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September 5, 2007

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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:

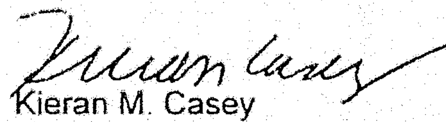
Enclosed, please find an original, and nine (9) copies of the Exceptions of Washington Park Water Company and Washington Park Sanitary Company to the initial decision of Administrative Law Judge Ember S. Jandebeur which was transmitted to the parties of record on August 16, 2007.

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.)

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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 v. W.P. Water Company, Inc. Respondent	:	Docket No. C-20055453 Docket No. C-20055473 Docket No. C-20065849
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

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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

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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).

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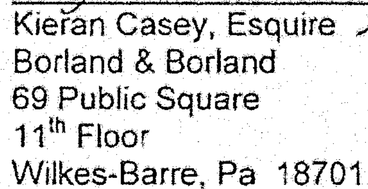

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMS.ION

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

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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.

2rd Floor Keystone Building
400 North Street
Harrisburg PA 17105-3265

Erin L. Gannon, Esquire
Office of Consumer Advocate
555 Walnut Street, 5th Floor, Forum Place
Harrisburg, PA 17101-1923

Rhonda L. Daviston
PA Public Utility Commission
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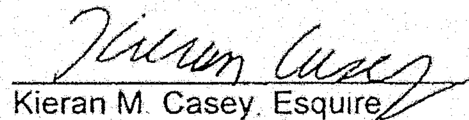
400 North Street
Harrisburg PA 17105-3265

RESEPECTFULLY SUBMITTED:

Borland & Borland, LLP



Kieran M. Casey, Esquire

COMMONWEALTH OF PENNSYLVANIA

OFFICE OF CONSUMER ADVOCATE
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IRWIN A. POPOWSKY
Consumer Advocate

FAX (717) 783-7152
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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

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 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

BTL

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

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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

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James Pugh
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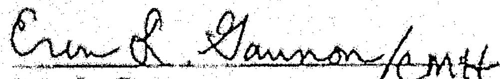

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

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EXCEPTIONS OF THE OFFICE OF CONSUMER ADVOCATE

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Advocate
PA Attorney ID # 83487

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Irwin A. Popowsky
Consumer Advocate

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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.

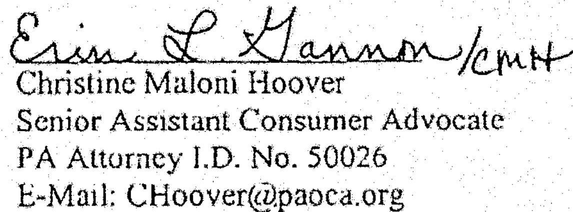
The OCA supports the ALJ's recommendation to order WP and the Kresge's individually to pay civil penalties. It is important to note, however, that penalties are punitive in nature and are paid to the General Fund. 66 Pa. C.S. § 3315. The penalties do not directly benefit the customers who have endured 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

DEC 2 8 1992
Office of Attorney General
OCA

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.

<u>History of Proceedings</u>

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 "unimproved 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 <u>Pa. P.U.C. et al. v. Lake Latonka Water Company, at R-891257 et al.</u>).

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 <u>Exceptions</u> to the R.D. on November 12, 1990, and also filed <u>Supplemental Exceptions</u> 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 homeowners 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 <u>within four years</u> 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.C0 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.

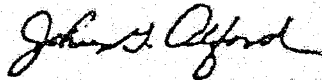
2. That the Recommended Decision of Administrative Law Judge Richard M. Lovenwirth be, and is hereby, adopted to the extent consistent with this Opinion and Order.

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

DEC 2 8 1992
Office of Attorney General
OCA

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

John I. Worrall
v.
Clean Treatment Sewerage Company

C-892531

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 <u>not</u> 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 <u>Luckie</u> 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 (<u>66 Pa. C.S.A. §1312)</u> limits the refunds or rebates which the Commission may order to be paid by a public utility to those caused by unlawful charges made <u>within four years</u> 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" <u>charges</u> between June, 1985 and June, 1990 of $274,240 is more than that which the Commission is empowered to award. <u>A fortiori</u>, 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 <u>some</u> 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 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 <u>within four years</u> 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 <u>before</u> 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:

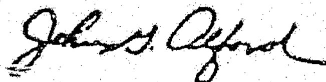
1. That the Exceptions of the Law Bureau to the Initial Decision filed herein be, and hereby are, granted.

