits of Mr. Fought for the OCA and Mr. Lash for the PUC Bureau of Fixed Utility Services provided substantial evidence that WP Water is persistently in violation of 52 Pa. Code § 1501. Violation of § 1501 subjects WP Water to a civil penalty. Assessment of this civil penalty will be addressed separately below.

D. Complaints Against WP Sanitary

Complainant Pugh's formal complaint addressed only the sewage treatment services. Complainant Pugh did not complain about WP Water. Therefore, Docket No. C-20065849 should be dismissed and marked closed. On October 13, 2005, Complainant Pugh's basement was flooded with wastewater. Complainant Pugh indicated that the quantity of sewage in his basement was more than the quantity of waste produced by his home alone. He had a check valve on the service lateral entering his home. The valve check did not stop the flow of wastewater into his basement. It may not have been operating properly. There was no rainfall in the days prior to Complainant Pugh's basement being flooded. Therefore, rain did not contribute to the quantity.

Complainant Pugh had raised concerns that tree roots were clogging WP Sanitary's collection mains because the joints in the terra cotta (or vitreous clay) pipes were not properly sealed. Complainant Pugh and his family check sewage flow levels in the manhole near his property on a frequent basis. They lift the manhole cover and visually check the level. When level is high, they move everything out of their basement because of their fear that sewage will back up into their home as it did in October 2005. In 2005, Mrs. Pugh called Mr. Kresge numerous times to warn him that the sewage levels were rising. Prior to a disagreement about responsibility for tree roots in the mains, the Kresges allowed the Pughs to call Roto-Rooter and request service. After the disagreement, the Kresge and Pugh relationship was strained and the Pughs no longer called Roto-Rooter directly. Now, when Mr. or Mrs. Pugh call, Mr. Kresge or his wife call Roto-Rooter to have blockages in the collection mains cleared.

1 Blockages in Collection Mains

The collection sewer mains installed in two or three streets, including Thomas Drive where Complainant Pugh lives, are made of vitreous clay with tar joints. Tar joints are conducive to infiltration and inflow. This is one reason that clay pipe with tar joints are no longer commonly installed in collection systems. Instead, "O-ring" joints, with a tighter seal, have been commonly used for sanitary sewers since the late 1950's, explained Mr. Fought.

Mr. Fought concluded that backups were likely due to "a combination of the sewer system having excessive infiltration/inflow and partial blockage(s) in downstream sewers, possibly due to tree roots entering the pipes through joint openings and cracked pipes." Mr. Kresge confirmed, "the problem is clearly the fact that the roots from [the] trees are infiltrating the main line" and that he (Kresge) has to have tree roots cut out of the mains about every two years. As Mr. Kresge stated, tree roots grow through the tar joints in the vitreous clay collection main, block the flow of wastewater and can cause wastewater to backup into customers' service laterals. Mr. Kresge testified that it was an ongoing problem. This is consistent with Mr. Fought and Mr. Pugh's assessment that the quantity of sewage that flooded Mr. Pugh's home was indicative of a blockage in the collection main rather than the service lateral. "[The sewage] would have been from his commodes, it would have been from his sink, it would have been from his shower. It wouldn't have been from anybody else's and it would not have been the amount of water that was indicated by the damage that I saw." Customers located upstream of blockages in the Company-owned mains are subject to flooding if check-valves are not installed or do not operate. It is the Company's responsibility to remedy if a backup originates in the collection mains. "The sewer company is responsible for correcting the excessive infiltration and inflow and blockages in sewer trunk lines and mains and also that portion of the customers' house service laterals within the street curb lines. The customer is responsible for blockages in the customer's house service lateral, which extends from inside the customer's home to the curb line." (WP Sanitary Tariff, original pp. 3-4; OCA St.1 at 16.)

Excessive infiltration/inflow can contribute to wastewater backing up from collection mains into customers' service laterals. The WP Sanitary system is subject to

excessively high flows from infiltration/inflow. Despite knowing of their infiltration/inflow issue, WP Sanitary has never obtained bids or cost estimates for an infiltration/inflow study. Moreover, WP Sanitary already has the authority in its tariff to direct customers to disconnect any sump pumps and footer drains from the system, which contribute to a plant's inflow. Based on the dearth of management activities performed by the Kresges overall, it is unlikely that they performed any survey or inspection of their customers to determine who complied with the tariff and who did not.

Contrary to Mr. Kresge's testimony, the solution for tree roots growing into the company collection mains is not to remove township trees. As Mr. Fought explained: the Company, not the tree owners, is responsible for having pipes that are able to deal with tree root infiltration. Control of infiltration/inflow is part of the normal operation of any wastewater system. (Tr. July 18, 2006 (Fought) at 166-68.)

2. Commission Precedent

Where customers had instances of sewage backing up into their homes, and the backups were caused by blockages in the collection mains resulting from improper system maintenance on the part of the company, the company was found to have provided inadequate service. Deresky v. Winona Lakes Util., Inc., 2000 Pa. PUC LEXIS 8. ("Deresky") In addition to not maintaining its collection mains resulting in blockages, the company also failed to replace a company-owned faulty check valve. In Deresky, the customers also had their own check valve, which they learned how to shut to avoid sewage flowing into their home. However helpful Deresky may be, the utility company in that case did not present any evidence as was done here. In Deresky, the utility lost the case by default because it failed to appear, and the complainant's presentation of evidence was accepted without the utility being available for rebuttal. In stark contrast, here, *the parties agreed that the system is subject to excessive infiltration and inflow.* Mr. Fought recommended that WP Sanitary find the cause of excessive infiltration and inflow in the system. That study will indicate to what extent the collection mains need to be rehabilitated in order to eliminate the excessive infiltration/inflow. Mr. Fought anticipated that the study

would support replacement of the vitreous clay mains. WP Sanitary and its Certified Operator both agreed that the sources of excessive infiltration/inflow must be studied and corrected.

Irrespective of such agreement, WP Sanitary took no steps to study the extent that its mains need rehabilitation and to eliminate the perennial infiltration and inflow problem. It is also undisputed that tree roots in the collection mains create blockages, but WP Sanitary does not preventatively clear roots in the mains until after there is a blockage and sewage is backing up in the mains. In addition to not maintaining its collection mains resulting in blockages, WP Sanitary failed to replace a company-owned faulty check valve. The customers had their own check valve, which they learned how to shut to avoid sewage flowing into their home.

3. Severe Malodors

Customers have experienced a pungent smell in the area surrounding the plant. Complainant Sylvester complained of a pungent smell outside her home for a few days during the summer of 2005, which she believed to be coming from the direction of the wastewater treatment plant. Complainant Finkler complained of a bad, potent smell coming from the direction of Debbie Drive and, specifically, the dirt road leading from there. He first noticed the smell in the summer of 2005 and testified during hearing that the odor was still present.

In addition to the customer complainant testimony, James Holmes, who holds a Bachelor of Science degree in Agriculture and a Master of Science degree in Microbiology, testified on behalf of the OCA. Mr. Holmes has worked in the DEP's water quality bureau since 1980 and, specifically, in DEP's operations section dealing with water and wastewater plants since 1985. As a field inspector and a supervisor, he has monitored WP Sanitary since 1986. Mr. Holmes is a DEP Water Quality Specialist Supervisor. He responded to a complaint regarding severe malodors near the WP Sanitary treatment plant on September 7, 2005. Mr. Holmes personally detected the severe septic or rotten egg odor at the treatment plant and at the stream on September 8, 2005, and September 13, 2005. Mr. Fought also testified that he experienced the smell at the treatment plant on July 17, 2006, and on March 8, 2006, when he

first toured the plant. Mr. Fought did not conclude that the detectable odor was coming from a farmer's field, as claimed by Mr. Kresge.

Both Mr. Fought and Mr. Holmes's testimony showed that the unpleasant smells are a result of the poor operation and maintenance of WP Sanitary. Moreover, in a properly managed and operated treatment plant, solids that can exacerbate odors, are settled out from the liquid sewage and deposited in sludge holding tanks on a daily basis, dried and hauled away as necessary. No settle-able solids should be discharged from a plant. Only suspended solids can be lawfully discharged (that is, in accordance with a valid NPDES permit) from a treatment plant. By definition, suspended solids are not settle-able. The liquid sewage then flows into a chlorine contact tank, where it is chlorinated and discharged.

WP Sanitary is not properly treating its sewage for at least two reasons. First, solids will not properly settle out unless there is a proper roll in the mixed liquor. When the mixed liquor in the aeration (or settling) tanks does not have a uniform, even roll, it indicates improper aeration. Mr. Fought noted an improper roll in the old and new treatment plant aeration tanks during his March 8, 2006 inspection. According to WP Sanitary, by June 2006, it had repaired and replaced the blowers. However, they only provided an invoice for two blowers which indicated the entire balance was still due. No invoice or confirmation was provided to confirm the blowers had been repaired or replaced. I cannot tell, therefore, if the blowers were replaced. On July 17, 2006, the roll in the new treatment plant showed improvement; however, the old treatment plant was still operating poorly.

When an aeration plant is not operated properly, the liquid can become septic. Septic treatment plants have a strong hydrogen sulfide smell, similar to rotten eggs. Mr. Holmes reported that on September 8, 2005, the plant effluent was septic.

In addition to improper aeration, the treatment plant is designed to detain 35,000 gallons of mixed liquor for 24 hours. As testified to by Mr. Kresge, each day, the plant experiences a peak flow rate that is greater than it can effectively treat. And, as already noted,

the system is subject to excessively high flows from infiltration/inflow. According to WP Sanitary's Certified Operator, Joseph Bontrager:

> There are several inherent problems with the working of the [WP Sanitary] sewer plant. The largest problem is one of excessive inflow and infiltration (I&I). The I&I is quite heavy during heavy rainfall events and rapid snow melt. These events, if large enough, wash the activated sludge from the plant. After these events, recovery of a healthy population of microbes for good treatment takes some time.
>
> (Exh.TLF-10 at 3.)

When the flow into the treatment plant greatly exceeds its capacity, as described by Mr. Bontrager, sludge is washed straight through to the receiving stream without treatment. "When it rains, the solids are being pushed through the treatment plant, pushed through the aeration tank, pushed into the contact tank and right into the stream. The solids are just blowing right though the plant when it rains. The infiltration is so high that the plant is not being able to assimilate the solids and the solids are just blowing out." Mr. Kresge's own testimony corroborates Mr. Bontrager's assessment. Moreover, the pictures provided by Mr. Holmes provide the clearest evidence that sewage sludge and solids from WP Sanitary have indeed "blown right through" to the receiving stream.

Mr. Fought calculated that the treatment plant should produce about 22.3 pounds of dry sludge per day or 268 gallons per day of sludge containing 1% solids (typical for un-decanted sludge). For every year that sludge is not hauled from the plant, the equivalent of 8,140 pounds of dry sludge or 97,820 gallons of sludge containing 1% solids are discharged into the receiving stream. Waste sludge has not been hauled from WP's treatment plant since at least 2001.

There are large depositions of sewage sludge in the receiving stream. However, Mr. Kresge agreed that when his customers paid their monthly sanitary bills, they were paying for the collection, cleaning, and proper discharge of the effluent, and proper hauling away of any

sludge. He agreed part of their money was to go toward operation and maintenance of the plant. The Commission has stated:

> It is our opinion that in exchange for the utility's provision of safe, adequate, and reasonable service, the ratepayers are obligated to pay rates which cover the cost of service which includes reasonable operation and maintenance expenses, depreciation, taxes and a fair rate of return to the utility's investors. Thus, as the OCA contends, a quid pro quo relationship exists between the utility and its ratepayers.

Pa. P.U.C. v. Pennsylvania Gas and Water Co., 61 PA PUC 409, 415-16, 74 PUR4th 238, 245 (1986) (PG&W).

WP Sanitary's failure to treat its customers' sewage within the legal parameters is substantial evidence that they failed to provide the service for which WP Sanitary customers are paying. Such incompetent operation and maintenance of a plant also accelerates the plant's deterioration and will lead to an earlier need for replacement of a plant which can unreasonably increases costs to the ratepayers.

The record is replete with evidence that WP Sanitary is neither being operated properly nor maintained properly and that untreated sewage is discharged to the receiving stream. Therefore, WP Sanitary is not providing safe, adequate or reasonable service to its customers and thus is in violation of § 1501 of the Code. Such violation subjects WP Sanitary to a civil penalty, which will be addressed separately, below.

Mr. Fought made a number of long- and short-term recommendations that WP Sanitary agreed are necessary to improve operation of the treatment plant and to help address the complaints regarding malodors. These same recommendations were made by WP Sanitary's Certified Operator. WP Sanitary agreed with each of Mr. Fought's long-term recommendations. Specifically, the Company agreed that the sources of excessive infiltration/inflow must be studied and corrected. As part of the infiltration/inflow study, the Company agreed that a working flow meter should be installed, which measures both treatment plant trains. The

Company agreed that an equalization tank should be installed, with necessary DEP approvals. The size of the equalization tank should be determined as part of an infiltration/inflow study. Last, the Company agreed that tertiary treatment should be installed or the plant size should be increased, with necessary DEP approvals.

With regard to Mr. Fought's short-term recommendations, the Company agreed that the splitter box (diverter) should be replaced. The Company provided some evidence to indicate that it has made repairs to its aeration system; however, Mr. Fought testified that aeration seemed improved, but not resolved. In response, the Company agreed to adjust diffusers to improve aeration – and thus settlement of solids – in the treatment plant trains. The Company also agreed that, during dry weather, the treatment plant tanks should be emptied, cleaned of sediment, repainted and repaired as necessary. In addition, WP is currently in violation of its DEP permit because the plant is being operated without a comminuter. Mr. Fought recommended that WP Sanitary install a comminuter or an automated bar screen, with necessary DEP approvals.

E. Civil Penalty

1. Civil Penalty Assessed Against WP Water

Section 3301 of the Code states:

> (a) **If any public utility**, or any other **person or corporation** subject to this part, **shall violate** any of the provisions of this part, or shall do any matter or thing herein prohibited; or shall fail, omit, neglect, or refuse to perform any duty enjoined upon it by this part; **or shall fail**, omit, neglect **or refuse to obey, observe, and comply with any regulation or final direction, requirement, determination or order made by the commission**, or any order of the commission prescribing temporary rates in any rate proceeding, or to comply with any final judgment, order or decree made by any court, **such public utility, person or corporation** for such violation, omission, failure, neglect, or refusal, **shall forfeit and pay to the Commonwealth a sum not exceeding $ 1,000**, to be recovered by an action of assumpsit instituted in the name of the Commonwealth. In construing and enforcing the provisions of this section, **the violation**, omission, failure, neglect, or refusal of any officer, agent, or employee acting for, or employed by, any such public utility, person or corporation **shall, in every case**

be deemed to be the violation, omission, failure, neglect, or refusal of such public utility, person or corporation.

(b) **Each and every day's continuance in the violation** of any regulation or final direction, requirement, determination, or order of the commission, or of any order of the commission prescribing temporary rates in any rate proceeding, or of any final judgment, order or decree made by any court, **shall be a separate and distinct offense.** [ ]

(d) The amount of the penalty, when finally determined, may be deducted from any sums owing by the Commonwealth to the person or corporation charged or may be recovered in a civil action. (Emphasis added.) 66 Pa. C.S. § 3301.

WP Water is subject to a civil penalty for its failure to meet the requirements of Section 1501 of the Code. While Mr. Kresge has stipulated to most of the facts that support a clear finding of this violation, it is necessary to identify some specifics. Specifically, WP Water has failed to provide safe, adequate, reasonable and efficient service to it patrons by having persistently low water pressure and frequent outages (SFoF[9] 12-14, 17, 18, 23), by failing to provide water for basic household usages (SFoF 17, FoF 92), by utilizing undersized piping exacerbating poor pressure, and by failing to properly bill patrons (SFoF 1-3). Additionally, WP Water is in violation of the Commission Order issued April 26, 1991, requiring the then current patrons to be metered and any new connections to be metered.

Commission standards for the application of a civil penalty were addressed in Joseph A. Rosi v. Bell-Atlantic-Pennsylvania, Inc. and Sprint Communications Company, L.P., Docket No. C-00992409 (Order entered March 16, 2000). The Commission uses the standards developed in Rosi as a basis to develop the amount of civil penalties in cases regarding other utility issues. Pennsylvania Public Utility Commission v. NCIC Operator Services, Docket No. M-00001440 (Order entered December 21, 2000).

The first standard to be considered is whether the violations were intentional or negligent. If the violations were intentional, the Commission will start with the presumption that the penalty will be in the range of $500 to $1,000 per day. If, on the other hand, the violation is negligent, the Commission will start with the presumption that the penalty will be in

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[9] SFoF refers to Stipulated Finding of Fact; FoF refers to Finding of Fact.

the range of $0 to $500 per day. This first standard is generic in nature and can be applied to any utility type. Mr. Kresge and his wife purchased WP Water approximately in 1985. In that time, they have accumulated a long history of environmental violations with DEP and a lengthy history with the PUC for their recalcitrance toward achieving any meaningful level of compliance. These violations are not the result of negligence. The history and patterns of behavior are persistent and the violations are intentional. I must also consider the length of time. The statute of limitations provides that I can look retrospectively to the three years prior to the formal complaints being filed. 66 Pa. C.S. § 3314 (a). Applying this, the civil penalty for violation of Section 1501 is 365 days, multiplied by three years. At a daily penalty presumption of $500, the penalty is $547,500.

The next two standards are phrased in Rosi to address the issue of slamming; however, they may be used in other utility penalty cases beyond those involving slamming. The second Rosi standard addressed the promptness with which the utility took steps to correct the issue, and the third Rosi standard questions whether the utility/Respondent initiated procedures to prevent the violation from occurring again. WP Water, i.e., the Kresges took no meaningful actions to correct the violations or to prevent violation going forward.

The fourth and fifth Rosi standards question the number of customers impacted by the violations, and whether the recommended penalty arises from a settlement or a litigated proceeding. The numbers of customers impacted by the Kresges' deliberate poor management are approximately 150-152. There has been no attempt at settlement.

Standards six and seven question the compliance history of the utility, and whether the utility cooperated with the Commission in attempting to correct the problem. WP Water has a history of failed compliance and has deliberately violated a Commission Order. There has been no meaningful attempt by the Company to correct any problems.

The eighth and ninth standards consider the amount of a civil penalty necessary to deter future violations and considers past Commission decisions regarding similar issues. The Company's pattern of behavior is consistently recalcitrant, consistently unwilling to take

responsibility, and unwilling to contact and work with the PUC staff, Mr. Kresge shows tendencies to treat the truth as malleable, and he deliberately obfuscates. In my opinion, there is no additional penalty that will alter the pattern already demonstrated; therefore, I have not increased the base penalty of $500 per day.

The tenth Rosi standard is other relevant factors; none was considered.

Therefore, based upon the discussion of the Rosi standards, the penalty against WP Water for its compound violations of 66 Pa. C.S. § 1501 is $547,500.

2. Civil Penalty Assessed Against WP Sanitary

WP Sanitary is separately subject to a civil penalty for its failure to meet the requirements of Section 1501 of the Code. As with WP Water, Mr. Kresge has stipulated to most of the facts that support a clear finding of these violations. Specifically, WP Sanitary has failed to provide safe, adequate, reasonable and efficient service to it patrons by failing to properly collect, treat and dispose of patrons' sewage, and by failing to properly maintain the Company equipment and facilities, and by failing to properly enforce terms of the applicable tariff with regard to sump pumps and tree roots. (SFoF 26-46.)

Again, using the Rosi standards, the first standard to be considered is whether the violations were intentional or negligent. I will not repeat my comments made above, as the same applies here. WP Water and WP Sanitary are a tandem operation of the Kresges. The history and patterns are the same. Therefore, the civil penalty for WP Sanitary's compound violations of Section 1501 is $500 multiplied by three years or $547,500.

The second Rosi standard addressed the promptness with which the utility took steps to correct the issue, and the third Rosi standard questions whether the utility/Respondent initiated procedures to prevent the violation from occurring again. WP Sanitary, i.e., the Kresges, took no meaningful actions to correct the violations or to prevent violations going forward.

The fourth and fifth Rosi standards question the number of customers impacted by the violations, and whether the recommended penalty arises from a settlement or a litigated proceeding. The numbers of customers impacted are approximately 150-152. There has been no attempt at settlement.

Standards six and seven question the compliance history of the utility, and whether the utility cooperated with the Commission in attempting to correct the problem. WP Sanitary has a history of failed compliance. The Company had made no meaningful attempts to correct problems.

The eighth and ninth standards consider the amount of a civil penalty necessary to deter future violations and considers past Commission decisions regarding similar issues. I addressed this above and need not repeat it here.

