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April 24, 2018

Via Electronic Filing

Rosemary Chiavetta, Secretary
PA Public Utility Commission
PO Box 3265
Harrisburg, PA 17105-3265

Re: Natalie Leon, Jaime Wagner, Louise Sell, Christopher Cratsley, and James Rauber v.
Pittsburgh Water and Sewer Authority – Docket No. C-2018-3000961

Dear Secretary Chiavetta:

Enclosed for electronic filing please find the Preliminary Objections by the Pittsburgh Water and Sewer Authority to Complaint with regard to the above-referenced matter. Copies to be served in accordance with the attached Certificate of Service.

Sincerely,



Carl R. Shultz

CRS/lww

Enclosure

cc: Cert. of Service w/enc.

CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of the foregoing **Preliminary Objections** upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

Via First Class Mail

Natalie Leon
2805 Homehurst Ave.
Pittsburgh, PA 15234

Jaime Wagner
2901 Homehurst Ave.
Pittsburgh, PA 15234

Louise Sell
2913 Homehurst Ave.
Pittsburgh, PA 15234

Christopher Cratsley
2915 Homehurst Ave.
Pittsburgh, PA 15234

James Rauber
1801 Byrnwick Drive
Pittsburgh, PA 15243

Office of Administrative Law Judge
Harrisburg Office
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
2nd Floor, L-M West
400 North Street
Harrisburg, PA 17120

Date: April 24, 2018



Carl R. Shultz, Esquire
Attorneys for
The Pittsburgh Water and Sewer Authority

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Natalie Leon, Jaime Wagner, Louise Sell, :
Christopher Cratsley, and James Rauber, : Docket No. C-2018-3000961
Complainants :
v. :
Pittsburgh Water and Sewer Authority, :
Respondent :

NOTICE

To:	Natalie Leon 2805 Homehurst Ave. Pittsburgh, PA 15234	Jaime Wagner 2901 Homehurst Ave. Pittsburgh, PA 15234	Louise Sell 2913 Homehurst Ave. Pittsburgh, PA 15234
	Christopher Cratsley 2915 Homehurst Ave. Pittsburgh, PA 15234	James Rauber 1801 Byrnwick Drive Pittsburgh, PA 15243	

Pursuant to 52 Pa. Code § 5.101, you are hereby notified that an answer to the enclosed **Preliminary Objections** of The Pittsburgh Water and Sewer Authority (“PWSA”) must be filed within 10 days of the date of service of the Preliminary Objections.

All pleadings, such as a Reply to Preliminary Objections, must be filed with the Secretary of the Pennsylvania Public Utility Commission with a copy served to counsel for PWSA and where applicable, the Administrative Law Judge presiding over the issue.

File with:

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
PO Box 3265
Harrisburg, PA 17105-3265

With a copy to:

Dan Clearfield, Esquire
Carl R. Shultz, Esquire
Eckert Seamans Cherin & Mellott, LLC
213 Market Street, 8th Floor
Harrisburg, PA 17101

Carl R. Shultz, Esquire

Date: April 24, 2018

Attorneys for
The Pittsburgh Water and Sewer Authority

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Natalie Leon, Jaime Wagner, Louise Sell, :
Christopher Cratsley, and James Rauber, : Docket No. C-2018-3000961
Complainants :
v. :
Pittsburgh Water and Sewer Authority, :
Respondent :

**PRELIMINARY OBJECTIONS
BY THE PITTSBURGH WATER AND SEWER AUTHORITY
TO COMPLAINT**

Pursuant to 52 Pa. Code § 5.101, The Pittsburgh Water and Sewer Authority (“PWSA” or “Authority”) submits the following Preliminary Objections to the Complaint of Natalie Leon, Jaime Wagner, Louise Sell, Christopher Cratsley, and James Rauber (collectively, the “Complainants”) seeking dismissal of the Complaint. Pursuant to 52 Pa. Code §§ 5.61 and 5.101(d), PWSA is also filing an Answer to the Complaint. In support of these Preliminary Objections, PWSA states as follows:

I. INTRODUCTION

PWSA is filing these Preliminary Objections in an effort to secure the just, speedy and inexpensive dismissal of the Complaint, which seeks a determination by the Commission on issues that are pending before the Allegheny Court of Common Pleas and are beyond the jurisdiction of the Commission.