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,

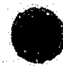


John Alford
Secretary

(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-000701124 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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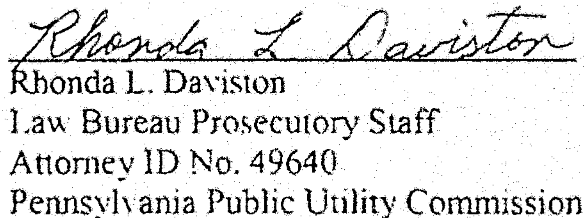

Rhonda L. Daviston
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Dated: September 17, 2007

COMMONWEALTH OF PENNSYLVANIA

OFFICE OF CONSUMER ADVOCATE
555 Walnut Street, 5th Floor, Forum Place
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IRWIN A. POPOWSKY
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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
Assistant Consumer Advocate
PA Attorney I.D. #83487

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

00095467.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.

SERVICE BY ELECTRONIC MAIL AND INTER-OFFICE MAIL

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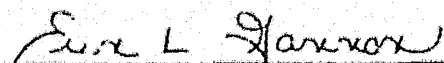

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88318.doc 1/ELG

ORIGINAL

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

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

REPLY EXCEPTIONS OF THE OFFICE OF CONSUMER ADVOCATE

DOCUMENT FOLDER

DOCKETED
SEP 1 8 2007

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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.

<u>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.</u> 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.

<u>**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.</u> 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.

<u>**Reply to WP Exception No. 16:** The ALJ Correctly Assessed A Civil Penalty Against WP Sanitary.</u> 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.

<u>**Reply to WP Exception No. 17:** The ALJ Calculated A Reasonable And Appropriate Civil Penalty For WP Sanitary Pursuant To Section 3301.</u> 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.

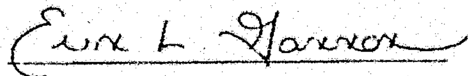
The ALJ had an opportunity to review WP's testimony about how and when it issues a boil water advisory. WP St. K-11 at 3-4. Although it is not discussed in the Initial Decision, at the same time WP contends that it issues advisories whenever there are service outages, the Company disputes its customers' 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,



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PA Attorney I.D. # 83487
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Office of Consumer Advocate
555 Walnut Street 5th Floor, Forum Place
Harrisburg, PA 17101-1923
Phone: (717) 783-5048
Fax: (717) 783-7152

September 17, 2007

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ORIGINAL

September 17, 2007

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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

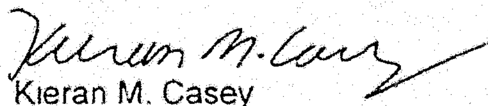
Dear Secretary McNulty:

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

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.)

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

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	:	

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SEP 17 2007

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

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	:	

DOCUMENT
FOLDER

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

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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

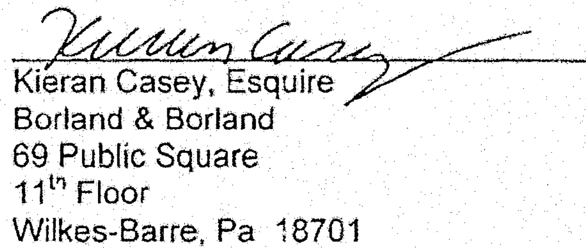
For the reasons set forth in their exceptions filed September 5, 2007, W.P. Water and W.P. Sanitary Companies dispute the OCA's assertion that the companies are "persistently in violation of Section 1501 of the Public Utility Code." Further, as noted in its exceptions, the Companies dispute the assertion, 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	:	

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SEP 17 2007

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

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:

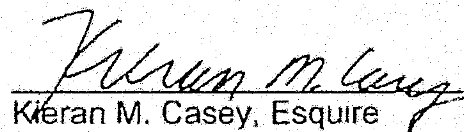
James J McNulty
Secretary P.U.C.
2nd Floor Keystone Building
400 North Street
Harrisburg PA 17105-3265

Erin L. Gannon, Esquire
Office of Consumer Advocate
555 Walnut Street, 5th Floor, Forum Place`
Harrisburg, PA 17101-1923