The tenth Rosi standard is other relevant factors. I considered no additional factors.

Therefore, based upon the discussion of the Rosi standards, the penalty against WP Sanitary for its compound violations of 66 Pa. C.S. § 1501 is $547,500.

3. Civil Penalty Assessed Against Carl Kresge

Section 3301 allows the imposition of a civil penalty against anyone who is subject to the statute stating at subsection (a):

> In construing and enforcing the provisions of this section, **the violation**, omission, **failure**, neglect, or **refusal of any officer**, agent, or employee **acting for, or employed by, any such** public utility, person or **corporation shall, in every case be deemed to be the violation**, omission, **failure**, neglect, **or refusal of such** public utility, **person** or corporation. 66 Pa C.S. § 3301

Subsection (b) provides:

> **Each and every day's continuance in the violation of any** regulation or final direction, requirement, determination, or **order of the commission**, or of any order of the commission prescribing temporary rates in any rate proceeding, or of any final judgment, order or decree made by any court, **shall be a separate and distinct offense.**

Subsection (d) provides:

> The amount of **the penalty**, when finally determined, **may be deducted from any sums owing by the Commonwealth to the person** or corporation charged, **or may be recovered in a civil action.**
>
> (Emphasis provided to show section application specific to Mr. Kresge.)

Pennsylvania law recognizes the participation theory as a basis of liability. Simply stated, the participation theory provides:

> [t]he general, if not universal, rule is that *an officer of a corporation who takes part in the commission of a wrong by the corporation is personally liable*; but that an officer of a corporation who takes *no* part in the commission of the wrong committed by the corporation *is not personally liable to third persons for such a wrong*, nor for the acts of other agents, officers or employees of the corporation in committing it, *unless he or she specifically directed the particular act to be done or participated, or cooperated therein.* (Emphasis added.)

3A Fletcher, *Cyclopedia of the Law of Private Corporations* § 1137, at 207, Perm. Ed. Rev. 1975. See also: Chester-Cambridge B. & T. Co. v. Rhodes, 346 Pa. 427, 433, 31 A.2d 128, 131 (1943); Amabile v. Auto Kleen Car Wash, 249 Pa.Superior Ct. 240, 250, 376 A.2d 247, 252 (1977); Disco, Inc. v. Casper Corp., 587 F.2d at 606; Martin v. Wood, 400 F.2d 310, 312 (3d Cir.1968) (applying Pennsylvania law).

Liability under the participation theory *attaches where the corporate officer is an actor who participates in the wrongful acts.* (Emphasis added.) Corporate officers may be held liable for misfeasance. Chester-Cambridge B. & T. v. Rhodes, 346 Pa. at 432, 31 A.2d at 131.

See also: Knuth v. Erie-Crawford Dairy Cooperative Ass'n, 463 F.2d 470, 481 (3d Cir.1972), *cert. denied*, 410 U.S. 913, 93 S.Ct. 966, 35 L.Ed.2d 278 (1973) However, corporate officers and directors *may not be held liable for mere nonfeasance*. (Emphasis added.) Chester-Cambridge B. & T. v. Rhodes, 346 Pa. at 432, 31 A 2d at 131; Hager v. Etting, 268 Pa.Superior Ct. 416, 422, 408 A.2d 856, 859 (1979). See also: Cohen v. Maus, 297 Pa. 454, 457, 147 A. 103, 104 (1929).

In this formal complaint proceeding, according to Mr. Kresge, he made all of the operational decisions; his wife Sandra handled the bookkeeping, billing, administrative, and office work. Applying Pennsylvania's participation theory, Mr. Kresge may be found personally liable *if* substantial evidence showed he was an actor participating in wrongful act(s).

> Under the participation theory, the court imposes liability on the individual as an actor rather than as an owner. Such liability is not predicated on a finding that the corporation is a sham and a mere alter ego of the individual corporate officer. Instead, liability attaches where the record establishes the individual's participation in the tortious [wrongful] activity. Wicks v. Milcozo Builders, Inc. 503 Pa. 614, A. 2d 86, 90 (1983)

A key to the application of the theory is whether the individual knew about the violations, but intentionally neglected to do anything about them. Wicks at 90.

WP Water has no board of directors; there is no management team or management company running WP Water. WP Water is Carl and Sandra Kresge's business, and a source of their income. They have incorporated the company, but cannot stand behind the corporation laws to shield themselves from their personal misfeasance. This is not a "piercing of the corporate veil" because; there is no need to do so. That is precisely what the participation theory addresses. Mr. Kresge is *personally* liable for his own misfeasance if he "knew about the violations, but intentionally neglected to do anything about them." Wicks at 90. Mr. Kresge has the authority and the responsibility to meet the Code, regulations, and of course, the 1991 Commission Order. There is no one in the chain of command higher than Mr. Kresge. See Whitemarsh v. PADEP, 2000 EHB 300 (2000), Pa. Envirn. LEXIS 21.

Mr. Kresge is personally liable because the record shows he knew of the 1991 Commission Order and (1) personally and deliberately chose not to comply with directives requiring metering. Specifically and personally, Mr. Kresge had to agree to connect the approximately 100 users that were connected subsequent to the 1991 Order; no one else but Mr. Kresge had that authority and/or responsibility "She's [i.e., Mrs. Kresge] not done anything of that nature." (July 18, 2006 at 59) Mr. Kresge personally chose to not call or write to the Commission seeking advice on how to meet the directives when he personally realized meeting the directives was problematic. It is not possible that the 100 additional customers could have connected to WP Water without Mr. Kresge's specific authorization because, as he testified, he handles all the operational decision-making. I can assume that Mr. Kresge discussed with Mrs. Kresge what the 1991 Order said and required, however I have no choice based on his own testimony, but to conclude that the ultimate decision to not seek PUC assistance and the ultimate decision to continue to hook up new customers was Mr. Kresge's decision.

The record is clear in the Commission Order that there were 52 users at the time the 1991 Order was issued. There are approximately 152 now. The additional 100 users were connected to WP Water with Mr. Kresge's specific and personal consent. His authorization for each new user to connect in violation of the 1991 Order was not simply negligence or nonfeasance. Hooking up the approximately 100 additional users contrary to the Commission Order is clear as well as substantial evidence of misfeasance. 66 Pa. C.S. § 3301(a). This conclusion is firmly supported by testimony and the stipulated facts. See SFoF 11, 16, 17, 20, 21, 22. For this misfeasance, a personal civil penalty applies. The time of this personal violation is from March 31, 1995[10] to the date of this decision. For simplicity, no other reason, I will use the dates March 31, 1995 through July 31, 2007. Applying the statute of limitations, I am again limited to reviewing and applying a civil penalty for three years or 1095 days. 66 Pa. C. S. § 3314 (a), (b).

Briefly restating the Rosi standards for determining an appropriate civil penalty, they are: (1) intentional versus negligent; (2) promptness to correct; (3) preventative measures

[10] The 31st is arbitrary, as the Order did not state a specific date in March, it merely indicated to comply by March 1995.

taken; (4) number of customers affected; (5) litigated or settled; (6) compliance history; (7) cooperation with the Commission; (8) deterrent factor; (9) similar Commission decisions; and (10) other relevant factors.

Mr. Kresge's misfeasance was intentional: he made no attempt to take corrective action by conferring with PUC staff; he took no preventative measures; approximately 100 customers were involved in the initial misfeasance, but, adding additional new users to the system affected the service of current users therefore, 152 were ultimately affected; this matter has been fully litigated and moreover, the 1991 Order was not appealed; Mr. Kresge's two companies have an abysmal compliance history that can only be a personal reflection on himself as there is no one higher in the chain of command as stated earlier; Mr. Kresge has not attempted to cooperate with the Commission; I do not believe penalty will effectuate any change in Mr. Kresge's set patterns of management and operations at both Companies; and no other relevant factors were considered.

Regarding similar decisions, (number 9 in the Rosi considerations), the most similar decision actually pertains to Mr. Kresge, and other supporting case law has already been cited above. In PA PUC v. Wilbar Realty Co., Inc. and Carl Kresge, President, Docket C-00957541 Order entered January 16, 1998, the Commission personally penalized Mr. Kresge $6000 for his using the corporate structure of Wilbar Realty to shield his wrongful conduct. I believe an appropriate civil penalty against Mr. Kresge for his misfeasance is $100 per day, or $109,500.00 (3 years x 365 days x $100/day) A lesser amount is not be appropriate due to Mr. Kresge's callous disregard for his customers' plights with their water service over the twelve (12) years and four (4) months since the Commissions Order.

4. Civil Penalty Assessed Against Sandra Kresge

Sandra Kresge, (according to Mr. Kresge, because she did not testify, but did attend the hearings) is the owner of both Companies. Also, according to Mr. Kresge, he operated the Companies; Mrs. Kresge did all of the bookkeeping, billing, office and administrative work. Nonetheless, as the owner, Mrs. Kresge is personally responsible for the operation and

maintenance of both Companies. She is responsible for meeting the Code, Commission regulations, and Orders. And, as explained in the citations and excerpts above, personal liability attaches due to one's action(s), *not* one's inaction(s)

Mrs. Kresge's personal liability for misfeasance regarding WP Water and WP Sanitary results from her failure to properly bill, failure to properly keep complaint records, and failure to provide proper boil water and/or outages notices. These are three specific regulatory requirements that she personally had authority and responsibility for, she personally controlled, and she personally chose to violate. Additionally, the April 26, 1991 Commission Order to WP Water was a requirement of Mrs. Kresge, however, I am not going to assess civil penalty for her personal violation regarding the 1991 Order, even though it is warranted because as the owner, Mrs. Kresge as well as her husband, had to personally choose to ignore the Commission's Order Only because I have assessed a civil penalty against her husband for personal misfeasance regarding the Order am I declining to apply the same penalty against Mrs. Kresge. I believe under the applicable law it does indeed apply to Mrs. Kresge with the same force and effect. I simply choose to not apply it. I am however, assessing civil penalty against Mrs. Kresge for her own behavior and misfeasance regarding her three (deliberately) miscarried administrative duties cited above. As with her husband, the stipulated findings of fact support this conclusion as does testimony that evidenced failure to bill properly, failure to keep proper complaint records, and failure to issue proper notices. See SFoF 1, 2, 3, 6, 7, 8, 9, 13, and 24

After reviewing the Rosi criteria, the statute of limitations, and the explanations above about the history and patterns of the Companies (that apply to Mrs. Kresge equally as they do to Mr. Kresge), a civil penalty of $100 per day is appropriate, multiplied by three years of misfeasance amounting to a civil penalty of $109,500.00.

V. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and subject matter of this proceeding. 66 Pa. C.S. § 701

2. The formal complainants and party intervenors have met their respective burdens of proof. 66 Pa. C.S. § 332 (a).

3. WP Water Company, Inc. and WP Sanitary, Inc. have failed to furnish and maintain adequate, safe, efficient, and reasonable service, and have failed to make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall have been necessary for the proper accommodation, convenience and safety of its patrons, constituting a violation of 66 Pa. C.S. § 1501.

4. WP Water, Inc. failed to: (i) provide adequate storage capacity causing outages and pressure below the regulatory mandate; (ii) provide adequate notice of outages to patrons; (iii) provide water suitable for household purposes; (iv) install and implement meters and to charge metered rates; (v) provide adequate emergency backup electric generation. 66 Pa. C.S. § 1501.

5. WP Sanitary, Inc. failed to: (i) provide proper collection, treatment, discharge, and disposal of patrons' sewage and wastewater; (ii) make such necessary repairs and changes to the facility to accommodate patrons; (iii) correct excessive infiltration and inflow; and (iv) properly use the mandates of their own tariff to address tree roots, and sump pumps. 66 Pa. C.S. § 1501.

6. WP Water, Inc. is in violation of the Commission Order entered April 26, 1991, at Docket No. M-820308 requiring 52 customers to be metered "no later than March 1995," for which a civil penalty applies. 52 Pa. Code § 65.7; 66 Pa. C.S. § 3301.

7. WP Water, Inc. is in violation of the Commission Order entered April 26, 1991, at Docket No. M-820308 requiring all new residential, commercial, and industrial customers to be metered upon connection. 52 Pa. Code § 65.7; 66 Pa. C.S. § 3301.

8. Carl Kresge and Sandra Kresge, jointly and individually do not possess the financial, managerial, or technical ability to operate a water utility or sewer utility. 66 Pa. C.S. § 529 (c) (1).

9. Violation of 66 Pa. C.S. § 1501 and failure to comply with a Commission Order subjects WP Water and WP Sanitary to assessment of a civil penalty. 66 Pa. C.S. § 3301.

10. Corporate officers may be held personally liable for their misfeasance Chester-Cambridge B. & T. v. Rhodes, 346 Pa. at 432, 31 A.2d at 131.

11. The personal and affirmative misfeasance of Carl Kresge subject him to a personal civil penalty. 66 Pa. C.S. § 3301, Wicks v Milzoco Builders, Inc., 503 PA 614, 470 A 2d 86, 89 (1983).

12. The personal and affirmative misfeasance of Sandra Kresge subject her to a personal civil penalty. 66 Pa. C.S. § 3301, Wicks v Milzoco Builders, Inc., 503 PA 614, 470 A 2d 86, 89 (1983).

13. Civil penalties assessed, if not timely paid, may be deducted from any sums owing by the Commonwealth to the person or corporation charged or may be recovered in a civil action. 66 Pa. C.S. § 3301(d).

VI. ORDER

THEREFORE,

IT IS ORDERED

1. That the formal complaints of Kathleen Sylvester at Docket No. C-20055453, and William J. Finkler at Docket No. C-20055473, against WP Water Company, Inc. are sustained.

2. That the formal complaints of Kathleen Sylvester at Docket No. C-20055455, William J. Finkler at Docket No. C-20055473, and James Pugh at Docket No. C-20065850 are sustained.

3. That the civil penalties assessed against WP Water Company, Inc and WP Sanitary Company, Inc. are held in abeyance until the consolidated matters at Docket Nos. I-00070114, and A-230550F2000 are resolved.

4. That Carl Kresge pay a civil penalty of $109,500.00 by certified check or money order as provided in section 3301(a) of the Public Utility Code, 66 Pa. C.S. § 3301(a), within twenty (20) days after the final Commission Order in this proceeding to:

Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

5. That Sandra Kresge pay a civil penalty of $109,500.00 by certified check or money order as provided in section 3301(a) of the Public Utility Code, 66 PA. C.S. § 3301(a), within twenty (20) days after the final Commission Order in this proceeding to:

Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

6. That the civil penalties herein imposed shall not be recoverable by WP Water Company, Inc. or WP Sanitary, Inc. in any future rate proceeding.

7. That the formal complaints at Docket Nos. C-20055453, C-20055455, C-20055473, C-20055473, C-20065849, and C-20065850 be marked closed.

Date: August 16, 2007

Ember S. Jandebeur
Administrative Law Judge

THE LAW OFFICES OF
BORLAND & BORLAND, L.L.P.
11TH FLOOR
69 PUBLIC SQUARE
WILKES-BARRE, PENNSYLVANIA 18701-2597

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ORIGINAL

September 5, 2007

RECEIVED
SEP - 5 2007
PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

JAMES J MCNAULTY
SECRETARY P.U.C.
2ND FLOOR KEYSTONE BUILDING
400 NORTH STREET
HARRISBURG PA 17105-3265

DOCUMENT
FOLDER

Re: Sylvester et al v. Washington Park Water Co., and Sylvester et al v. Washington Park Sanitary Company
Docket No. C-20055453
Docket No. C-20055473
Docket No. C-20065849
Docket No. C-20055455
Docket No. C-20065850
File No. CM/57293

Dear Secretary McNaulty:

Enclosed, please find an original, and nine (9) copies of the Exceptions of Washington Park Water Company and Washington Park Sanitary Company to the initial decision of Administrative Law Judge Ember S. Jandebeur which was transmitted to the parties of record on August 16, 2007.

A Certificate of Service, evidencing service of the same upon the parties of record is attached to the Exceptions.

BTL 30

Thank you for your consideration.

Sincerely,

Kieran M. Casey

KMC:jp
Enclosures

VIA OVERNIGHT MAIL TRACKING #8614 4786 9317

Cc: Erin Gannon, Esquire (w/encl.) (overnight mail tracking #8614 4786 9340)
Rhonda L. Daviston (w/encl.) (overnight mail tracking #8614 4786 9339)
Carl Kresge (w/encl.)

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMS.ION

Kathleen Sylvester; William J. Finkler; and James Pugh; Complainants And PA PUC LAW Bureau, And Office of Consumer Advocate Intervenors	:	Docket No. C-20055453 Docket No. C-20055473 Docket No. C-20065849
v. W.P. Water Company, Inc. Respondent	:	
Kathleen Sylvester; William J. Finkler; and James Pugh; Complainants And PA PUC LAW Bureau, And Office of Consumer Advocate Intervenors v. W.P. Sanitary Company, Inc. Respondent	:	Docket No. C-20055455 Docket No. C-20055473 Docket No. C-20065450

DOCUMENT FOLDER

DOCKETED
SEP 10 2007

RECEIVED
SEP - 5 2007
PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

EXCEPTIONS OF RESPONDENTS W.P. WATER COMPANY AND W.P. SANITARY COMPANY TO THE AUGUST 16, 2007 INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EMBER S. JANDEBEUR

1. The Administrative Law Judge (hereinafter ALJ) erred in determining that customers of W.P. Water Company endure frequent periods of low water pressure and frequent water outages. (Initial Decision, pages 40-41). This finding was based primarily on the testimony of Complainants Sylvester and Finkler. In his written rebuttal to the testimony of Complainants Sylvester and Finkler, Carl Kresge acknowledged that a water outage occurred on October 15

and October 16 of 2005. (Written Rebuttal at 3-4). He also acknowledged that on the Christmas holiday of 1999 or 2000, there was a water outage and indicated that he typically receives one to two complaints of low water pressure per year. (Written Rebuttal at 5). In his written rebuttal testimony, Mr. Kresge disputed that Ms. Sylvester regularly lodges Complaints of low water pressure. (Written Rebuttal at 2-3). Further, evidence of a specific water pressure reading taken at Ms. Sylvester's home revealed that the pressure was typically within acceptable parameters. (Lash, N.T., 59-63; 7-19-06). Prior to the Complaint at issue, Ms. Sylvester filed no written complaints regarding water pressure with the PUC. (Sylvester, N.T. 66-67; 2-27-06). Mr. Finkler also acknowledged that he had filed no prior complaint regarding water pressure against Mr. Kresge and had never contacted Mr. Kresge regarding concerns over his water pressure. (Finkler, N.T. 119-120; 2-27-06) Despite the ALJ's observation that Mr. Kresge's credibility was questionable, as referenced throughout the decision, Mr. Kresge's truthfulness is evident through the acknowledgments set forth herein and in the substantial number of facts to which he stipulated. Further, the ALJ bases her determination that water pressure and water outage problems were frequent on the testimony of only 2 out of 150 customers. It is respectfully submitted that disagreements regarding the frequency of water pressure or water outage issues should have been resolved in Mr. Kresge's favor.

2. The ALJ erred in determining that W.P. Water Company did not provide adequate notice of service interruptions (Initial Decision, at 42) as Mr. Kresge indicated that upon such interruptions he issued a boil advisory. (Written rebuttal testimony to the testimony of Complainants Sylvester and Finkler, at 5-6).

3. The ALJ erred in determining that W P. Water Company has both a water storage and a water source problem. Mr. Kresge has admitted a need for increased water storage, but has testified that his current water source is sufficient (Written Rebuttal to the testimony of Terry Fought, at 2-3).

4. The ALJ's intimation that Mr. Kresge came to the realization that the W.P. Water Company was in need of increased water storage only upon the occurrence and attendant pressure of the hearings in these matters (Initial Decision, at 46) is without basis. Specifically, the record is clear that the Kresge's attempted to obtain a PENNVEST loan to acquire this storage tank. The ALJ refers to this application throughout the decision (by way of example, see Initial decision at 38 and 51). See also, (Written Rebuttal to the testimony of Terry Fought, at 2-3).

5. The ALJ's intimation that the company failed to consider dedicating a portion of the tariff collected from customers to water storage upgrades is unsupported by the record. Mr. Kresge indicated that these tariffs were insufficient to achieve these upgrades. (Written Rebuttal to the testimony of Terry Fought, at 3-4).

6. The ALJ erred in determining that "it is unreasonable that the Kresges presume one generator can reasonably provide backup for their numerous enterprises," (Initial Decision at 46) without specifying the other enterprises to which she is referring.