Rhonda L. Daviston
PA Public Utility Commission
3rd Floor Keystone Building
400 North Street
Harrisburg PA 17105-3265

RESEPECTFULLY SUBMITTED:

Borland & Borland, LLP



Kieran M. Casey, Esquire

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

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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

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OCT 5 - 2007

cc: Susan Hoffner

BA

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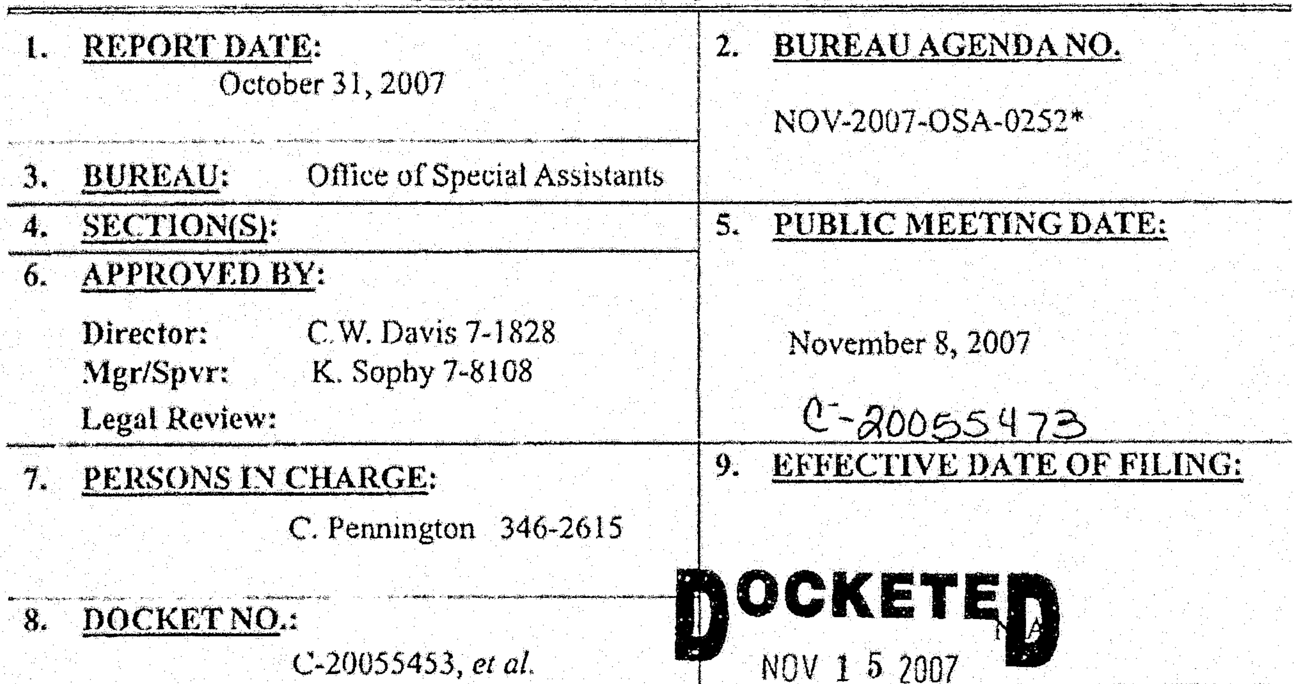
PENNSYLVANIA PUBLIC UTILITY COMMISSION
Uniform Cover and Calendar Sheet



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:**
November 8, 2007

C-20055473

6. **APPROVED BY:**
Director: C.W. Davis 7-1828
Mgr/Spvr: K. Sophy 7-8108
Legal Review:

7. **PERSONS IN CHARGE:**
C. Pennington 346-2615

8. **DOCKET NO.:**
C-20055453, *et al.*

9. **EFFECTIVE DATE OF FILING:**

DOCKETED
NOV 1 5 2007

10. (a) CAPTION (abbreviate if more than 4 lines)
(b) Short summary of history & facts, documents & briefs
(c) Recommendation

DOCUMENT
FOLDER

(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

SECONDED: Commissioner Cawley

Commissioner Christy - Yes
Commissioner Pizzingrilli - Yes
Commissioner

CONTENT OF MOTION: Postponement to Public Meeting of December 6, 2007 for the Commission's further consideration.