7. The ALJ erred in finding that the Kresge's "unilaterally" disregarded a Commission Order to install water meters (Initial decision, at 48) The inability to install meters was not wilfull disregard of a Commission Order, but rather, was not economically feasible due to the failure to consummate the Pennvest loan the company had applied for to make such upgrades coupled with the low flat rate payments the company receives from water customers. (Written Rebuttal to the testimony of Terry Fought, at 2-4).

8. The ALJ's determination that "approximately 23% of the WP customers are served by 2-inch diameter pipe, 24% by 3-inch diameter pipe, 15% by 4-inch diameter pipe and 38% by 6-inch diameter pipe," is inaccurate. (Initial Decision, at 49). Mr. Kresge admitted that 70% of those customers are served by 6 inch water mains, while approximately 30% are served by 3 inch diameter water mains (Written Rebuttal to the testimony of Terry Fought, at 2).

9. Based on exceptions #1 through 8, above, the ALJ erred in her Conclusions of Law #3 and #4 as those conclusions pertain to W.P. Water Company. Therefore, the imposition of a civil penalty upon W.P. Water Company constitutes an error.

10. The ALJ erred in suggesting that the PUC was unaware of the state of the water delivery system at Washinton Park asW.P. Water Company applied for a PENNVEST loan to make upgrades to its water delivery system in approximately 1994. By the terms of the application, the proceeds from the loan were to be used to develop a new water well source, acquire a water storage tank, to facilitate the metering of customer homes, and to acquire a back-up electric generator (Initial Decision, at 51).

11. The ALJ erred in noting that W.P. Water Company has a long history of environmental violations with DEP in her discussion of a civil penalty to be applied to W.P. Water (Initial Decision, at 61).

12. The ALJ erred in her calculation of a civil penalty to be assessed to W.P. Water Company, pursuant to Joseph A. Rosi v. Bell-Atlantic-Pennsylvania, Inc. and Sprint Communications Company, L.P., Docket No. C-00992409 (Order entered March 16, 2000). (Initial Decision, at 61-62, and 71)

a The ALJ erred in determining that any of the purported violations were intentional and that a daily penalty of $500.00 should be

assessed. The ALJ based this determination upon past DEP and PUC violations. The ALJ did not specify which DEP violations she was referring to in this calculus. Further, the testimony of DEP employee Jim Holmes is subject to a separate an ongoing and contested proceeding. Further, purported DEP violations relate to the Sanitary Company, no the Water Company. The only prior violation of a PUC directive within the three year statue of limitations that was specified by the ALJ and related to the Water Company was the Company's non-compliance with the 1991 Order directing that Water Meters be installed As noted above, the purpose of the PennVest application was, in part, to secure these meters. See also, Initial decision at 51.

b Carl Kresge admitted that he has been unable to secure funding, despite his best efforts for a new storage tank. With regard to his efforts to correct problems actually raised by the customers, Respondent draws the Commission's attention to his respons to the October 2005 water outage, as set forth in Written rebuttal to the testimony of Complainants Finkler and Sylvester.

c. With regard to the number of customers affected by the purported violations, Respondent submits that only three customer complaints are at issue, a small fraction of the 152 company customers.

d With regard to standards six and seven, as has been noted above, the Company did not deliberately fail to comply with a directive to install water meters. Rather, such installation was not economically feasible, a fact known by the PUC as early as 1994, the date of the Company's application for a PennVest loan. There is no record of any effort on the part of the Commission to help or assist the Company to upgrade its delivery system. Therefore, assertions that the Company failed to cooperate with the Commission are unsupportable.

e Although, the ALJ did not assess additional penalties pursuant to the eighth and ninth factors, Respondent disputes the characterization of Mr Kresge's testimony as dishonest. The significant number of facts that were stipulated to, along with Mr. Kresge's acknowledgment of improved water storage capacity speak to his honesty

Respondent submits that the contents of this Exception (Exception #12) constitue mitigating factors and that a $500.00 a day penalty over a three year period for a utility of this size is grossly unreasonable.

13. The ALJ erred in finding that "despite knowing of their infiltration/inflow issue, WP Sanitary has never obtained bids or cost estimates for an infiltration/inflow study." (Initial decision, at 54). This language suggests that Mr. Kresge intentionally chose not to obtain a infiltration/inflow study. However, Mr. Kresge's testimony at pages two and three of his written response to the testimony of Larry Lash indicates that such a study would not be economically feasible for a utility of this size.

14. In her determination that customers have been subjected to malodors (Initial Decision at 55-56), and in her calculation of a civil penalty assessed to the Sanitary Company, the ALJ erred in failing to consider the testimony of Larry Lash. Mr. Lash indicated that he inspected the treatment plant on June 3, 2007 and July 15, 2006 and detected no malodors . (Lash, N.T., 69-70; 7-19-06).

15. The ALJ erred in determining that, "the pictures provided by Mr. Holmes provide the clearest evidence that sewage sludge and solids from WP Sanitary have indeed "blown right through" to the receiving stream." (Initial Decision, at 57). The testimony of Mr. Holmes is the subject of a separate and contested proceeding.

16 The ALJ erred in assessing a civil penalty against W.P. Sanitary Company

17. The ALJ erred in her calculation of a penalty against W.P. Sanitary Company. (Initial decision 62-63, 69-71).

a. Initially, the ALJ determined that the exact same penalty assessed against the Water Company should be assessed against the Sanitary Company. Whereas, the fine assessed upon the Water Company was based on the last three years of non-compliance with a 1991 Order requiring installation of water meters, the ALJ provides no indication of why she saw fit to assess a $500.00 a day fine upon the Sanitary Company. No specific violation lasting for a period of three years appears of record and no such violation is referred to by the ALJ. Further, the evidence of record is clear that Mr. Kresge recognizes that an infiltration/inflow problem exists and that he has been unable to remedy it due to a lack of capital. (Written rebuttal of Carl Kresge to the testimony of Terry Fought, 4-5). As such, Mr. Kresge has recognized the problem, but has been unable to remedy it. This does not constitute intentional or willful conduct.

b. With regard to the second Rosi standard, the ALJ erred in not considering the companies compliance with specific recommendations set forth by Mr. Fought. (See Statement of Terry Fought, OCA Statement #1, 16-18, and (Written rebuttal of Carl Kresge to the testimony of Terry Fought, 4-5).

c The ALJ refers to a history of non-compliance in reference to the sixth and seventh factors of the Rosi analysis, but specifies no such history with regard to the Sanitary Company.

Respondent suggests that the factors set forth in subsections a. and b. are mitigating factors, rendering a fine of $500.00 a day for three years unsupportable.

18. The ALJ erred in assessing a civil penalty against Mr. Kresge. The ALJ's decision to assess a personal fine upon Mr. Kresge is based upon her determination that he knew about the violations, but intentionally neglected to do anything about them (Initial Decision, at 65). The specific violation discussed by the ALJ in this section of the decision is the failure to comply with the 1991 Order requiring that water meters be installed. As has been noted above, Mr. Kresge attempted to secure a PennVest loan, in part to install such meters. Accordingly, from the date of this application in 1994, the PUC had notice that the Water Company did not have the funds necessary to install these meters. In addition to attempting to secure funding through PennVest, Mr. Kresge testified at the hearing that he attempted to obtain private loans, but that financial institutions would not extend such financing as it was secured by a regulated utility. (Kresge, N.T. 61; 7-18-06). Finally, as noted above, he indicated that the income derived from the flat rates charged to customers was not sufficient to install water meters. To the extent, the personal fine levied against Mr. Kresge is based on other purported violations, Respondent incorporates those arguments set forth above in response to the assessed fines levied against the Water and Sanitary Companies.

19. The ALJ erred in assessing a civil penalty to Sandra Kresge in the Amount of $109,500.00. (Initial decision, at 67-68, and 72). This assessment is based on the conclusion that Ms. Kresge "failed to properly bill, failure to properly keep complaint records, and failure to provide proper boil water and/or outages notices." Initially, respondent notes that the ALJ cited no customer concerns regarding these specific responsibilities as support for this assessment. Further, the ALJ provides no precedent for the imposition of such an extreme penalty for these particular deficiencies. Finally, no history of deliberate non-compliance by the companies with regard to these clerical responsibilities appears of record. Accordingly, no finding of an intentional violation can be supported.

A. Billing

As noted by Mr. Kresge, the testimony of Marilyn Kraus cited seven areas of purported deficiency with regard to the billing practices of the companies. During his written rebuttal to the testimony of Ms. Kraus, Mr. Kresge acknowledged that the bills did not fully comply with the technical requirements of the PUC and that

he would comply with the recommendations of Ms. Kraus as to appropriate billing practices. Mr. Kresge's testimony is as follows:

> With regard to number 1, I agree that the beginning and ending dates of the billing period are not expressly set forth on the bill. The bill can be adjusted to provide this information. However, the billing date of February 1, 2006 is present. I believe our customers know that the bills are sent out on the first day of the month for the billing period constituting the month that has just past.
>
> With regard to item 2, I agree that the due date on which a payment shall be made is not present. This can also be remedied.
>
> With regard to item #3, the "amount of payments and other credits made to the account during the billing period are not shown on this particular bill as this account was current at the time of the February 1, 2006 billing period." I am providing a bill, (attached as Exhibit 1) which provides an example of an overdue balance being included on a monthly bill. The amount of payments and credits made during a billing period can be added to our bills.
>
> With regard to item #4, I admit that the quoted language is not present on the bill. This can be remedied.
>
> With regard to number 5 and number 6, I note that we charge all customers a flat rate with regard to water, sewer and hose service. As such, that rate is equal to the amount due, which is itemized on the bill. (Written rebuttal testimony of Carl Kresge to the testimony of Marilyn Kraus, at 2-3).

Ms. Kraus also indicated that an invoice number rather than an account number is shown on the bills. As such, she asserted that the bill is not in compliance with the Commission's policy statement regarding plain language guidelines to provide customers with a clear and informative bill. (Written rebuttal testimony of Carl Kresge to the testimony of Marilyn Kraus, at 3).

Mr. Kresge's reply to this concern indicated a willingness to comply with this suggested change. As I have indicated, many of the issues Ms. Kraus raises with our bill can be easily remedied. However, I do believe, based on the fact that we charge a flat rate for our services, which are itemized, that the customers receive a clear and informative bill.

B. Boil Water/Outage Advisories

Mr. Kresge testified that the company typically issues a boil water advisory in four circumstances: (a) if there is a water main break; (b) if there is an outage of water service; (c) if there is a significant drop in water pressure; or (d) a malfunction of chlorinating machine. These advisories are communicated to and through the local television networks. (Written rebuttal testimony of Carl Kresge to the testimony of Marilyn Kraus, at 4).

RESPECTFULLY SUBMITTED.

Kieran Casey, Esquire
Borland & Borland
69 Public Square
11th Floor
Wilkes-Barre, Pa 18701

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMS.ION

Kathleen Sylvester;	:	Docket No. C-20055453
William J. Finkler;	:	Docket No. C-20055473
and James Pugh;	:	Docket No. C-20065849
Complainants	:	
And	:	
PA PUC LAW Bureau,	:	
And	:	
Office of Consumer Advocate	:	
Intervenors	:	
	:	
	:	
v.	:	
W.P. Water Company, Inc.	:	
Respondent	:	
	:	
	:	
Kathleen Sylvester;	:	Docket No. C-20055455
William J. Finkler;	:	Docket No. C-20055473
and James Pugh;	:	Docket No. C-20065450
Complainants	:	
And	:	
PA PUC LAW Bureau,	:	
And	:	
Office of Consumer Advocate	:	
Intervenors	:	
v.	:	
W.P. Sanitary Company, Inc.	:	
Respondent	:	

CERTIFICATE OF SERVICE

I, Kieran M. Casey, Esquire, do hereby certify that on this 5th day of September, 2007, a true and correct copy of the Exceptions of Respondents W P Water Company and W.P. Sanitary Company to the August 16, 2007 Initial Decision of Administrative Law Judge Ember S. Jandebeur was served upon the following individuals by Overnight Mail:

James J McNaulty
Secretary P.U.C.

COMMONWEALTH OF PENNSYLVANIA

OFFICE OF CONSUMER ADVOCATE
555 Walnut Street, 5th Floor Forum Place
Harrisburg, Pennsylvania 17101-1923
(717) 783-5048
800-684-6560 (in PA only)
FAX (717) 783-7152
consumer@paoca.org

IRWINA POPOWSKY
Consumer Advocate

ORIGINAL

September 5, 2007

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17101-3265

Re: Re: Kathleen Sylvester, William J. Finkler, and James Pugh, Complainants
v.
W. P. Water Company, Respondent
Docket Nos. C-20055453, C-20055473, and C-20065849

DOCUMENT FOLDER

Kathleen Sylvester, William J. Finkler, and James Pugh, Complainants
v.
W. P. Sanitary Company, Respondent
Docket Nos. C-20055455, C-20055473 and C-20065850

Dear Secretary McNulty:

Enclosed for filing are an original and nine (9) copies of the Exceptions of the Office of Consumer Advocate, in the above-referenced proceeding.

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

Sincerely,

Erin L. Gannon/cmh

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

Enclosures
cc: Honorable Ember S. Jandebeur
Office of Special Assistants
Parties of Record
00095467.DOC

BTL

CERTIFICATE OF SERVICE

Re: Kathleen Sylvester, William J. Finkler, and James Pugh, Complainants
v.
W. P. Water Company, Respondent
Docket Nos. C-20055453, C-20055473, and C-20065849

Kathleen Sylvester, William J. Finkler, and James Pugh, Complainants
v
W. P. Sanitary Company, Respondent
Docket Nos. C-20055455, C-20055473 and C-20065850

I hereby certify that I have this day served a true copy of the foregoing document, the Office of Consumer Advocate's Exceptions, 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 5th day of September, 2006.

SERVICE BY ELECTRONIC MAIL AND INTER-OFFICE MAIL

Rhonda Daviston, Esq.
Law Bureau
Pennsylvania Public Utility Commission
P. O. Box 3265
Harrisburg, PA 17105-3265

SERVICE BY ELECTRONIC MAIL AND FIRST CLASS MAIL

Kieran Michael Casey, Esq
Borland and Borland, L.L.P.
69 Public Square
Suite 1100
Wilkes-Barre, PA 18701

Ernest D. Preate, Jr., Esquire
Mellon Bank Building
400 Spruce Street, Suite 300
Scranton, PA 18503

Fayling Dempsey, Assistant Counsel
Pa. Dept. of Environmental Protection
Office of Chief Counsel
2 Public Square
Wilkes-Barre, PA 18711-0790

SERVICE BY FIRST CLASS MAIL, POSTAGE PREPAID

Kathleen Sylvester
17 Jeanne Drive
Tunkhannock, PA 18657

William J. Finkler
18 Jeanne Drive
Tunkhannock, PA 18657

James Pugh
8 Thomas Drive
Tunkhannock, PA 18657

Erin L. Gannon/CMH
Erin L. Gannon
Assistant Consumer Advocate
PA Attorney I.D. # 83487
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Counsel for
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88318.doc,1/ELG

ORIGINAL

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Kathleen Sylvester, William J. Finkler, and James Pugh, Complainants v. W. P. Water Company, Respondent	:	Docket Nos. C-20055453, C-20055473, and C-20065849
Kathleen Sylvester, William J. Finkler, and James Pugh, Complainants v. W. P. Sanitary Company, Respondent	:	Docket Nos C-20055455, C-20055473 and C-20065850

EXCEPTIONS
OF THE
OFFICE OF CONSUMER ADVOCATE

Erin L. Gannon
Assistant Consumer Advocate
PA Attorney ID # 83487

Counsel for
Irwin A. Popowsky
Consumer Advocate

Office of Consumer Advocate
555 Walnut Street 5th Floor, Forum Place
Harrisburg, PA 17101-192
Phone: (717) 783-5048
Fax: (717) 783-7152
September 5, 2007

I. INTRODUCTION

On August 16, 2007, the Office of Administrative Law Judge issued the Initial Decision of Administrative Law Judge Ember S. Jandebeur in connection with the complaints of several customers of W.P. Water Company and W.P. Sanitary Company regarding their quality of service pursuant to Section 1501 of the Public Utility Code.

The ALJ concluded that WP Water and WP Sanitary have intentionally and persistently failed to provide safe, adequate, reasonable and efficient service to customers. The ALJ assessed reasonable civil penalties against each utility and Mr. and Mrs. Kresge, individually, for these failures. While the ALJ did not adopt all of the Office of Consumer Advocate's proposed remedies, the OCA submits that Judge Jandebeur has provided the Public Utility Commission with an extremely well reasoned and well-written Recommended Decision. The record in this case was voluminous and the ALJ did an admirable job of sifting through the evidence in a thoughtful and even-handed manner. Nevertheless, the OCA respectfully submits these Exceptions with respect to one important issue that was not addressed in the Initial Decision – customer refunds

The OCA notes that the ALJ adopted 50 stipulated findings of fact and 220 findings of fact, which together with her discussion, provide a roadmap of improvements needed to resolve the myriad problems with WP's water and wastewater systems. I.D. at 51, 58-59. The ALJ's Ordering Paragraphs do not specifically order WP to make these improvements – this may be attributable to WP's lack of managerial, technical and financial fitness. I.D. at 36-37, FoF 261-268. The OCA is also attempting to address these matters in the pending Section 529 proceeding. Investigation of W.P. Water Co., Inc. and W.P. Sanitary Co., Inc. pursuant to

Section 529 of the Pennsylvania Public Utility Code, Consolidated Docket Nos. I-00070114, P-00072313, A-230550F2000, Order (July 11, 2007).

Therefore, pursuant to 52 Pa. Code § 5.533, the OCA files the following exception for the Commission's consideration.

II EXCEPTION

OCA Exception: The Commission Should Order W.P. to Refund A Portion Of Customers' Payments Because W.P. Has Not Provided Safe, Adequate or Reasonable Service. OCA M.B. at 35-36; OCA R.B. at 23-24.

A. Introduction.

In her Initial Decision, the ALJ made 270 findings of fact, which support her conclusion that WP is persistently in violation of Section 1501 of the Public Utility Code. Initial Decision (I.D.) at 5-37, 50, 52, 58. 66 Pa. C.S. § 1501. The record shows that WP customers' water and wastewater service is terribly inadequate, as evidenced by ongoing low pressure, outages and water quality complaints, poor maintenance and operation of the wastewater collection and treatment systems, discharge of untreated sewage to the receiving stream, related odor complaints, and chronic non-compliance with Commission and DEP regulations. I.D. at 5-37, Stipulated Findings of Fact (SFoF) 1-50, Findings of Fact (FoF) 51-270.

B Commission Precedent Supports Refunds Where The Service Is Not Adequate, Reasonable And Sufficient.

As discussed above, the ALJ has correctly determined that WP is operating in violation of Section 1501 of the Public Utility Code. The rates utilities charge to customers are premised on the assumption that the service being provided satisfies Section 1501.

> It is our opinion that in exchange for the utility's provision of safe, adequate and reasonable service, the ratepayers are obligated to pay rates which cover the cost of service which includes reasonable operation and maintenance expenses, depreciation, taxes and a fair rate of return to the utility's investors. Thus, as the OCA contends, a quid pro quo relationship exists between the utility and its ratepayers.

Pa. P.U.C. v. Pennsylvania Gas and Water Co., 61 PaPUC 409, 415-16, 74 PUR4th 238, 244-45 (1986). Where a utility has charged rates "in violation of any regulation or order of the

commission," Section 1312 of the Public Utility Code authorizes the Commission to require the utility to refund the amount of any excess paid by any customer. 66 Pa. C.S. § 1312(a).

In this case, the record supports the ALJ's finding that the operators of WP for more than 20 years are "individually and collectively incapable of managing either a water supply utility or a wastewater treatment utility." I.D. at 37, FoF 268. The ALJ observed a pattern of "feckless management and service" and "persistent" and "intentional" regulatory non-compliance over this time period. I.D. at 50, 61, *see also* I.D. at 60-68. Given the egregiousness of the service provided by WP, the OCA submits that it would be appropriate for the Commission to exercise its discretion to order refunds.

Section 1312 allows refunds for the four years prior to the complaint and specifies that refunds should be made to all customers. 66 Pa. C.S. § 1312(a). WP has collected the same flat rate, $38.25 per month, from all customers during the four years preceding the filing of the complaints. Accordingly, Section 1312 allows refunds of $1,836 per customer (4 years x 12 months x $38.25 per month) plus interest. Recognizing that the PUC has the discretion to reduce the amount of refunds, the OCA has recommended that one-half the billed amount be refunded without interest, or $918 per customer. OCA M.B. at 36; OCA R.B. at 23. The OCA submits that this reduced amount is reasonable, because the refunds could have been calculated to include the additional amounts billed since the complaints were filed in October 2005, while this proceeding was pending.[1]

[1] There is no question that WP's service continues to be grossly inadequate, as evidenced in the Orders issued by the Commission on June 21, 2007 and July 11, 2007 Ratification of Emergency Order in re: W.P. Water and Sanitary Co. and its Duty to Provide Adequate, Safe and Continuous Water Service to its Customers, Docket No. P-00072312; Investigation of W.P. Water Co., Inc. and W.P. Sanitary Co., Inc. pursuant to Section 529 of the Pennsylvania Public Utility Code, Consolidated Docket Nos. I-00070114, P-00072313, A-230550F2000

In Luckie v. Clean Treatment Sewage Co., the utility argued that it would not be practical to continue operating if it were subject to the full amount of refunds recommended by the OCA. 76 PaPUC 30 at 47-48 (1992) (Clean Treatment). The Commission agreed with the OCA that the maximum refund that could be ordered was $338,965, but determined that $23,526 was the amount the company "could refund to customers on an annual basis and still be able to pay expenses and a reasonable estimate of interest on debt." *Id.* at 48-49. The legality and appropriateness of refunds was specifically reserved for two pending complaint proceedings where customers had requested refunds. *Id.* at 49.

In the first of those proceedings, Luckie v. Clean Treatment Sewage Co., the PUC held that a refund was appropriate because the utility improperly charged customers for a service that could not be provided due to a regulatory ban. Docket No. C-892706, Order at 18 (Dec. 29, 1992) (Luckie)[2] The PUC reduced the refund authorized under Section 1312 from $23,526 to $20,000 per year, over five years. *Id.* at 19. In the second proceeding, Worrall v. Clean Treatment Sewage Co., the PUC also granted the refund in the reduced amount of $20,000, for the reasons outlined in Luckie. Docket No. C-892531, Order at 16 (Dec. 29, 1992) (Worrall).[3]

Pursuant to Clean Treatment, Luckie and Worrall, it is clear that the PUC has the discretion to reduce potential refunds where there is evidence that a greater amount would risk the financial viability of a company. It is equally clear that the determination whether customers are entitled to refunds under 66 Pa. C.S. § 1312 must be separately decided. In other words,

[2] This order is attached as Appendix A.
[3] This order is attached as Appendix B.

financial instability may be considered in reducing the level of refunds, but it cannot be used as a defense against a finding that refunds are warranted under Section 1312.[4]

C. The ALJ's Recommendation To Assess Penalties Can Complement Refunds To Customers.

The OCA supports the ALJ's recommendation to order WP and the Kresge's individually to pay civil penalties. It is important to note, however, that penalties are punitive in nature and are paid to the General Fund. 66 Pa. C.S. § 3315. The penalties do not directly benefit the customers who have endured WP's terrible service and incurred additional costs to live with it. In contrast to civil penalties, refunds are paid directly to the aggrieved customers. OCA submits that refunds, together with the recommended civil penalties, are reasonable and appropriate.

[4] To the extent the Commission may find it is not feasible for WP to provide refunds immediately, it may be appropriate to pay refunds out of proceeds from a future sale of the companies.

III. CONCLUSION

For all of the foregoing reasons, the OCA respectfully excepts to the Initial Decision of Administrative Law Judge Ember S. Jandebeur and requests that the Commission order WP Water Company and WP Sanitary Company, collectively, to provide appropriate refunds to each customer

Respectfully submitted,

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Dated: September 5, 2007

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Appendix A

Robert J. Luckie
v.
Clean Treatment Sewage Company
Docket No. C-892706

Opinion and Order

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265

Public Meeting held December 17, 1992

Commissioners Present:

David W. Rolka, Chairman
Joseph Rhodes, Jr., Vice-Chairman
Wendell F. Holland, Commissioner

Robert J. Luckie
v.
Clean Treatment Sewage Company

C-892706

OPINION AND ORDER

BY THE COMMISSION:

Before the Commission for disposition are the Exceptions filed by Respondent Clean Treatment Sewage Company ("Respondent" or "Clean Treatment") to the Recommended Decision ("R.D.") of Administrative Law Judge ("ALJ") Richard M. Lovenwirth issued on November 27, 1991. Respondent Clean Treatment also filed Supplemental Exceptions.

History of Proceedings

1. On December 6, 1989, Robert J. Luckie ("Complainant") filed a Formal Complaint against Clean Treatment at C-892706.

2. The Formal Complaint alleged that the Respondent's sewer availability fee charged to Complainant is illegal because Complainant's unimproved lot cannot be hooked up to the Respondent's sewage system due to a May 1, 1984 finding by the Pennsylvania Department of Environmental Resources (hereinafter "DER") that the Respondent's central sewerage system is inadequate for hookup by additional buildings. The Complaint requested an Order from this Commission which would invalidate the said availability fee retroactive to May 1, 1984.

3. On January 10, 1990, an Answer was filed by the Respondent which alleged that the availability charge is part of the Respondent's approved tariff. The said Answer also denied the lack of availability of sewage service to the Complainant.

4. A Hearing was held on April 12, 1990 at State Office Building, Scranton, Pennsylvania. The transcript of said hearing consisted of 72 typewritten pages. Complainant moved an exhibit into the record and Respondent moved seven exhibits into the record. No briefs were filed.

5. Administrative Law Judge ("ALJ") Richard M. Lovenwirth issued his Recommended Decision in this case on October 30, 1990.

6. Clean Treatment filed Exceptions to the Recommended Decision on November 12, 1990.

7. Clean Treatment filed Supplemental Exceptions to the Recommended Decision on November 19, 1990.

8. On February 11, 1991, Clean Treatment filed a Petition to Reopen the Record.

9. By Order entered May 9, 1991, we granted Respondent's Petition to Reopen, and we also remanded this matter to the Office of Administrative Law Judge to be consolidated for hearing and the issuance of a Recommended Decision with Respondent Clean Treatment Sewage Company's general rate increase investigation at Docket No. R-911918. We further acted to mandate that the record there be developed relative to the impact of giving full force and effect to ALJ Lovenwirth's October 30, 1990 R.D.

10. ALJ Lovenwirth issued his Recommended Decision in R-911918 and the consolidated cases, including this docket of C-892706, on November 27, 1991.

11. On January 23, 1992, we issued our Opinion and Order in the R-911918 case and in the instant docket, C-892706.

12. As pointed out in our Order of January 23, 1992, the issues raised in Respondent's Exceptions to the R.D. of ALJ Lovenwirth of October 30, 1990 are still pending before the Commission and will be here addressed.

Discussion

In his R.D. relative to the Complaint proceeding, ALJ Lovenwirth presented the following proposed Findings of Fact, on pages 10-13:

> 1. Complainant is Robert J. Luckie, an individual who resides at R.D. #2, Box 72, Meshoppen, Pennsylvania 18630.
>
> 2. Complainant owns an unimproved lot of real estate at the Marcel Lakes Estates, Dingmans Falls, Delaware Township, Pike County, Pennsylvania ("unimproved lot") (N.T. 16, 17).
>
> 3. Complainant entered into an agreement of sale for the purchase of the "unimp-oved lot" from "All American Realty Corporation" in 1971, but under the terms of the agreement of sale, he did not take title to said "unimproved lot" until January, 1980, when his deed was recorded (N.T. 18). The delay between the time that he purchased the said "unimproved lot" and the date when his deed was recorded was caused by the fact that he made installment payments to the seller (N.T. 18).
>
> 4. Prior to obtaining his deed, Complainant had to pay a charge of $1,500 for a sewer pipe in front of the unimproved

lot, even though there was no sewage plant available to him when he made the said payment (N.T. 19).

5. Starting in 1985 the Complainant started getting bills from Respondent for availability of sewage treatment to his unimproved lot (N.T. 20). His first bill in the sum of $18.75 was received on June 30, 1985, and each succeeding bill was sent to him in like amounts every three months (N.T. 25, 26). The witness has never paid any of his sewage availability bills, and the amount which Respondent now claims is due and owing to it from Complainant is $378.75 (N.T. 34).

6. The "unimproved lot" in question has no sewage available to it, and has had no sewage available to it since May, 1984, at which time DER declared a moratorium against adding additional homes to Respondent's sewage system (N.T. 20, 22, 23, 42, 46; Complainant's Exhibit No. 1).

7. There are a total of 1,100 lots in Marcel Lakes Estates (N.T. 46); but only 163 or 164 lots have improvements thereon which are hooked up to the sewage treatment plant (N.T. 44, 45). As aforementioned in the next preceding Finding of Fact, DER will not permit expansion of Respondent's sewage treatment plant to accommodate any additional buildings. Thus, according to Respondent's witness Robert F. Matros, there are 936 unimproved lots in the Marcel Lakes Estates which are presently unbuildable because of the lack of available central sewage to said lots (1,100 lots less 164 improved lots already hooked up) (N.T. 44-46).

8. Respondent's water treatment facilities were not intended to provide sanitary sewage service to the 1,100 potential homes at Marcel Lakes Estates; the said sewage treatment facilities having been built for a significantly lesser amount of homes - it being Respondent's plan to

enlarge its plant in stages on an "as needed" basis (N.T. 42, 46).

9. There is currently pending before various regulatory agencies Respondent's application to expand its sewage treatment plant so as to accommodate another 140 homes; it being the present intention of the municipality that if said expansion in the sewage system is made that a lottery will be held to ascertain which "applicant-owners" of unimproved lots will be serviced by the proposed expansion to the sewage treatment facilities (N.T. 31, 45). Thus, even if the sewage treatment facilities of Respondent are expanded in accordance with its present application pending before DER for that purpose, it still will be insufficient to serve the entire service territory of Marcel Lakes Estates.

10. Respondent's tariff provision at "Supplement No. 6 to Sewer-Pa. P.U.C. No. 1, second revised page no. 4, paragraph (1)" allows for a charge of $18.75 per quarter per lot for availability of sewage to unimproved lots (N.T. 40, 41; Respondent's Exhibit No. 5).

Based on these Findings of Fact, and on his discussion of the issues raised herein, the ALJ reached the following Conclusions of Law, on page 17 of his R.D.:

1. This Commission has jurisdiction over the subject matter of this proceeding and over the parties thereto.

2. An availability fee levied against owners of unimproved lots in residential developments is valid only where the facilities of the public utility levying said charge were constructed to service the entire vacation lot development, and only where said facilities are, in fact, available to service said unimproved lots. (Commission order entered 12/28/89 in Pa. P.U.C. et al. v. Lake Latonka Water Company, at R-891257 et al.).

3. The provision in the tariff of the Clean Treatment Sewage Company, being Supplement No. 6 to Sewer-Pa. P.U.C. No. 1, second revised page no. 4, paragraph (1), which allows a charge of $18.75 per quarter per lot for availability of sewage to unimproved lots, is unlawful, unreasonable and unjust.

Based on his Conclusions of Law, ALJ Lovenwirth proposed the following Ordering Paragraphs, at page 18 of his R.D.:

1. That the Complaint of Robert J. Luckie against the Clean Treatment Sewage Company, as amended, filed on December 6, 1989 at C-892706, be and is hereby SUSTAINED.

2. That the Clean Treatment Sewage Company shall immediately cease and desist from enforcing the provisions of that portion of its tariff being Supplement No. 6 to Sewer-Pa. P.U.C. No. 1, second revised page no. 4, paragraph (1), allowing a charge of $18.75 per quarter per lot for availability of sewage to unimproved lots.

3. That Clean Treatment Sewage Company shall cancel all balances reflected upon its books of account as being due and owing as sewer availability fees incurred after December 6, 1985 from Robert J. Luckie and from all other Marcel Lakes Estates patrons in like situation who have been charged sewer availability fees since said date. Additionally, Clean Treatment Sewage Company shall rebate to all owners or former owners of unimproved lots in Marcel Lakes Estates (or to their proper heirs or assigns) any payments made by them for availability of sewage fees to unimproved lots incurred on or after December 6, 1985, without payment of interest to said ratepayers.

As noted above, Respondent Clean Treatment filed Exceptions to the R.D. on November 12, 1990, and also filed Supplemental Exceptions to the R.D. on November 19, 1990.

The Exceptions and Supplemental Exceptions

The Exceptions of Clean Treatment are not lengthy, and they will be quoted in full:

> Clean Treatment takes exception to the Administrative Law Judge's Decision to sustain the Complaint of Robert J. Luckie. More specifically, Clean Treatment takes exception to the relief granted in the proposed Order requiring that Clean Treatment immediately cease and desist from enforcing the provisions of its previously approved tariff, cancelling all balances upon its books of account showing due and owing sewer fees from Luckie and others in his situation and further requiring Clean Treatment to rebate to all owners or former owners of unimproved lots in Marcel Lakes Estates any previous payments made by them since December 6, 1985.
>
> The Administrative Law Judge erred in setting aside the previously approved tariff by the Commission, in finding that Luckie had met his burden of proof, and in characterizing the tariff as "ready to serve" or "stand by" fees. In fact, the tariff as approved last on July 3, 1982, states simply that the charge of $18.75 per quarter per lot shall be payable by the owner of each lot irrespective of the quantity of sewage discharged. There is no requirement that the sewage system be at all times "ready to serve".
>
> The Administrative Law Judge further erred by penalizing Clean Treatment for regulatory action by other government agencies, including the Department of Environmental Resources and the local township through its zoning and building requirements which independently had suspended construction of improvements (Recommended Decision p. 3-4).
>
> The relief recommended by the Administrative Law Judge is excessive and unnecessarily

penal as it tends only to remove from Clean Treatment part of the essential funding it requires for continuation and expansion, and places an unfair burden upon connected home-owners to support the facility and any expansions (Recommended Decision, p. 7).

The Administrative Law Judge errs as well in the conclusion that no structure can be erected "solely" because of the problems with sewage (Recommended Decision, p. 14). The Complainant never attempted, other than one time in 1983, to apply for necessary variances to build (Recommended Decision, p. 4). All decisions to grant building permits are made by the township through a lottery system and are not in the control of the Respondent (Recommended Decision, p. 5).

Similarly, Clean Treatment's Supplemental Exceptions are not lengthy, and they will be quoted in full:

The Administrative Law Judge did not take into consideration the inherent nature of utilities for vacation homes and lots and mistakenly applied obligations upon the Respondent on extensions of growth as though it were a more traditional utility. In any vacation community, wherein plot owners buy first for investment and later for building, it would be financially infeasible as well as probably violative of the customers' rights for the Respondent to have overbuilt the system at the start. If for any reason the investors/lot owners decided not to build, then the customers would be saddled with a disproportionate tariff to cover the cost of an unused system.

The Administrative Law Judge also erred in making his relief so broad without sufficient foundation. There is nothing on the record to support that all other customers who have not built are in the same situation as this particular Complainant. As the decision itself recognizes, only a small number of homes were built despite the fact that the community began in the early 1970's. Should the relief be upheld, it should not be applied so broadly but rather individual lot owners should be required to come forth to show that they have somehow been forbidden

from improving their lots for reasons other than mere financial investment on their part.

The Administrative Law Judge failed to consider the issue of over-capacity had the Respondent constructed in the fashion he would suggest in the rationale in his decision and failed to consider the modular fashion used by the Respondent which is fair and more economically feasible to the customers.

Section 1312 of the Public Utility Code, 66 Pa. C.S. §1312(a) provides that if the Commission determines that any rate received by a public utility was unjust and unreasonable, the Commission has the power to order a refund of the amount of any excess paid by a customer in consequence of such unlawful collection (subject to a four year period limitation). However, that subsection also expressly provides that, "...Any order of the Commission awarding a refund shall be made for and on behalf of all patrons subject to the same rate of the public utility..."

As we noted above, the Exceptions and the Supplemental Exceptions filed to the R.D. herein were held in abeyance since, by our Order entered May 2, 1991, we granted Clean Treatment's Petition to Reopen the Record, and consolidated this case with the Respondent's general rate increase investigation at R-911918.

The ALJ's R.D. in the general rate increase investigation at R-911918 was issued on November 27, 1991, and our final Opinion and Order relative thereto was issued on January 23, 1992.

In our Opinion and Order of January 23, 1992, the relevant portion concerning the financial impact of any possible refund is found at pages 30-40. We expressly stated therein, on page 34, that the issue to be considered in that Order was the "financial impact of potential refunds upon the Company".

After a discussion of the arguments of the parties to the general rate proceeding, the discussion continued as follows:

> In his Recommended Decision, at page 67, the ALJ determines that the maximum amount which the Commission could direct to be refunded is $219,392. His reasoning on this point is as follows:
>
> > We first note that Section 1312 of the Public Utility Code (66 Pa. C.S.A. §1312) limits the refunds or rebates which the Commission may order to be paid by a public utility to those caused by unlawful charges made within four years prior to the date of the filing of the complaint (the Luckie complaint, having been filed on December 6, 1989). Accordingly, the Company's calculation that the amount of "availability fees" charges between June, 1985 and June, 1990 of $274,240 is more than that which the Commission is empowered to award. A fortiori, OCA's suggestion that the amount should be increased by $64,725 to reflect the charges through June, 1991, too exceeds any amount which the Commission is empowered to order. Four-fifths of the amount calculated by the Company (.80 x $274,240) or $219,392 is the correct amount of refund which this Commission is empowered to order.

The ALJ apparently believes that a requirement to refund even this reduced amount would call into question the Company's ability to continue operations. The ALJ notes the discretion of the Commission to order partial refunds. He then suggests that it may be appropriate for the Commission to direct the refund of half this amount, or $109,696, over a five year period with no interest. At page 68 of his Recommended Decision, the ALJ explains the impact of such a refund and how it might be accomplished:

> > If the Commission ordered that this total refund be amortized over a five year period, it would be paid at the rate of $21,939 per year

($109,696 divided by 5 = $21,939). This would not require the Company to make out-of-pocket payments during said five year period in the stated sum, since some of the ratepayers would not be entitled to a cash rebate, but would only be entitled to a credit against the sums which they already owe. These refunds could be ordered paid to all record owners of unimproved lots as of May 31, 1991 (about the time the new sewage treatment plant went into service). Such a rebate order would penalize the shareholders for the hardship which the company caused to owners of unimproved lots by failing to maintain adequate facilities; while not creating what would clearly be a serious threat to the financial viability of the Company.

The ALJ finds that "great hardships would or may be created" if the Company is permitted to go bankrupt or if it is financially impaired to the point of being unable to provide adequate service.

In its exceptions to the Recommended Decision, CTSC repeats the arguments set forth on the record and in its briefs. A summary of the Company's position is that no refunds are warranted, and that even if the Commission determines that refunds are appropriate, the Company cannot afford to pay them.

It must be emphasized, at this point, that the sole issue to be addressed in these consolidated proceedings with regard to the refund of availability charges, is the financial impact of potential refunds on the Company and its customers. The legality of refunds, the appropriateness of refunds, and whether refunds will ultimately be ordered are issues in Luckie and Worrall and will be resolved by the Commission in the context of those proceedings.

The only point which CTSC makes in its exceptions, which relates to the financial impact of possible refunds, is the contention that if it were required to refund the availability fees charged between June 1985 and

June 1990, an amount in excess of $274,000, it would be impossible for the Company to survive. The ALJ apparently agreed with the Company in this regard since he suggested that the Commission may consider refunds in an amount which is less than half the Company's calculation, and that amount could be refunded over a period of five years.

All of the remaining arguments in the Company's exceptions address the issue of whether or not refunds are warranted. As this issue will not be addressed in this proceeding, the Company's exceptions, in this regard, will not be considered here.

The OCA, in its exceptions, objects to the amount of refunds which the ALJ "found ... should be ordered in this proceeding." (OCA Ex. p. 1). The OCA asserts that the Commission should direct CTSC to refund the amount of $338,965 to its customers over five years.

The ALJ did not find that refunds should be ordered in this proceeding. The ALJ did determine that the Commission could, "if the Commission thought it prudent", order the refund of one-half of the fees that were charged during a four-year period. (R.D., pp. 67-68). We repeat that the matter at issue in these proceedings is not whether refunds should be ordered in the final disposition of Luckie and Worrall. To the extent that the OCA exceptions relate to the appropriateness of refunds and whether refunds should be ordered by the Commission, such exceptions will not be considered here.

On this issue of the financial impact of potential refunds, the OCA does take exception to the ALJ's calculation of the maximum amount of refunds which he determined the Commission could award under Section 1312 of the Public Utility Code. The OCA agrees that Section 1312 does limit the Commission's ability to order refunds for the time prior to a complaint being filed, but the OCA goes on to assert that:

> However, there is no prohibition in Section 1312 that would prohibit the Commission from ordering refunds for the period during which the complaint is being heard by the

> Commission, assuming that the same rate that is being challenged is still being levied...
>
> The OCA's refund recommendation included the additional amount billed through June, 1991 because until that time, Clean Treatment, was unable to provide sewage service due to the moratorium put in place by DER and the municipality. See, R.D. at 54-55. As of June, 1991, DER found the plant to be operating properly.

(OCA Exc., pp. 5-6).

We agree with the OCA and grant its exception on this point to the extent that we find the maximum refund that could be ordered is $338,965.

It is clear from the record in this proceeding that any refund which might be ordered in Luckie and Worrall and which approaches the maximum amount of $338,965, unless flowed through to customers over a protracted period, would seriously jeopardize the continued operation of the Company. Our authority to order refunds of such magnitude notwithstanding, we find it appropriate, and in keeping with our instructions on remand in Luckie and Worrall, to attempt to determine the annual amount which the Company could refund at no risk to its continued financial viability.

Based upon our resolution of the issues in this rate proceeding, we have determined the Company's allowable revenues, expenses, return and rate base to be as follows:

Operating revenue	$ 366,506
Expenses	$ 239,444
Income Available for Return	$ 127,062
Rate Base	$1,220,581

To provide a margin for safety, and recognizing that ratemaking is not an exact science, it is assumed that CTSC's debt ratio is 87% which is the highest ratio testified to on the record in this case. (R.D. p. 12).

> It is further assumed that the Company's cost of debt is 9.75% which is the highest final proposed debt cost rate of any party. (R.D., p. 14).
>
> Based upon the above assumptions, it appears that a reasonable estimate of the Company's maximum annual debt service requirement would be $103,536 ($1,220,581 rate base x .87 x .0975). Deducting the $103,536 from our determination of $127,062 for income available for return leaves $23,526 in return available to the equity investor. We, therefore, determine that $23,526 is the amount which CTSC could refund to customers on an annual basis and still be able to pay expenses and a reasonable estimate of interest on debt. [Emphasis added].
>
> We recognize, as the ALJ points out at page 67 of his Recommended Decision and which no party disputes, that the Commission may order partial refunds. However, we repeat that a decision as to whether or not there will be refunds, and at what level, if so ordered, will not be made here but is reserved for the final resolution in Luckie and Worrall.

(R.D., pp. 35-40).

Therefore, the "bottom line" of our Opinion and Order at Docket No. R-911918 was that the sum of $23,526 was the amount which Clean Treatment could refund to customers on an annual basis and still be able to pay expenses and a reasonable estimate of interest on debt.

We will next consider some of the Exceptions to the R.D. filed on the issue of the appropriateness of ordering refunds.

The ALJ in his R.D. herein on pages 67-68 made several observations on the issue of rebates. Firstly, the ALJ observed that Section 1312 of the Public Utility Code (66 Pa. C.S.A. §1312) limits the refunds or rebates which the Commission may

order to be paid by a public utility to those caused by unlawful charges made within four years prior to the date of the filing of the Complaint. Also, the ALJ noted that none of the parties to this controversy has disputed the ability of the Commission to order a partial refund. The ALJ stated that he could find no legal prohibition, if the Commission should deem it advisable, to order, payable without interest over a five year period, one-half of the amount of refunds due and owing. The ALJ further suggested that refunds could be ordered paid to all record owners of unimproved lots as of May 31, 1991 (about the time the new sewage treatment plant went into service). The ALJ stated that such a rebate order would penalize the shareholders for the hardship which the Company caused to owners of unimproved lots by failing to maintain adequate facilities, while not creating what would clearly be a serious threat to the financial viability of the Company. The ALJ added that the Commission may reject the OCA's position that the financial viability of the Company is not a matter of public interest.

In its Exceptions to the R.D., the Company stated its position that no rebates are warranted in this case and, alternatively, that the Company cannot afford to pay out monies or credit accounts even if the refunds were to be found warranted. The Company then stated that it was not clear as to how the Commission wishes to handle the argument on the issue of the validity of the refunds.

Clean Treatment stated that even the sole witness of the OCA admitted that Clean Treatment would not have sufficient gross revenues to meet its debt service and expenses if it were to be required to pay out the rebate it was seeking. Clean Treatment continued that, although the testimony was uncontroverted that the Company could not afford the rebates, the ALJ went forth nonetheless and gave a suggestion of rebates over five years of approximately $22,000.00 per year. Clean Treatment argued that the amount found by the ALJ was speculative, not

based on evidence in the record and contrary to the evidence that was produced. In fact, continued Clean Treatment, the amount of the rebate suggested by the ALJ still greatly exceeds the statistical average of homes that might have been built during the moratorium placed upon the development by DER. Clean Treatment argued, in the alternative, that should a rebate ever be required, the actual "harm" done would have been the denial of that statistical average of construction of 13.5 lots per year, leaving a total amount of only $10,126.00 to be amortized over the same five year period.

Finally, Clean Treatment stated that there appeared to be a pervasive belief, without foundation, that the moratorium imposed by DER somehow made the tariff of Clean Treatment "unlawful" and caused "harm" to the rate payers. Clean Treatment stated that the "harm" was quite speculative. Beyond question, continued Clean Treatment, properties continued to be sold during the moratorium even at higher prices than the original purchase. No real estate testimony was produced by any party that the moratorium somehow worked financial harm to these property owners. Clean Treatment also stated that the issue of a rebate has been a "red herring" based upon a fallacious assumption that harm necessarily flowed from a moratorium on building until the new plant was completed. Clean Treatment concluded that it should not be "penalized for being caught in the pincers of two regulatory agencies, the PUC and the DER. One agency requiring the construction of new technology while the other depletes the funds available for the construction." Finally, Clean Treatment notes that at all times it had to maintain its pre-existing plant with all of the mains installed in the development, reaching out to all the lots whether improved or not.

The OCA also filed Exceptions to the ALJ's R.D., stating that the Commission should reject the ALJ's refund recommendation and order the full refund amount as proposed by

the OCA. The OCA is of the opinion that the Commission should not exercise its discretion to order partial refunds herein, and should order the full refund amount. The OCA also recommended that the refunds be returned over five years and without any interest. The OCA stated that, by the Commission choosing an extended refund period, the Commission would adequately balance the interests of the utility and the ratepayer. The OCA also argued that there was no evidence to support only a partial refund. The total refund amount is the "as billed" amount. In addition, the Company's position that refunds should only be granted to select customers ignores the Public Utility Code. The OCA also stated that the Company's alternative calculation of the refund amount is without foundation and is entirely speculative. Therefore, concluded the OCA, the Commission should order Clean Treatment to refund $338,965 to be refunded to its customers over five years.

The OCA also argued that the Commission should reject the ALJ's refund calculation. The OCA continued that Section 1312 limits the Commission's ability to grant refunds for the time before the Complaint is filed. However, there is no prohibition in Section 1312 to keep the Commission from ordering refunds for the period during which the Complaint is being heard by the Commission, assuming that the same rate that is being challenged is still being levied. In this case, during the period from December 6, 1989 until the Company installed plant which is sufficient to permit new hook-ups, it continued charging the availability fee. Thus, until that new plant is used and useful in providing service, the availability charges were improper and should be refunded. The OCA's refund recommendation included the additional amount billed through June, 1991, because until that time, Clean Treatment was unable to provide sewage service due to the moratorium put in place by DER and the municipality. As of June, 1991, DER found the plant to be operating properly. The Company calculated $274,240 as the amount billed from June, 1985 to June, 1990. To that amount, the

OCA added $64,725, which represents charges through June, 1991, for a total amount charged of $338,965. Using the ALJ's methodology with the corrected numbers, the annual refund amount is $33,897 for five years. Other than the issue of refunds, the OCA recommended that the Commission adopt the R.D. of ALJ Richard M. Lovenwirth.

DISCUSSION

To return to the specific issues of the Luckie case at Docket C-892706, we find that Luckie's Complaint should be sustained and that the Exceptions filed to the R.D. issued on October 30, 1990, should be denied. As we stated in the Worrall case at docket no. C-892531, a refund is appropriate in this case because the availability fee charged by Clean Treatment was an unreasonable rate while the moratorium was in place. It is the Commission's general policy that when tariffed services cannot be provided due to a regulatory ban, the utility should not be allowed to charge for that service. Hobba v. Riviera Utilities Water Co. and Hobba v. Riviera Utilities Sewer Co., Docket No. C-903166, C-903167. (Order entered June 18, 1992) The moratorium was lifted in June of 1991, so after that point there is no objection to the assessment of prospective availability charges.

Refunds are the appropriate remedy for these types of Complaints. The Company sought to impose a charge for a service it could not provide. It is permitted to utilities, under Section 1305 of the Code, 66 Pa. C.S. §1305, to charge ready to serve assessments. The basis for such a charge is to provide adequate and continuous service. Nevertheless, it is not reasonable to collect such a charge when, in fact, the record does not establish the basis for such a charge. George Cup et al., Petitioners v. Pennsylvania Public Utility Commission, Respondent, 556 A.2d 470, 124 Commonwealth Ct. 291, 298.

We will therefore order Clean Treatment to file with the Commission a refund plan. The refund contemplated can begin no earlier than four (4) years preceding the filing of the Complaint. The refund plan must include Mr. Luckie and all others similarly situated.

In the general base rate case, we calculated $23,526 per year as the amount which Clean Treatment could refund to customers and still remain financially viable itself. As noted above, the Commission has the authority to order partial refunds. We therefore find that Clean Treatment's refund plan should be based on the amount of $20,000 per year over five years. After Clean Treatment files its refund plan, the OCA and other interested parties may wish to file comments; **THEREFORE,**

IT IS ORDERED:

1. That the Complaint of Robert J. Luckie against the Clean Treatment Sewage Company, as amended, filed on December 6, 1989, at C-892706, be, and hereby is, sustained.

2. That the Recommended Decision of Administrative Law Judge Richard M. Lovenwirth be, and is hereby, adopted to the extent consistent with this Opinion and Order.

3. That the Exceptions filed by Respondent Clean Treatment Sewage Company on November 12, 1990, to the Recommended Decision herein issued on October 30, 1990, be, and hereby are, denied.

4. That Respondent Clean Treatment Sewage Company file with the Commission, within 20 days of the entry date of this Opinion and Order, or within such additional time as may be granted, a refund plan which conforms to the requirements of 66 Pa. C.S. §1312, for Mr. Luckie and all others similarly situated, as more fully explained in the body of this Opinion and Order.

5. That any party to this proceeding so desiring may file comments to the refund plan within thirty (30) days of the date of entry of this Opinion and Order or within such additional time as may be granted.

BY THE COMMISSION,

John G. Alford
Secretary

(SEAL)

ORDER ADOPTED: December 17, 1992

ORDER ENTERED: DEC 29 1992

Appendix B

John I. Worrall
v.
Clean Treatment Sewerage Company
Docket No. C-892531

Opinion and Order

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265

Public Meeting held December 17, 1992

Commissioners Present:

David W. Rolka, Chairman
Joseph Rhodes, Jr., Vice-Chairman
Wendell F. Holland, Commissioner

C-892531

John I. Worrall
v.
Clean Treatment Sewerage Company

OPINION AND ORDER

BY THE COMMISSION:

Before us for consideration are the Exceptions of the Commission Law Bureau ("Staff") filed on February 14, 1990 to the Initial Decision of Administrative Law Judge ("ALJ") Martin R. Fountain, issued to the parties on January 25, 1990. Additionally, pursuant to the provisions of 66 Pa. C.S. §332(h), we exercised our right to review the decision on February 8, 1990. No Reply Exceptions were filed.

By Opinion and Order entered May 17, 1991, we acted to hold in abeyance the Exceptions of Staff herein, and to remand this matter to the Office of Administrative Law Judge, to be consolidated for hearing and Recommended Decision, with Respondent Clean Treatment Sewage Company's ("CTSC") general rate increase investigation at Docket No. R-911918. The matter was assigned to Administrative Law Judge ("ALJ") Richard M. Lovenwirth.

BRIEF HISTORY OF THE PROCEEDING

ALJ Fountain's History of the Proceeding, at pages 1-2 of the Initial Decision ("I.D."), is not extensive and we shall, therefore, quote it in its entirety:

> John I. Worrall, hereinafter complainant, filed a complaint against Clean Treatment Sewerage Company, hereinafter Sewerage Company and/or Respondent, on August 18, 1989, alleging he is the owner of a vacant lot in Marcel Lake Estates, Pike County, Pennsylvania (Block M-402, Sec. 4, Lot #25). He further alleges that due to the inadequacy of the sewage system, no additional tie-ins to the system have been permitted for the past four years. Since, therefore, sewage service is not available, he does not feel that he should be required to pay the rate of $75.00 per year. He requests a refund for fees paid during the four year period, and also requests that Respondent cease billing him as long as the service is not available.
>
> Respondent filed a timely answer and a hearing was held on December 11, 1989, at which time complainant appeared pro se. Respondent appeared by counsel, together with two witnesses. A record of 31 pages was compiled, including 7 exhibits. No briefs were filed.

ALJ Fountain issued his Initial Decision ("I.D.") herein on January 25, 1990. In his I.D., the ALJ recommended that this Complaint be dismissed, and that the record be marked closed.

Staff filed Exceptions to the I.D. on February 14, 1990.

By Order entered May 17, 1991, we acted to hold the Exceptions filed herein in abeyance, and to remand this matter to the Office of Administrative Law Judge ("OALJ") to be consolidated for hearing and the issuance of a Recommended Decision

("R.D.") with Respondent CTSC's general rate increase investigation at Docket No. R-911918.

ALJ Richard M. Lovenwirth issued his Recommended Decision in R-911918 and the consolidated cases, including the instant docket of C-892531, on November 27, 1991.

On January 23, 1992, we issued our Opinion and Order in the R-911918 base rate case and the instant docket, C-892531.

As pointed out in our Order of January 23, 1992, the issues raised in Staff's Exceptions to ALJ Fountain's I.D. of January 25, 1990 are still pending before the Commission and will be here addressed.

Discussion

ALJ Fountain's Findings of Fact, at pages 5-6 of the I.D., are not extensive. As they will illuminate our discussion of the issues herein, we will set them forth in their entirety:

1. Complainant took title to a vacant lot in 1975, located within the development known as Marcel Lake Estates (N.T. 4).

2. Respondent Sewer Company services the Marcel Lake Estates (N.T. 5).

3. Complainant, as a customer of respondent, is charged $75.00 per year (N.T. 5).

4. Due to litigation brought by an area resident against respondent on environmental grounds, a building moratorium has been in effect since 1985 because of alleged inadequacy of the sewage system (N.T. 5).

5. Notwithstanding the building moratorium, complainant is billed quarterly and remits payment in a timely manner (N.T. 5, 27).

6. Complainant has never had a structure on his lot; has never applied for a building permit; and has never requested a hookup to the sewer system even though he took title to his vacant lot in 1975, while other owners had built homes on the lots prior to the moratorium and have hooked up to the sewer system (N.T. 8).

7. Litigation was brought against respondent by an area resident under State and Federal Clean Water Acts, which proved to be involved and protracted, and includes a Consent Order and Agreement between respondent and DER, the purpose of which was to outline procedures to correct certain environmental problems (N.T. 14).

8. Under a Consent Decree, permits had to be obtained in order to serve more customers, fix existing problems and allow additional hookups into the upgraded facility.

9. The lawsuit has been settled and progress is at hand, and construction will begin in the spring, provided other agencies cooperate (N.T. 22).

ALJ Fountain found, based on the credible record evidence, that the Complainant had failed to carry his burden of proof with respect to his entitlement to the relief requested. In this regard, the Company put into evidence its filed tariff, which the ALJ quotes in pertinent part at page 8 of the Initial Decision, to wit:

> A charge of $18.75 per quarter per lot shall be payable by the owner of each lot which is located within the development known as Marcel Lake Estates, and upon which no structure has been erected. Such charges shall be payable irrespective of the quantity of sewage discharged.

The ALJ, therefore, concluded at pp. 8-9 of his Initial Decision:

> Since complainant is the party proposing a rule or order, namely that respondent be required to remit compensation to him, complainant bears the burden of proving, by a preponderance of the credible evidence, that he is legally entitled to the compensation he seeks, 66 Pa. C.S.A. Section 332(a); Replogle v. Pennsylvania Electric Co., 54 Pa. PUC 528 (1980). In the case at bar, that burden of proof requires that complainant demonstrate his entitlement to compensation under respondent's tariff, which constitutes the sole contract between the parties, and, of course, has the effect of law. See, Brockway Glass Co. v. Pa. PUC, 63 Pa. Commw. 319, 379 A.2d 339 (1977) [sic].[1/] Complainant has failed to sustain his burden of proof, and is, therefore, not entitled to the compensation he seeks. The clear, unambiguous terms of respondent's tariff, as cited aforesaid, precludes compensation because complainant is subject to assessment of $18.75 quarterly irrespective of the quantity of sewage discharged (emphasis supplied). Here, the building moratorium continued nevertheless. The complaint should therefore be dismissed.

THE EXCEPTIONS

Staff's Exceptions argued that because sewer service has not been available during the building moratorium, the Complaint should be sustained and that any similarly situated customers should also be compensated, pursuant to 66 Pa. C.S. §1312.

Section 1312 of the Public Utility Code, 66 Pa. C.S. §1312(a), provides that if the Commission determines that any rate received by a public utility was unjust or unreasonable, the Commission has the power to order a refund of the amount of any

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1/ Corrected citation - 63 Pa. Commw. 238, 437 A.2d 1067 (1981).

excess paid by a customer in consequence of such unlawful collection (subject to a four year period of limitation). However, that subsection also expressly provides that, "...Any order of the commission awarding a refund shall be made for and on behalf of all patrons subject to the same rate of the public utility."

In our Opinion and Order entered May 17, 1991, whereby we remanded this matter for consolidation with the general rate increase proceeding of Clean Treatment, we stated as follows on pages 5-6:

> At this point, we are inclined to grant Staff's Exceptions to the extent that a refund for four (4) years from the filing of the complaint be provided to the Complainant. The appropriateness of a ready to serve charge evaporates when a utility such as Respondent is not ready to serve. Clearly, it appears that a fundamental condition underlying the tariffed charge has not been met. However, in light of the provisions of Section 1312, further information is required prior to our disposition of this matter.
>
> When the Commission approved the utility's no structure charge, it did so in the context of a rate proceeding which established a level of total revenues that could lawfully be collected by the utility. We are concerned that we should not order these refunds without first determining the overall impact on the utility's revenue levels and the possible implications to its remaining customers, who may have to make up any revenue shortfall at some future time.
>
> * * * * * *
>
> In light of our disposition in the Luckie case, we are of the opinion that a ruling on the Exceptions herein should be held in abeyance, and that this case should also be remanded to the Office of Administrative Law Judge, to be consolidated with Respondent's general rate increase investigation for hearing and Recommended Decision. In addition to receiving evidence concerning the

financial impact of refunds associated with the Luckie and Worrall cases, the parties to the base rate case should also address the reasonableness of prospective availability charges and any rate structure changes that are appropriate upon the possible elimination of the availability charge. Any additional relevant evidence on this topic that has become available after the close of the evidentiary records in the Luckie and Worrall Complaints should be presented in the base rate case.

Based on our discussion in our May 17, 1991 Opinion and Order, we ordered as follows:

1. That the Exceptions of the Law Bureau filed in this case be held in abeyance.

2. That this proceeding be, and hereby is, remanded to the Office of Administrative Law Judge, to be consolidated for hearing and Recommended Decision, with Respondent Clean Treatment Sewage Company's general rate increase investigation at Docket No. R-911918, and that the record there be developed as discussed in the body of this Opinion and Order.

As noted above, ALJ Lovenwirth's R.D., relative to the Company's general rate increase proceeding, was issued on November 27, 1991, and our final Opinion and Order was issued on January 23, 1992.

In our Opinion and Order of January 23, 1992, the relevant portion is found at pages 30-40. We stated therein, on page 34, that the issue to be considered in the general rate case was the "financial impact of potential refunds upon the Company."

After a discussion of the arguments of the parties herein, the discussion continued as follows, on pages 35-40 of our Opinion and Order:

In his Recommended Decision, at page 67, the ALJ determines that the maximum amount which the Commission could direct to be refunded is $219,392. His reasoning on this point is as follows:

> We first note that Section 1312 of the Public Utility Code (66 Pa. C.S.A. §1312) limits the refunds or rebates which the Commission may order to be paid by a public utility to those caused by unlawful charges made within four years prior to the date of the filing of the complaint (the Luckie complaint, having been filed on December 6, 1989). Accordingly, the Company's calculation that the amount of "availability fees" charges between June, 1985 and June, 1990 of $274,240 is more than that which the Commission is empowered to award. A fortiori, OCA's suggestion that the amount should be increased by $64,725 to reflect the charges through June, 1991, too exceeds any amount which the Commission is empowered to order. Four-fifths of the amount calculated by the Company (.80 x $274,240) or $219,392 is the correct amount of refund which this Commission is empowered to order.

The ALJ apparently believes that a requirement to refund even this reduced amount would call into question the Company's ability to continue operations. The ALJ notes the discretion of the Commission to order partial refunds. He then suggests that it may be appropriate for the Commission to direct the refund of half this amount, or $109,696, over a five year period with no interest. At page 68 of his Recommended Decision, the ALJ explains the impact of such a refund and how it might be accomplished:

> If the Commission ordered that this total refund be amortized over a five year period, it would be paid at the rate of $21,939 per year ($109,696 divided by 5 = $21,939). This would not require the Company to make out-of-pocket payments during said five year period in the stated sum, since some of

> the ratepayers would not be entitled to a cash rebate, but would only be entitled to a credit against the sums which they already owe. These refunds could be ordered paid to all record owners of unimproved lots as of May 31, 1991 (about the time the new sewage treatment plant went into service). Such a rebate order would penalize the shareholders for the hardship which the company caused to owners of unimproved lots by failing to maintain adequate facilities; while not creating what would clearly be a serious threat to the financial viability of the Company.

The ALJ finds that "great hardships would or may be created" if the Company is permitted to go bankrupt or if it is financially impaired to the point of being unable to provide adequate service.

In its exceptions to the Recommended Decision, CTSC repeats the arguments set forth on the record and in its briefs. A summary of the Company's position is that no refunds are warranted, and that even if the Commission determines that refunds are appropriate, the Company cannot afford to pay them.

It must be emphasized, at this point, that the sole issue to be addressed in these consolidated proceedings with regard to the refund of availability charges, is the financial impact of potential refunds on the Company and its customers. The legality of refunds, the appropriateness of refunds, and whether refunds will ultimately be ordered are issues in Luckie and Norrall and will be resolved by the Commission in the context of those proceedings.

The only point which CTSC makes in its exceptions, which relates to the financial impact of possible refunds, is the contention that if it were required to refund the availability fees charged between June 1985 and June 1990, an amount in excess of $274,000, it would be impossible for the Company to survive. The ALJ apparently agreed with the Company in this regard since he suggested that the Commission may consider refunds in an amount which is less than half

the Company's calculation, and that amount could be refunded over a period of five years.

All of the remaining arguments in the Company's exceptions address the issue of whether or not refunds are warranted. As this issue will not be addressed in this proceeding, the Company's exceptions, in this regard, will not be considered here.

The OCA, in its exceptions, objects to the amount of refunds which the ALJ "found ... should be ordered in this proceeding." (OCA Ex. p. 1). The OCA asserts that the Commission should direct CTSC to refund the amount of $338,965 to its customers over five years.

The ALJ did not find that refunds should be ordered in this proceeding. The ALJ did determine that the Commission could, "if the Commission would deem it advisable: and "if the Commission thought it prudent", order the refund of one-half of the fees that were charged during a four-year period. (R.D., pp. 67-68). We repeat that the matter at issue in these proceedings is not whether refunds should be ordered in the final disposition of Luckie and Worrall. To the extent that the OCA exceptions relate to the appropriateness of refunds and whether refunds should be ordered by the Commission, such exceptions will not be considered here.

On this issue of the financial impact of potential refunds, the OCA does take exception to the ALJ's calculation of the maximum amount of refunds which he determined the Commission could award under Section 1312 of the Public Utility Code. The OCA agrees that Section 1312 does limit the Commission's ability to order refunds for the time prior to a complaint being filed, but the OCA goes on to assert that:

> However, there is no prohibition in Section 1312 that would prohibit the Commission from ordering refunds for the period during which the complaint is being heard by the Commission, assuming that the same rate that is being challenged is still being levied...

> The OCA's refund recommendation included the additional amount billed through June, 1991 because until that time, Clean Treatment, was unable to provide sewage service due to the moratorium put in place by DER and the municipality. See R.D. at 54-55. As of June, 1991, DER found the plant to be operating properly.

(OCA Exc., pp. 5-6).

We agree with the OCA and grant its exception on this point to the extent that we find the maximum refund that could be ordered is $338,965.

It is clear from the record in this proceeding that any refund which might be ordered in Luckie and Worrall and which approaches the maximum amount of $338,965, unless flowed through to customers over a protracted period, would seriously jeopardize the continued operation of the Company. Our authority to order refunds of such magnitude notwithstanding, we find it appropriate, and in keeping with our instructions on remand in Luckie and Worrall, to attempt to determine the annual amount which the Company could refund at no risk to its continued financial viability.

Based upon our resolution of the issues in this rate proceeding, we have determined the Company's allowable revenues, expenses, return and rate base to be as follows:

Operating revenue	$366,506
Expenses	239,444
Income Available for Return	$127,062
Rate Base	$1,220,581

To provide a margin for safety, and recognizing that ratemaking is not an exact science, it is assumed that CTSC's debt ratio is 87% which is the highest ratio testified to on the record in this case. (R.D. p. 12). It is further assumed that the Company's cost of debt is 9.75% which is the highest final proposed debt cost rate of any party. (R.D., p. 14).

> Based upon the above assumptions, it appears that a reasonable estimate of the Company's maximum annual debt service requirement would be $103,536 ($1,220,581 rate base x .87 x .0975). Deducting the $103,536 from our determination of $127,062 for income available for return leaves $23,526 in return available to the equity investor. We, therefore, determine that $23,526 is the amount which CTSC could refund to customers on an annual basis and still be able to pay expenses and a reasonable estimate of interest on debt.
>
> We recognize, as the ALJ points out at page 67 of his Recommended Decision and which no party disputes, that the Commission may order partial refunds. However, we repeat that a decision as to whether or not there will be refunds, and at what level, if so ordered, will not be made here but is reserved for the final resolution in Luckie and Worrall.

We stated in our May 17, 1991 Order that we were inclined to grant Staff's Exceptions to the extent that a refund for four (4) years from the date of the filing of the Complaint be provided to the Complainant. We further stated in that Order that the appropriateness of a ready to serve charge evaporates when a utility such as Respondent is not ready to serve. A fundamental condition underlying the tariffed charge has not been met.

As discussed supra, we determined in the recently concluded base rate case that $23,526 was the amount which Clean Treatment could refund to customers on an annual basis and still be able to pay expenses and a conservative estimate of interest on its debt.

We will next consider some of the Exceptions to the R.D. filed on the issue of the appropriateness of ordering refunds herein.

The ALJ in his R.D. herein on pages 67-68 made several observations on the issue of rebates. Firstly, the ALJ observed that Section 1312 of the Public Utility Code (66 Pa. C.S.A. §1312) limits the refunds or rebates which the Commission may order to be paid by a public utility to those caused by unlawful charges made within four years prior to the date of the filing of the Complaint. Also, the ALJ noted that none of the parties to this controversy has disputed the ability of the Commission to order a partial refund. The ALJ stated that he could find no legal prohibition, if the Commission should deem it advisable, to order, payable without interest over a five year period, one-half of the amount of refunds due and owing. The ALJ further suggested that refunds could be ordered paid to all record owners of unimproved lots as of May 31, 1991 (about the time the new sewage treatment plant went into service). The ALJ stated that such a rebate order would penalize the shareholders for the hardship which the Company caused to owners of unimproved lots by failing to maintain adequate facilities, while not creating what would clearly be a serious threat to the financial viability of the Company. The ALJ added that the Commission may reject the OCA's position that the financial viability of the Company is not a matter of public interest.

In its Exceptions to the R.D., the Company stated its position that no rebates are warranted in this case and, alternatively, that the Company cannot afford to pay out monies or credit accounts even if the refunds were to be found warranted. The Company then stated that it was not clear as to how the Commission wishes to handle the argument on the issue of the validity of the refunds.

Clean Treatment stated that even the sole witness of the OCA admitted that Clean Treatment would not have sufficient gross revenues to meet its debt service and expenses if it were to be required to pay out the rebate it was seeking. Clean

Treatment continued that, although the testimony was uncontroverted that the Company could not afford the rebates, the ALJ went forth nonetheless and gave a suggestion of rebates over five years of approximately $22,000.00 per year. Clean Treatment argued that the amount found by the ALJ was speculative, not based on evidence in the record and contrary to the evidence that was produced. In fact, continued Clean Treatment, the amount of the rebate suggested by the ALJ still greatly exceeds the statistical average of homes that might have been built during the moratorium placed upon the development by DER. Clean Treatment argued, in the alternative, that should a rebate ever be required, the actual "harm" done would have been the denial of that statistical average of construction of 13.5 lots per year, leaving a total amount of only $10,126.00 to be amortized over the same five year period.

Finally, Clean Treatment stated that there appeared to be a pervasive belief, without foundation, that the moratorium imposed by DER somehow made the tariff of Clean Treatment "unlawful' and caused "harm" to the rate payers. Clean Treatment stated that the "harm" was quite speculative. Beyond question, continued Clean Treatment, properties continued to be sold during the moratorium even at higher prices than the original purchase. No real estate testimony was produced by any party that the moratorium somehow worked financial harm to these property owners. Clean Treatment also stated that the issue of a rebate has been a "red herring" based upon a fallacious assumption that harm necessarily flowed from a moratorium on building until the new plant was completed. Clean Treatment concluded that it should not be "penalized for being caught in the pincers of two regulatory agencies, the PUC and the DER. One agency requiring the construction of new technology while the other depletes the funds available for the construction." Finally, Clean Treatment notes that at all times it had to maintain its pre-existing plant with all of the mains installed in the development, reaching out to all the lots whether improved or not.

The OCA also filed Exceptions to the ALJ's R.D., stating that the Commission should reject the ALJ's refund recommendation and order the full refund amount as proposed by the OCA. The OCA is of the opinion that the Commission should not exercise its discretion to order partial refunds herein, and should order the full refund amount. The OCA also recommended that the refunds be returned over five years and without any interest. The OCA stated that, by the Commission choosing an extended refund period, the Commission would adequately balance the interests of the utility and the ratepayer. The OCA also argued that there was no evidence to support only a partial refund. The total refund amount is the "as billed" amount. In addition, the Company's position that refunds should only be granted to select customers ignores the Public Utility Code. The OCA also stated that the Company's alternative calculation of the refund amount is without foundation and is entirely speculative. Therefore, concluded the OCA, the Commission should order Clean Treatment to refund $338,965 to be returned to its customers over five years.

The OCA also argued that the Commission should reject the ALJ's refund calculation. The OCA continued that Section 1312 limits the Commission's ability to grant refunds for the time before the Complaint is filed. However, there is no prohibition in Section 1312 to keep the Commission from ordering refunds for the period during which the Complaint is being heard by the Commission, assuming that the same rate that is being challenged is still being levied. In this case, during the period from December 6, 1989 until the Company installed plant which is sufficient to permit new hook-ups, it continued charging the availability fee. Thus, until that new plant is used and useful in providing service, the availability charges were improper and should be refunded. The OCA's refund recommendation included the additional amount billed through June, 1991, because until that time, Clean Treatment was unable to

provide sewage service due to the moratorium put in place by DER and the municipality. As of June, 1991, DER found the plant to be operating properly. The Company calculated $274,240 as the amount billed from June, 1985 to June, 1990. To that amount, the OCA added $64,725, which represents charges through June, 1991, for a total amount charged of $338,965. Using the ALJ's methodology with the corrected numbers, the annual refund amount is $33,897 for five years. Other than the issue of refunds, the OCA recommended that the Commission adopt the R.D. of ALJ Richard M. Lovenwirth.

DISCUSSION

On review of this issue, we shall reverse the ALJ and reiterate our grant of the refund request of Mr. Worrall. The availability fee charged by Clean Treatment was an unreasonable rate while the moratorium was in place. It is the Commission's general policy that when tariffed services cannot be provided due to a regulatory ban, the utility should not be allowed to charge for that service. Hobba v. Riviera Utilities Water Co. and Hobba v. Riviera Utilities Sewer Co., Docket No. C-903166, C-903167 (Order entered June 17, 1992). The moratorium was lifted in June of 1991, so there is no objection to the assessment of prospective availability charges after that point.

Refunds are the appropriate remedy for these types of Complaints. The Company sought to impose a charge for a service it could not provide. It is permitted to utilities, under Section 1305 of the Code, 66 Pa. C.S. §1305, to charge ready to serve assessments. The basis for such a charge is to provide adequate and continuous service. Nevertheless, it is not reasonable to collect such a charge when, in fact, the record does not establish the basis for such a charge. George Cup et al., Petitioners v. Pennsylvania Public Utility Commission, Respondent 556 A.2d 470, 124 Commonwealth Ct., 291, 298.

We will therefore order Clean Treatment to file with the Commission a refund plan. The refund plan shall begin no earlier than four (4) years preceding the filing of the instant Complaint. The refund plan must include Mr. Worrall and all others similarly situated.

In the general base rate case, we calculated $23,526 per year as the amount which Clean Treatment could refund to customers and still remain financially viable itself. As noted above, the Commission has the authority to order partial refunds. We therefore find that Clean Treatment's refund plan should be based on the amount of $20,000 per year over five years. After Clean Treatment files its refund plan, the OCA and other interested parties may wish to file comments; **THEREFORE,**

IT IS ORDERED:

1. That the Exceptions of the Law Bureau to the Initial Decision filed herein be, and hereby are, granted.

2. That the Initial Decision of Administrative Law Judge Martin R. Fountain issued herein on January 25, 1990, be, and is hereby, reversed.

3. That Respondent Clean Treatment Sewage Company file with the Commission, within 20 days of the entry date of this Opinion and Order, or within such additional time as may be granted, a refund plan which conforms to the requirements of 66 Pa. C.S. §1312, for Mr. Worrall and all others similarly situated, as more fully explained in the body of this Opinion and Order.

4. That any party so desiring may file comments to the refund plan within thirty (30) days after the date of entry of this Opinion and Order, or within so such additional time as may be granted.

BY THE COMMISSION,

John Alford
Secretary

(SEAL)

ORDER ADOPTED: December 17, 1992

ORDER ENTERED: DEC 29 1992

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE
REFER TO OUR FILE
2005.0319.00

DOCUMENT FOLDER

September 17, 2007

ORIGINAL

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: Kathleen Sylvester, William J. Finkler, and James Pugh, Complainants v. WP Water Company, Inc., Respondent; Docket Nos. C-20055453, C-20055473, and C-20065849

Kathleen Sylvester, William J. Finkler, and James Pugh, Complainants v. WP Sanitary Company, Inc., Respondent; Docket Nos. C-20055455, C-20055473, and C-20065450

Dear Secretary McNulty:

Pursuant to 52 Pa. Code § 5.535, Prosecutory Staff files this letter in lieu of reply exceptions. Prosecutory Staff supports ALJ Jandebeur's decision and filed no exceptions. However, Prosecutory Staff wishes to go on record in response to OCA's exceptions that seek the imposition of customer refunds. Judge Jandebeur did not address OCA's request for customer refunds in her Initial Decision.

WP Water Co. and WP Sanitary Co. (collectively referred to as WP) are currently involved in consolidated proceedings at I-00070124 and A-230550F2000 for mandatory acquisition of WP pursuant to 66 Pa. C.S. § 529. OCA is a party thereto. Those proceedings are currently in mediation, and customer refunds are being addressed. Prosecutory Staff submits that ordering customer refunds in the context of a Commission order in the customer service complaint case may frustrate the parties' ability to reach a comprehensive settlement in the consolidated proceedings. Accordingly, Prosecutory Staff is opposed to the imposition of customer refunds in the above-captioned matter.

Sincerely,

Rhonda L. Daviston

Rhonda L. Daviston
Law Bureau Prosecutory Staff

cc: Per Certificate of Service

CERTIFICATE OF SERVICE

I hereby certify that I have on this 17th day of September, 2007, served a true copy of the foregoing document upon the participants listed below, in accordance with the requirements of 52 Pa. Code §1.54 (relating to service by a participant).

BY FIRST CLASS MAIL and ELECTRONIC MAIL:

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Dated: September 17, 2007

COMMONWEALTH OF PENNSYLVANIA

OFFICE OF CONSUMER ADVOCATE
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September 17, 2007

ORIGINAL

James J. McNulty, Secretary
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Re: Kathleen Sylvester, William J. Finkler, and James Pugh, Complainants
v.
W. P. Water Company, Respondent
Docket Nos. C-20055453, C-20055473, and C-20065849

Kathleen Sylvester, William J. Finkler, and James Pugh, Complainants
v.
W. P. Sanitary Company, Respondent
Docket Nos. C-20055455, C-20055473 and C-20065850

DOCUMENT FOLDER

Dear Secretary McNulty:

Enclosed for filing are an original and nine (9) copies of the Reply Exceptions of the Office of Consumer Advocate, in the above-referenced proceeding.

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

Sincerely,

Erin L. Gannon

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

Enclosures
cc: Honorable Ember S. Jandebeur
Office of Special Assistants
Parties of Record
06075467.DOC

CERTIFICATE OF SERVICE

Re: Kathleen Sylvester, William J. Finkler, and James Pugh, Complainants
v.
W. P. Water Company, Respondent
Docket Nos. C-20055453, C-20055473, and C-20065849

Kathleen Sylvester, William J. Finkler, and James Pugh, Complainants
v.
W. P. Sanitary Company, Respondent
Docket Nos. C-20055455, C-20055473 and C-20065850

I hereby certify that I have this day served a true copy of the foregoing document, the Office of Consumer Advocate's Reply Exceptions, 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 17th day of September, 2007.

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

ORIGINAL

Kathleen Sylvester, William J. Finkler, and James Pugh, Complainants v. W. P. Water Company, Respondent	:	Docket Nos. C-20055453, C-20055473, and C-20065849
Kathleen Sylvester, William J. Finkler, and James Pugh, Complainants v. W. P. Sanitary Company, Respondent	:	Docket Nos. C-20055455, C-20055473, and C-20065850

REPLY EXCEPTIONS OF THE OFFICE OF CONSUMER ADVOCATE

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September 17, 2007

I. INTRODUCTION

The Office of Consumer Advocate (OCA) files this Reply to the Exceptions of W.P. Water Company and W.P. Sanitary Company (WP). The OCA urges the Commission to adopt the Administrative Law Judge's well-reasoned positions as contained in the Initial Decision, and supported by the OCA below.

Most importantly, the ALJ properly found that WP is not providing adequate water and wastewater service and is in violation of Section 1501 of the Public Utility Code. In addition, the ALJ noted that WP has insufficient financial, managerial and technical capabilities, poor customer service, and a history of failed compliance with orders and regulations of the Commission and Department of Environmental Protection (DEP). The Section 1501 violations, together with WP's other violations provide the basis for the ALJ's assessment of civil penalties pursuant to Section 3301 of the Public Utility Code

For the reasons below, and those contained in the ALJ's Initial Decision, the OCA's Main Brief and the OCA's Reply Brief, the Exceptions of WP should be rejected.

II. REPLY EXCEPTIONS

Reply to WP Exception No. 1: The ALJ Correctly Ruled That Customers Of WP Water Endure Frequent Periods Of Low Pressure And Frequent Outages. I.D. at 40-52.

WP disputes the ALJ's ruling that WP customers endure frequent periods of low water pressure and frequent outages. WP Exc. ¶1. The testimony of OCA witness Fought shows that the combination of well capacity and finished water storage is insufficient to meet peak demands. FoF 90-93; OCA St. 1 at 5. As a result, customers who reside at higher elevations in Washington Park, like the two complainants, routinely experience water outages or very low pressure during times of peak demands. FoF 83, 84; OCA St. 1 at 7. The record shows that

customers experienced lengthy outages in summer 2005, October 2005 and July 2006. FoF 76; tr. Feb. 27, 2006 (Sylvester) at 36-37, 73 and (Finkler) at 101-02, 111 and July 19, 2006 (Lash) at 24, 26, 55; Exh. KS-6.

WP also suggests that one pressure reading taken at Mrs. Sylvester's house shows that "the pressure was typically within acceptable parameters." WP Exc. ¶1. One pressure reading does not indicate typical pressures, particularly because Mrs. Sylvester testified that her pressure fluctuates. Tr. Feb. 27, 2006 (Sylvester) at 32. For this reason, the Commission requires water utilities to use a continuous 24-hour pressure recorder to test pressure at representative points in the distribution system near periods of maximum and minimum demand. 52 Pa. Code § 65.6(b),(d). All water utilities are required to conduct these tests at least once per year. WP Water failed to produce these records. OCA St. 1 at 2; tr. Feb. 27, 2006 at 24-25; tr. 3 (Fought) at 140-41, *see* OCA M.B. at 26.

Mr. Kresge's assertions that he did not receives only one to two complaints of low water pressure per year is put in doubt by his admission that he does not regularly keep records of customer complaints. Tr. May 23, 2006 (Kresge) at 118 120. Moreover, these assertions are inconsistent with Mr. Kresge's statement that he has been "so concerned" about pressure problems in "Mrs. Sylvester's pressure area and any of the higher elevations" Since 1993. Tr. July 19, 2006 (Kresge) at 179. This type of inconsistency supports the ALJ's finding that Mr. Kresge is not credible. FoF 265.

For these reasons, the Company's exception should be rejected.

Reply to WP Exception No. 2: The ALJ Correctly Ruled That WP Water Did Not Provide Adequate Notice of Service Interruptions. I.D. at 42.

WP objects to this ruling because "Mr. Kresge indicated that upon such interruptions he issued a boil advisory." WP Exc. ¶2. Ms. Sylvester and Mr. Finkler testified, however, that they did not receive notice of a Boil Water Advisory during outages. Tr. Feb. 27, 2006 (Sylvester) at 45; (Finkler) at 103-04. The ALJ correctly gave greater weight to the testimony of WP's customers than the testimony of Mr. Kresge whom she found to be not credible. FoF 69, 72-74, 265

The Company's exception should be rejected.

Reply to WP Exception 3: The ALJ Correctly Ruled That WP Water Has Both A Water Storage And A Water Source Problem. I.D. at 45.

The need for more water storage has been admitted by the Company. SFoF 19. With regard to supply, WP presented no facts to refute testimony provided by OCA witness Fought. The undisputed evidence of record shows that:

> (1) The average daily water demand on the system is approximately 29,000 gallons or 20.14 gallons per minute. OCA St. 1 at 4, Sch. TLF-1, Tables 1w, 3w.
> (2) The water system's maximum day demand is estimated to be 36.25 gallons per minute. WP Water's three wells produce a safe yield of 31 gallons per minute. Accordingly, the system's total source capacity is 5.25 gallons per minute less than the estimated maximum day demand. OCA St. 1 at 5, Sch. TLF 1, Table 2w, 3w.
> (3) With the largest producing well out of service, the system's safe yield is 19 gallons per minute or 1.14 gallons per minute less than its average daily water demand. OCA St. 1 at 4, Sch. TLF-1, Tables 2w, 3w.

Ergo, WP Water does not have sufficient water sources to consistently satisfy its water demands. OCA St. 1 at 5.

In oral testimony, Mr. Kresge admitted that a new well (and storage) is needed to avoid loss of pressure and outages. Tr. July 18, 2006 at 74-75, tr. July 19, 2006 at 176.

Accordingly, the Company's exception is not supported by the record and should be rejected.

Reply to WP Exceptions No. 4 and 5: The ALJ Correctly Found That WP Did Not Adequately Use A Portion Of The Rates Collected For System Improvements And Maintenance. I.D. at 46.

WP excepts to the ALJ's "intimation that Mr. Kresge came to the realization that the W.P. Water Company was in need of increased water storage only upon occurrence and attendant pressure of the hearings in these matters," citing page 46 of the Initial Decision. WP Exc. ¶4. WP argues that Mr. Kresge knew that additional storage was needed as early as 1994, when WP applied for PennVest financing.

WP is partly correct. In light of Mr. Kresge's admission regarding the need for more finished water storage, the ALJ logically questioned:

> why Mr. Kresge did not arrive at that conclusion years earlier and set aside a portion of the collected tariff to work toward that goal. In the decades that the Kresges have owned and operated WP Water, a portion of the tariff was intended to be used for maintenance of the facility. The Kresges did not adequately do this.

I.D. at 46; FoF 262, 267. The Company's exception misses the point, however. The ALJ discusses tariffed rates, not PennVest financing.

In its fifth exception, WP argues that the Company did consider dedicating a portion of its tariff to water storage upgrades, but the tariffed rates were insufficient. WP Exc. ¶5. WP's current rates became effective in March 1993. Tr. July 19, 2006 (Lash) at 28-29. If the Company's tariffed rates were not sufficient to allow the Company to work toward the goal of improving the system, I.D. at 46, WP had the option to file a rate case. WP chose not to. Indeed, the ALJ observed that "It is likely that the Kresges did not approach the Commission for either a rate increase or assistance deliberately to avoid attention to themselves and the various Company issues." I.D. at 48.

WP's exceptions 4 and 5 should be rejected.

Reply to WP Exception No. 6: The ALJ Correctly Found That WP Does Not Have A Dedicated Backup Electric Generator. I.D. at 46.

WP opposes the finding that one generator cannot reasonably provide backup for the Kresge's numerous enterprises because the ALJ did not specify the "numerous enterprises." WP Exc. ¶6 The ALJ is clearly referring to the two divisions of WP Water and Mr. Kresge's home/business address in Wilkes-Barre, from which Mr. Kresge also manages a well drilling company. Specifically, Mr. Kresge testified that he has one backup generator, which is located 35 miles away from Washington Park in WP's Sleepy Hollow division. Tr. July 19, 2006 at 186. Apparently, there has been no generator at Washington Park since 1993 or longer. Tr. July 19, 2006 (Kresge) at 142-43, 146, 177, 186. Law Bureau Prosecutory Staff witness Larry Lash testified that Mr. Kresge told him that he had a backup generator at his place of business in Wilkes-Barre, which is about 45 minutes away from Washington Park. Tr. July 19, 2006 (Lash) at 27, 41, Tr. May 23, 2006 (Kresge) at 123, 125; July 18, 2006 (Fought) at 211 12; FoF 54.

The record is clear that WP Water does not have a dedicated backup generator at all times. The ALJ found the lack of a dedicated generator for Washington Park – and the concept that one generator could be moved between Washington Park, Wilkes-Barre and Sleepy Hollow when needed – to be unreasonable. I.D. at 46. Moreover, WP agreed that a backup generator should be installed. Tr. July 19, 2006 (Kresge) at 186.

The Company's exception should be rejected.

Reply to WP Exception No. 7: The ALJ Correctly Found That WP Unilaterally And Willfully Disregarded A Commission Order To Install Meters. I.D. at 48.

WP argues that it did not install meters because it "was not economically feasible" due to its failure to consummate the 1994 PennVest loan and the low flat rate payments from customers. WP Exc. ¶7.

WP's failure to obtain a PennVest loan applied for more than ten years ago is not a reasonable excuse for its failure to comply with the PUC's April 1991 Order directing the Company to meter all customers by March 1995. Tr. July 19, 2006 (Lash) at 29-30; Exh. PS-6. As the ALJ remarked:

> The Order was not contingent upon a PENNVEST loan. Metering is a universal requirement that all water utilities have been required to meet. See 52 Pa. Code § 65.7(a)-(d). Not only did the Kresges ignore the Order regarding metering of their (then) 52 customers, but they connected 100 or more new customers without metering them, after the Commission's Order to meter all new connections.

I.D. at 47.

Likewise, the level of its tariffed rates for service is not an excuse for non-compliance with a Commission Order. The fallacy of this argument is discussed in the OCA's Reply to WP Exception Nos. 4 and 5.

The Company's exception should be rejected.

Reply to WP Exception No. 8: The ALJ Correctly Found That Only 38% of WP Customers Are Served By 6-Inch Diameter Mains. I.D. at 49

WP argues that the ALJ's finding regarding pipe diameter in the WP Water system are inaccurate. WP Exc. ¶8. Rather, the ALJ correctly found that approximately 23% of WP Water customers are served by 2-inch diameter pipe, 24% by 3-inch diameter pipe, 15% by 4-inch diameter pipe and 38% by 6-inch diameter pipe. FoF 78; tr. July 18, 2006 (Fought) at 142-43, Sch. TLF-2. WP's claim that 70% of customers are served by 6-inch mains description of the

system is inconsistent with the system map the Company provided in response to OCA discovery. Tr.July 18, 2006 (Fought) at 142; OCA St. No. 1, Sch. TLF-2. For example, the map clearly shows some 2-inch and 4-inch mains; those main sizes are missing from WP's assertion that all customers are served by 6-inch and 3-inch mains. Sch. TLF-2. The system map clearly supports the percentages identified in the ALJ's findings. I.D. at 49; FoF 78.

The Company's exception should be rejected.

Reply to WP Exception No. 9: The ALJ's Decision To Impose A Civil Penalty On WP Water Is Based On The Substantial Evidence Showing That WP Has Violated Section 1501 Of The Public Utility Code. I.D. at 60

WP asserts that the imposition of a civil penalty upon WP Water constitutes an error. WP Exc. ¶9. The Company bases its assertion on its previous exceptions.

Section 3301 of the Public Utility Code provides that if any public utility fails to comply with the Commission's laws, regulations or orders, the utility shall forfeit and pay a penalty to the Commission. 66 Pa. C.S. § 3301. The ALJ observed that most of the facts that support a clear finding of WP Water's violation of Section 1501 of the Public Utility Code – failure to provide safe, adequate, reasonable and efficient service to its patrons by having persistently low water pressure and frequent outages, failure to provide water for basic household usages, use of undersized piping to exacerbate poor pressure and failure to properly bill patrons – were stipulated by the Company. SFoF 1-3, 12-14, 17, 18, 23. The other findings were based on credible testimony by experts, OCA witness Terry Fought and LBPS witness Larry Lash, and customers Kathleen Sylvester and Will Finkler. FoF 61-104. The ALJ's forty-four findings of fact provide ample support for her legal conclusion that WP Water is not meeting the requirements of Section 1501. Additionally, WP Water is in violation of a PUC Order. SFoF 20-22.

The ALJ's conclusions are well-founded and her application of Section 3301 is appropriate. The Company's exception should, therefore, be rejected.

Reply to WP Exception No. 10: The ALJ Correctly Noted That Responsibility For Its Failures Lies With The Utility Rather Than The Commission. I.D. at 50.

Citing page 51 of the Initial Decision, WP claims that the ALJ "erred in suggesting that the PUC was unaware of the state of the water delivery system at Washington Park" because WP applied for a PennVest loan in 1994 to make improvements to the water system. WP Exc. ¶10.

It is not clear to what WP is referring on page 51 of the Initial Decision. In any event, it is irrelevant whether the PUC was aware of the state of the water delivery system at Washington Park at any time prior to the instant proceeding. As the ALJ correctly noted, responsibility for the lawful provision of water service rests with the utility.

> The Commission cannot be everywhere, and it is not intended to be. The Code and regulations presume lawful compliance. The burden is on an owner and operator to know the applicable laws and to comply. Here, the Kresges chose to willfully ignore a Commission Order and avoid detection of the violation as long as possible. The Kresges' poor management decisions ensured that the inadequate service to the WP Water customers would be perpetuated.

I.D. at 48; *see also* I.D. at 50.

Accordingly, WP's exception is incorrect and should be rejected.

Reply to WP Exception No. 11: The ALJ Correctly Found That WP Has A Long History Of Violations. I.D. at 61.

WP argues that WP Water does not have a long history of environmental violations with DEP. WP Exc. ¶11. Specifically, the ALJ correctly found that WP's *owners* "have accumulated a long history of environmental violations with DEP and a lengthy history with the PUC for their recalcitrance toward achieving any meaningful level of compliance. These violations are not the result of negligence. The history and patterns of behavior are persistent and the violations are intentional." I.D. at 61. Thus WP is correct that the record in the instant proceeding does not

address DEP violations by WP Water. However, WP Water is not in conformance with DEP technical guidelines for safe yield average and maximum daily demand and finished water storage. FoF 91-92, 97; OCA St 1 at 4-6, Sch. TLF-1, Tables 2w, 3w.

More to the point, DEP violations are not a requirement for the imposition of civil penalties pursuant to Section 3301. Section 3301 requires noncompliance with Commission statutes, regulations and orders. 66 Pa. C.S. § 1501. WP Water is in violation of a Commission Order, Section 1501 of the Public Utility Code and a variety of Commission regulations, including 52 Pa. Code § 65.7 (universal metering), 52 Pa. Code § 65.6 (minimum pressures), 52 Pa. Code § 67.1 (notice to PUC of unscheduled service interruptions), and 52 Pa. Code § 56.15 (billing information). The requirements of Section 3301 are satisfied with regard to WP Water and the ALJ's assessment of a civil penalty is appropriate.

For these reasons, WP's exception should be rejected.

Reply to WP Exception No. 12: The ALJ Calculated A Reasonable And Appropriate Civil Penalty For WP Water Pursuant To Section 3301. I.D. at 61-62 and 71.

WP argues that the ALJ erred in her calculation of a civil penalty to be assessed to WP Water. WP Exc. ¶12 a., b., c., d., e.

The ALJ gave proper consideration of each of the standards set forth in Joseph A. Rosi v. Bell-Atlantic-Pennsylvania, Inc. and Sprint Communications Company, L.P. to determine the appropriate amount of penalties under Section 3301 of the Public Utility Code. Docket No. C-00992409 (Mar. 16, 2000) (Rosi). The first standard is whether the violations were intentional or negligent.[1] The ALJ correctly determined that the violations were intentional. She based this conclusion on a record replete with evidence regarding WP's ongoing poor customer service,

[1] WP's contentions regarding the basis for the ALJ's conclusion that WP Water is in violation of Section 1501 are disproved in OCA's Reply to WP Exception no. 11.

mismanagement and incompetent operation and failure to take any meaningful action to remedy problems that were known by the utility to exist since at least 1994. SFoF 1, 5, 18, 19, 20, 21, 24, 25, 26; FoF 59, 60, 61, 64-65, 69-76, 84-89, 91-97, 267.

WP argues that its only daily violation for purposes of Section 3301 is its failure to comply with the Commission's order regarding metering. WP Exc. ¶12.a. Section 3301 is not limited to violations of Commission orders, it applies to violations of the Public Utility Code. 66 Pa. C.S. § 3301. As discussed above, WP Water has been in constant violation of Section 1501 of the Public Utility Code for a number of reasons, most remarkably for its failure to provide water continuously and in sufficient quantity for household purposes. I.D. at 60; SFoF 17; FoF 91, 92.

WP disputes that it has violated Section 1501 in its provision of water service. WP Exc. ¶12 a. With regard to metering, WP admits its non-compliance, but argues that it tried to get PennVest funding in 1994 to secure meters. Although it is not stated, WP seems to argue that because it tried to get funding for meters more than ten years ago, its noncompliance was not intentional. The fact is that WP knew of the water problems and, after 1994, failed to take any meaningful steps to resolve them.

The second and third standards in Rosi are the utility's promptness to correct and actions to correct the violations. As discussed, WP does not even acknowledge the scope and severity of its violations. The Company blames everything on its failure to get a PennVest loan in 1994. In its exceptions, WP does not discuss the fact that, in 1997, PennVest gave Mr. Kresge an opportunity to meet numerous obligations in order to consummate the loan. The obligations were not met. FoF 65; OCA St. 1, Sch. TLF-5; Tr. July 18, 2006 (Kresge) at 75-76. WP did not apply for another PennVest loan. FoF 63, 201; Tr. July 18, 2006 (Kresge) at 27, 68-71, 76. The

record shows that no meaningful actions have been taken to improve the problems. In fact, the Company has exacerbated the water situation by allowing more homes to be connected to the system. I.D. at 50; SFoF 16, 17. As a result, the severity of low pressure problems has increased. Tr. Feb. 27, 2006 (Sylvester) at 58, 61.

The fourth standard in Rosi addresses the number of customers impacted by the violations. The ALJ correctly found that all of WP's water customers, approximately 150, are impacted by WP's poor customer service and failure to provide metered rates for service, notice of boil water advisories and outages and bills containing all of the information required by Commission regulation. SFoF 1, 5, 18, 20, 22, 26. All customers at higher elevations in the system are affected by low water pressure and outages. FoF 84, 85, 86, 91-93. The Company's characterization that only three customers are impacted is proven false by the engineering facts and its own admissions.

The compliance history of WP, standard six, is addressed above. The seventh standard asks whether the utility cooperated with the Commission in attempting to correct the problem. The Company admitted that it has never contacted the PUC to seek help with regard to compliance with Commission requirements or funding for its operation, maintenance or improvements. I.D. at 48 ("It is likely that the Kresges did not approach the Commission for either a rate increase or assistance deliberately to avoid attention to themselves and the various Company issues."), tr. July 18, 2006 (Kresge) at 60.

In its exceptions, WP points to the fact that "[t]here is no record of any effort on the part of the Commission to help or assist the Company to upgrade its delivery system." WP Exc. ¶12 d. The ALJ responded to this flawed argument in her Initial Decision, pointing out that the burden of complying with applicable laws is on the utility, not the Commission. I.D. at 48.

In response to the eighth and ninth standards, the OCA notes that the ALJ elected not to increase the base amount of penalties for willful violations, i.e. $500 per day, not out of lenience, but because she correctly opined that "there is no additional penalty that will alter the pattern already demonstrated." I.D. at 62. WP does not except to this determination; however, it argues that the ALJ incorrectly characterized Mr. Kresge's testimony as dishonest. The ALJ was sufficiently persuaded by the evidence in this proceeding to render a finding of fact stating that "Mr. Kresge is not credible." FoF 265.

For all of these reasons, given the severity and history of WP's offenses, the ALJ's use of the lowest end of the range of penalties for intentional violations, and the ALJ's recommendation that the penalties against WP Water and WP Sanitary be held in abeyance until other WP proceedings before the Commission are resolved, the OCA submits that the level of penalties assessed is an appropriate and reasonable application of Section 3301 of the Public Utility Code.

Reply to WP Exception No. 13: The ALJ Correctly Found That WP Has Never Obtained Bids Or Cost Estimates For An Infiltration/Inflow Study. I.D. at 54.

WP does not dispute that it has not taken steps to do an infiltration/inflow study; however, the Company argues that its failure was not intentional because the study was not economically feasible for a utility its size. WP Exc. ¶13. The fact remains that the study is needed so that the sources of excessive infiltration/inflow can be corrected. Until it is corrected, on a daily basis, the customers' waste will continue to "blow through" the system without treatment. Tr. May 23, 2006 (Holmes) at 181; tr. July 18, 2006 (Kresge) at 27-28, 54-48, tr. July 19, 2006 (Kresge) at 180; OCA St. 1, Sch. TLF-10 at 3.

If WP cannot treat its customers' sewage within legal parameters, for whatever reason, it has the burden of approaching the Commission for a rate increase or assistance before it allows the system to become out of compliance. I.D. at 48. The argument that WP was denied

PennVest funding more than ten years ago is not a valid defense. As it stands, WP Sanitary's customers are paying rates for a service that is not being provided – the collection, cleaning and proper discharge of the effluent, and operation and maintenance of the plant. I.D. at 57-58; FoF 122, 129-36, 149, 155-57, 159-62, 167, 169, 181-83, 197, 199, 240-42, 246-47, 253, 258-60.

The Company's exception should therefore be rejected.

Reply to WP Exception No. 14: The ALJ Correctly Found That WP's Customers Are Subjected To Malodors Resulting From Poor Operation And Maintenance Of WP Sanitary's Plant. I.D. at 55-58.

WP contends that the ALJ failed to consider the testimony of LBPS witness Larry Lash with regard to malodors produced by WP Sanitary's plant. WP Exc. ¶14.

The ALJ's conclusion that WP's plant is producing pungent, bad odors that can be smelled by customers, is supported by substantial evidence. I.D. at 55-58. Multiple witnesses testified about malodors in summer 2005, September 7-8 and 13, 2005, March 8, 2006 and July 17, 2006. Tr. Feb. 27, 2006 (Sylvester) at 89-90; tr. Feb 27, 2006 (Finkler) at 128-130; tr. May 23, 2006 (Holmes) at 133-34, 175. The malodors come from two sources, the aeration plant – if it is not operating properly, the liquid can become septic – and the untreated waste that builds up in the receiving stream. OCA St. 1 at 13 and Sch. TLF-7 at 2, 4; tr. July 18, 2006 (Fought) at 146; tr. Feb. 27, 2006 (Holmes) at 175, 217; tr. May 23, 2006 (Holmes) at 133-34, 175. Contrary to WP's assertion, the fact that Mr. Lash did not detect the odor on two other days does not rebut the testimony of the customers, Mr. Holmes and Mr. Fought about the malodor on the dates in question.

Accordingly, WP's exception should be rejected.

Reply to WP Exception No. 15: The ALJ Correctly Considered Testimony By Mr. Holmes Regarding The Deposition of Sewage Sludge And Solids In The Receiving Stream. I.D. at 57.

WP disputes the evidence provided by DEP Water Quality Specialist Supervisor, Mr. Holmes, showing that untreated waste is being deposited in the receiving stream because "the testimony of Mr. Holmes is the subject of a separate and contested proceeding." WP Exc ¶15. First, WP admits that waste is flowing through the plant without treatment, so there is other testimony in the record to support the ALJ's findings on this issue. Tr. July 18, 2006 (Kresge) at 54-55, *see also* OCA St. 1 at 13. Second, Mr. Holmes testimony before this Commission was subject to cross-examination by WP and was appropriately weighed and considered by the ALJ. The issue in the separate, contested DEP proceeding is not Mr. Holmes' testimony, but WP's violations of applicable DEP laws and regulations. Tr July 18, 2006 (Holmes) at 87, 101-02.

The Company's exception should, for these reasons, be rejected

Reply to WP Exception No. 16: The ALJ Correctly Assessed A Civil Penalty Against WP Sanitary. I.D. at 62-63.

No reply to this exception is necessary because WP did not provide any support for its exception, just the statement that it believes the ALJ was in error for assessing a civil penalty against WP Sanitary. WP Exc. ¶16. The record shows that WP Sanitary violates Section 1501 of the Public Utility Code. Accordingly, there is basis for a civil penalty pursuant to Section 3301.

The exception should be rejected

Reply to WP Exception No. 17: The ALJ Calculated A Reasonable And Appropriate Civil Penalty For WP Sanitary Pursuant To Section 3301. I.D. at 62-63, 71.

WP asserts that there is "no specific violation lasting for a period of three years" on the record or referenced in the Initial Decision and thus no basis for the ALJ's assessment of a $500

per day fine upon WP Sanitary. WP Exc. ¶17.a. This is patently false. The record is replete with evidence regarding WP's long history of failure to properly operate and maintain its wastewater system. These problems are discussed on pages 55-59 in the Initial Decision. *See also* FoF 122-268. Arguably, the most egregious of these ongoing problems is the Company's failure to treat its customers' sewage within legal parameters. I.D. at 58. The last time any sludge was hauled from the treatment plant rather than discharged to the receiving stream was 2001. FoF 31; OCA St. 1 at 13; tr. July 18, 2006 (Kresge) at 46, 54-58 and (Holmes) at 96, 99. Mr. Fought estimates that for *every year* that waste sludge was not hauled from the plant, the equivalent of 8,140 pounds of dry sludge or 97,820 gallons of sludge containing 1% solids have been discharged to the receiving stream. OCA St. 1 at 13. Mr. Kresge admits that he has known that untreated sewage has been discharged from his plant since 1991. Tr. July 18, 2006 at 54-55.

WP does acknowledge that it has an infiltration/inflow problem but argues that the Company cannot remedy it due to lack of capital and, therefore, claims that its conduct was not intentional. WP Exc. ¶17.a. As discussed repeatedly in the Initial Decision and herein, lack of capital is not a defense to a utility's obligations pursuant to the Public Utility Code. WP has known that untreated waste is discharged from its system, has known about the excessive infiltration/inflow, but has failed to take any meaningful action to address it. WP Sanitary's actions are intentional and the ALJ appropriately assessed civil penalties pursuant to Section 3301.

With regard to the second Rosi standard, WP argues that the ALJ should have considered that the Company made some of the immediate repairs recommended by its Certified Operator and OCA witness Fought. WP Exc. ¶17.b. The ALJ specifically noted that WP Sanitary "provided some evidence to indicate that it has made repairs to its aeration system; however, Mr.

Fought testified that aeration seemed improved, but not resolved." I.D. at 29. The ALJ noted further that WP has agreed to make some additional adjustments and repairs. *Id.* The ALJ understood, however, that – even if WP makes all of the short-term repairs to the treatment plant - the wastewater system will not operate properly until the infiltration/inflow problem is corrected. I.D. at 58-59; tr. May 23, 2006 (Holmes) at 180; tr. July 18, 2006 (Fought) at 157-58.

With regard to the sixth and second Rosi standards, WP excepts to the ALJ's failure to "specify" any history of non-compliance with respect to WP Sanitary. WP Exc. ¶17.c. WP admits that its system has excessive infiltration/inflow and that, because its treatment plant cannot handle system flow, it has not treated the waste discharged from its treatment plant on a daily basis since 2001 and, possibly, since 1991. St. K-10 at 3; tr. July 18, 2006 (Kresge) at 54-58; tr. July 19, 2006 (Kresge) at 180. These admissions are specified on pages 57 and 58 of the Initial Decision and incorporated in the ALJ's findings of fact. FoF 182, 199, 202, 239-242. These admissions of WP Sanitary's failure to provide wastewater service are corroborated by DEP documents which indicate that WP Sanitary exceeded the limits of its effluent discharge permit in all but five of the forty-five months between August 2001 and May 2005. OCA St. 1, Sch. TLF-6 at 5-7. Moreover, WP does not currently have a permit to discharge *any amount* of effluent. Tr. July 18, 2006 (Holmes) at 87, 175-76, 179.

No mitigation of the penalties below the base amount of $500 per day is warranted by the evidence. Given the severity and history of WP Sanitary's offenses, the ALJ's use of the lowest end of the range of penalties for intentional violations, and the ALJ's recommendation that the penalties against WP Water and WP Sanitary be held in abeyance until other WP proceedings before the Commission are resolved, the OCA submits that the level of penalties assessed is an appropriate and reasonable application of Section 3301 of the Public Utility Code.

Reply to WP Exception No. 18: The ALJ Calculated A Reasonable And Appropriate Civil Penalty For Mr. Kresge Pursuant To Section 3301. I.D. at 63-64, 71.

WP does not dispute the ALJ's finding that "there is no one in the chain of command higher than Mr. Kresge." I.D. at 65. WP admits that Mr. Kresge knew about the violation of the Commission's 1991 metering order, but argues that WP could not do anything about it because WP Water did not have the funds necessary to install meters. WP Exc. ¶18. WP also asserts that Mr. Kresge tried and failed to get PennVest and private funding and that its income from the flat rates charged to customers was not sufficient. As discussed in the OCA's reply to WP Exception nos. 4, 5 and 7, the Commission's directive that WP install meters was not contingent on receipt of PennVest funding. I.D. at 47. Nor was it contingent on receipt of private funding or a rate increase. Not only did Mr. Kresge fail to contact the Commission for help or to request a rate increase, but Mr. Kresge authorized the connection of 100 or more new customers to the system without metering them. This compounded the violation of the 1991 Order and exacerbated the pressure and outage problems on the system. I.D. at 47-48, 66. On this evidence, the ALJ correctly determined that Mr. Kresge's actions constituted a misfeasance, rather than negligence or a nonfeasance. I.D. at 66.

Although it is not specifically addressed in the ALJ's discussion of penalties, the record also supports a finding that Mr. Kresge's actions regarding WP's violations of Section 1501 constituted a misfeasance. Mr. Kresge admits knowing about the water pressure and storage problems as early as 1995. Tr. July 18, 2006 (Kresge) at 73-75. He admits knowing about the wastewater plant problems as early as 1991. Tr. July 18, 2006 (Kresge) at 54-55. He not only failed to take meaningful steps to bring WP into compliance with Section 1501, but he tripled the customer base – knowing that additional usage would worsen the existing problems.

Mr. Kresge's actions warrant imposition of a civil penalty pursuant to Section 3301. To the extent that WP's other arguments contained in its Exception no. 18 are not specifically addressed, the OCA incorporates its responses to the previous seventeen exceptions. WP's exception should be rejected.

Reply to WP Exception No. 19: The ALJ Calculated A Reasonable And Appropriate Civil Penalty Pursuant For Mrs. Kresge To Section 3301. I.D. at 67-68.

WP argues that assessment of a civil penalty upon Mrs. Kresge is not appropriate because the ALJ cited no customers concerns about the Company's failure to properly bill, properly keep complaint records and failure to provide proper boil water and/or outage notices. First, Section 3301 does not require customer complaints, only non-compliance with a provision of the Public Utility Code or Commission regulation, final direction, requirement, determination or order. 66 Pa. C.S. § 3301(a). Second, customers did complain about WP's failure to provide proper notice of outages and boil water advisories and disputed the Company's testimony about the number and severity of complaints received about poor service. Tr. Feb. 27, 2006 (Sylvester) at 45-46, 48, (Finkler) at 101, 103-04.

Next, WP contends that the penalty is extreme for these particular deficiencies. In fact, the penalty is not extreme. The ALJ applied the lowest penalty for an intentional violation *and* she chose not to apply a penalty for violation of the Commission's 1991 metering order, despite finding that the penalty legally applies to Mrs. Kresge. I.D. at 68.

Last, WP argues that Mrs. Kresge's non-compliance was not deliberate. Mrs. Kresge is the owner of a utility. As an owner, she has the burden to know the applicable laws and to comply. I.D. at 48. The Kresges were already under notice regarding the Commission's requirements regarding customer service and billing – in an Order entered in January 1998, the

Commission found that another utility owned and operated by the Kresges, *inter alia*, was improperly billing customers and needed staff to properly manage customer complaints. Pa. P.U.C. v. Wilbar Realty Company, Inc. and Carl Kresge, President, Docket No. C-00957541 (Jan 16, 1998).[2] The evidence in this proceeding supports the ALJ's conclusion that Mrs. Kresge's violations constitute misfeasance.

Accordingly, WP's exception to the assessment of a penalty against Mrs. Kresge should be rejected

Reply to WP Exception No. 20 (A. Billing): The ALJ Correctly Found That WP's Bills Do Not Comply With Commission Requirements. I.D. at .6

WP argues that its bill is "clear and informative" because the Company charges a flat rate for service, despite its failure to "fully comply with the technical requirements of the PUC." WP Exc. ¶20. WP has already stipulated that its bills do not include a number of items required by 52 Pa. Code §§ 56.15, 69.251 and agreed to modify bills to comply with those provisions. St. K-11 at 3-4; Tr. July 19, 2006 (Kresge) at 108. It is not clear to what portion of the ALJ's Initial Decision WP excepts because the ALJ simply accepted the finding of fact stipulated by the Company. I.D. at 6.

Given the Company's admissions and stipulations, the billing issue is moot and WP's exception should be rejected.

Reply to WP Exception No. 21 (B. Boil Water/Outage Advisories): The ALJ Correctly Found That WP Does Not Properly Notify Customers Regarding Boil Water Advisories. I.D. at 68.

Again, WP fails to identify any portion of the ALJ's Initial Decision to which it excepts. Presumably, the Company is arguing that Mrs. Kresge should not be liable for civil penalties

[2] PA PUC v. Wilbar Realty Company, Inc. and Carl Kresge, President, Docket No. C-00957541 Order entered January 16, 1998.

because the Company does, in fact, properly notify customers regarding Boil Water Advisories. WP Exc. ¶21; I.D. at 68.

The ALJ had an opportunity to review WP's testimony about how and when it issues a boil water advisory. WP St. K-11 at 3-4. Although it is not discussed in the Initial Decision, at the same time WP contends that it issues advisories whenever there are service outages, the Company disputes its customers' assertions that outages occur frequently. WP Exc.¶1 (WP does not acknowledge the outages in summer 2005 and July 2006). It is unlikely, therefore, that WP issues boil water advisories every time customers experience outages. This reasoning is supported by the ALJ's findings that Ms. Sylvester and Mr. Finkler did not receive notice of the beginning and lifting of boil water advisories in summer and October 2005. FoF 72-76; *see also* OCA Reply to WP Exc ¶2.

Accordingly, WP's exception should be rejected.

III CONCLUSION

For those reasons set forth in the OCA's Main Brief and Reply Brief, and these Reply Exceptions, the OCA submits that the ALJ's Initial Decision should be upheld.

Respectfully Submitted,

Christine Maloni Hoover
Senior Assistant Consumer Advocate
PA Attorney I.D. # 50026
E-Mail. CHoover@paoca.org

Erin L. Gannon
Assistant Consumer Advocate
PA Attorney I.D. # 83487
E-Mail. EGannon@paoca org

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September 17, 2007

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ORIGINAL

September 17, 2007

RECEIVED

SEP 17 2007

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

JAMES J MCNULTY
SECRETARY P.U.C.
2ND FLOOR KEYSTONE BUILDING
400 NORTH STREET
HARRISBURG PA 17105-3265

DOCUMENT FOLDER

Re: Sylvester et al v. W.P Water Co.,
and Sylvester et al v. W. P.
Sanitary Company
Docket No. C-20055453
Docket No. C-20055473
Docket No. C-20065849
Docket No. C-20055455
Docket No. C-20065850
File No. CM/57293

BTL

Dear Secretary McNulty:

Enclosed, please find an original, and nine (9) copies of the Response of W.P. Water Company and W. P. Sanitary Company to Exceptions of the Office of Consumer Advocate to the Initial Decision of Administrative Law Judge Ember S. Jandebeur.

A Certificate of Service, evidencing service of the same upon the parties of record is attached to the Response.

Thank you for your consideration.

Sincerely,

Kieran M. Casey

Kieran M. Casey

87

KMC:jp
Enclosures

VIA OVERNIGHT MAIL TRACKING #8614 4786 9317

Cc: Erin Gannon, Esquire (w/encl.) (overnight mail tracking #8614 4786 9340)
Rhonda L. Daviston (w/encl.) (overnight mail tracking #8614 4786 9339)
Carl Kresge (w/encl.)

ORIGINAL

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Kathleen Sylvester;	:	Docket No. C-20055453
William J. Finkler;	:	Docket No. C-20055473
and James Pugh;	:	Docket No. C-20065849
Complainants	:	
And	:	
PA PUC LAW Bureau,	:	
And	:	
Office of Consumer Advocate	:	
Intervenors	:	
	:	
v.	:	
W.P. Water Company, Inc.	:	
Respondent	:	
	:	
	:	
Kathleen Sylvester;	:	Docket No. C-20055455
William J. Finkler;	:	Docket No. C-20055473
and James Pugh;	:	Docket No. C-20065450
Complainants	:	
And	:	
PA PUC LAW Bureau,	:	
And	:	
Office of Consumer Advocate	:	
Intervenors	:	
v.	:	
W.P. Sanitary Company, Inc.	:	
Respondent	:	

RESPONSE OF W.P. WATER COMPANY AND W.P. SANITARY COMPANY TO THE EXCEPTIONS OF THE OFFICE OF CONSUMER ADVOCATE TO THE INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EMBER S. JANDEBEUR

I PROCEDURAL HISTORY

On August 16, 2007, Administrative Law Judge Ember S. Jandebeur issued her initial decision in this controversy. In this decision, the ALJ assessed

a civil penalty of $547,500 00 against W P Sanitary and an identical civil penalty of $547,500.00 against W.P. Water Company The ALJ also assessed a civil penalty of $109,500 00 against both Carl and Sandra Kresge personally. The W.P. companies and the Office of Consumer Advocate both filed exceptions to the Initial Decision on September 5, 2007.

Despite the substantial amount of penalties assessed against the W.P. companies and the Kresges personally, the OCA asserts that the ALJ erred by not ordering refunds to the customers.

II DISCUSSION

For the reasons set forth in their exceptions filed September 5, 2007, W.P. Water and W.P. Sanitary Companies dispute the OCA's assertion that the companies are "persistently in violation of Section 1501 of the Public Utility Code." Further, as noted in its exceptions, the Companies dispute the assertion, as made by the ALJ in her decision and by the OCA in its exceptions, that any existing regulatory issues are the result of "intentional" neglect.

Additionally, the assertion that all customers are entitled to a refund is unsupported by the record W P Water and W P Sanitary have approximately 150 customers. Yet, only three customer complaints were before the commission. Accordingly, awarding refunds to every customer is inappropriate.

Further, in light of the substantial penalties imposed against the Kresges and the companies, an Order directing the companies to pay refunds as well is excessive

Finally, as noted in a letter sent earlier today by Rhonda Daviston, Esquire, the Public Utility Commission Prosecutory Staff opposes the imposition of refunds as such an Order could jeopardize an ongoing mediation.

RESPECTFULLY SUBMITTED:

Kieran Casey, Esquire
Borland & Borland
69 Public Square
11th Floor
Wilkes-Barre, Pa 18701

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMS.ION

Kathleen Sylvester;	:	Docket No. C-20055453
William J. Finkler;	:	Docket No. C-20055473
and James Pugh;	:	Docket No. C-20065849
Complainants	:	
And	:	
PA PUC LAW Bureau,	:	
And	:	
Office of Consumer Advocate	:	
Intervenors	:	
	:	
v.	:	
W.P. Water Company, Inc.	:	
Respondent	:	
	:	
Kathleen Sylvester;	:	Docket No. C-20055455
William J. Finkler;	:	Docket No. C-20055473
and James Pugh;	:	Docket No. C-20065450
Complainants	:	
And	:	
PA PUC LAW Bureau,	:	
And	:	
Office of Consumer Advocate	:	
Intervenors	:	
v.	:	
W.P. Sanitary Company, Inc.	:	
Respondent	:	

CERTIFICATE OF SERVICE

I, Kieran M. Casey, Esquire, do hereby certify that on this 17TH day of September, 2007, a true and correct copy of the Response of W.P. Water Company and W. P. Sanitary Company to the Exceptions of the Office of Consumer Advocate to the Initial Decision of Administrative Law Judge Ember S. Jandebeur was served upon the following individuals by Federal Express, Overnight Delivery:

James J McNulty
Secretary P.U C.
2nd Floor Keystone Building
400 North Street
Harrisburg PA 17105-3265

DATE: October 5, 2007

SUBJECT: C-20055453, C-20055473, C-20065849, C-20055455, C-20065850

TO: Cheryl W. Davis, Director
Office of Special Assistants

FROM. James J. McNulty
Secretary
nvl

DOCUMENT
FOLDER

Kathleen Sylvester et al
Pennsylvania Public Utility Commission – Law Bureau
Office of Consumer Advocate
v.
Washington Park Water Company
Washington Park Sanitary Company

Copies of the Initial Decision have been served upon all parties of interest.

Exceptions have been filed by:

OFFICE OF CONSUMER ADVOCATE
W.P. WATER COMPANY & W.P. SANITARY COMPANY

Reply Exceptions have been received from:

OFFICE OD SONSUMER ADVOCATE
WP WATER/SANITARY COMPANY

cc: Susan Hoffner

BA

PUC-77 Rev.
304007

PENNSYLVANIA PUBLIC UTILITY COMMISSION
Uniform Cover and Calendar Sheet

1. **REPORT DATE:** October 31, 2007	2. **BUREAU AGENDA NO.** NOV-2007-OSA-0252*
3. **BUREAU:** Office of Special Assistants	
4. **SECTION(S):**	5. **PUBLIC MEETING DATE:**
6. **APPROVED BY:** Director: C.W. Davis 7-1828 Mgr/Spvr: K. Sophy 7-8108 Legal Review:	November 8, 2007 C-20055455
7. **PERSONS IN CHARGE:** C. Pennington 346-2615	9. **EFFECTIVE DATE OF FILING:**
8. **DOCKET NO.:** C-20055453, *et al.*	N/A

10. (a) CAPTION (abbreviate if more than 4 lines)
(b) Short summary of history & facts, documents & briefs
(c) Recommendation

(a) Kathleen Sylvester *et al.* (Complainants) v. Washington Park Water Company, Inc. and Washington Park Sanitary Company (WP)

(b) On October 19, 2005, through January 9, 2006, the Complainants filed Formal Complaints against WP alleging that the quality of their water and/or wastewater service was poor. The Complainants requested, *inter alia*, that various service problems, included poor water pressure and malodors from the wastewater treatment plant, be corrected. By her Initial Decision issued August 16, 2007, Administrative Law Judge (ALJ) Ember S. Jandebeur sustained the Complaint and determined that WP's actions were intentional and warranted penalties. WP and the Office of Consumer Advocate (OCA) filed on September 5, 2007. The OCA and the Commission's Law Bureau filed Reply Exceptions on September 17, 2007

(c) The Office of Special Assistants recommends that the Commission adopt the proposed Opinion and Order that grants the Exceptions, in part and denies the Exceptions, in part, and modifies the Initial Decision.

Order Doc No. 687674v1 Calendar Doc. No 690201v1

11. MOTION BY: Commissioner Chm. Holland — Commissioner Christy - Yes; Commissioner Pizzingrilli - Yes; Commissioner

SECONDED: Commissioner Cawley

CONTENT OF MOTION: Postponement to Public Meeting of December 6, 2007 for the Commission's further consideration.