For the reasons stated herein *and* in PWSA’s Answer to the Complaint (which as noted below is incorporated herein by reference), the Complaint should be dismissed by the Commission because: (a) the issues raised are pending in a proceeding before the Common Pleas Court; (b) the Commission lacks jurisdiction to decide the issues raised by the Complaint; and (c) the Complaint is insufficient to show that the Complainants are entitled to requested relief.

II. BACKGROUND

1. This is a property dispute between PWSA and the Complainants that arose prior to April 1, 2018.¹ PWSA's position is that the subject common sewer line serving the properties located at 2805, 2807, 2811, 2901, 2903, 2905, 2907, 2909, 2911, 2913 and 2915 Homehurst Avenue in the City of Pittsburgh, Pennsylvania (the Disputed Line") is a private line that has not been constructed by PWSA or the City of Pittsburgh ("City") nor dedicated for public use. The Complainants' position is that the Disputed Line is a public line is owned by the City, and leased by the City to PWSA.

2. PWSA is not responsible for the repair and maintenance of every sewer line in the City. PWSA is only responsible for the repair and maintenance of Sewer Mains (a) leased to the PWSA by the City under the Capital Lease Agreement effective July 27, 1995, as amended;² (b) constructed by the City or the Authority for public use since July 27, 1995; and (c) dedicated to public use and accepted by the Authority on or after July 27, 1995. Responsibility for the repair and maintenance of sewer line(s) that are not within (a), (b) or (c) as described above — including but not limited to Sewer Laterals — lies with the constructing party and/or the Owners of the property or properties served by such line(s).

3. An action is pending before the Allegheny Court of Common Pleas³ regarding the responsibility for the repair and maintenance of the Disputed Line. That action will decide the

¹ April 1, 2018 is the date on which PWSA became subject to Commission jurisdiction. 66 Pa. C.S. § 3202; See also *Implementation of Chapter 32 of the Public Utility Code Re Pittsburgh Water And Sewer Authority*, Docket No. M-2018-2640802 (water) and M-2018-2640803 (wastewater), Final Implementation Order entered March 15, 2018, at p. 6. See, e.g., Complaint at ¶ 14.

² PWSA is a party to 30-year lease with the City of Pittsburgh, and PWSA will only acquire the City's assets upon termination of that lease in 2025. See *Implementation of Chapter 32 of the Public Utility Code Re Pittsburgh Water And Sewer Authority*, Docket No. M-2018-2640802 (water) and M-2018-2640803 (wastewater), Final Implementation Order entered March 15, 2018, at p. 27.

³ Court of Common Pleas of Allegheny County, Docket Number SA-17-886. That action is an administrative appeal from a decision of the Allegheny County Health Department ("ACHD"). *In re: Sewer Line 2805-2915 Homehurst Avenue, Pittsburgh, PA 15234*, Decision dated October 2, 2017 regarding Notice of Violation

public versus private nature of the Disputed Line and, therefore, the responsibility for repair and maintenance of the Disputed Line.

4. Despite the pending action, the Complaint seeks to have the Commission determine that the Disputed Line must be repaired (or replaced) and maintained by PWSA⁴ because it was (allegedly) leased to the PWSA by the City under the Capital Lease Agreement.⁵

5. Contemporaneously with the filing of these Preliminary Objections, PWSA has filed an Answer to the Complaint, which is incorporated herein by reference. PWSA's Answer denies the material allegations set forth in the Complaint.

PRELIMINARY OBJECTIONS

6. To the extent deemed necessary or appropriate, the "Introduction" to these Preliminary Objections is incorporated herein by reference.

A. The Commission may not act on the Complaint because the issues raised therein are pending in an action before the Allegheny County Court of Common Pleas

7. Paragraphs 1 to 6 are incorporated herein by reference.

8. To act on the Complaint, there must not be a prior proceeding where the same rights and issues are being litigated.⁶ Stated otherwise, relief should not be available from the Commission with respect to issues raised in a civil action before the courts. This avoids a

to PWSA, which is available at www.achd.net/legal/pub/pdf/Homehurst-II-Administrative-Decision.pdf. The ACHD commenced proceedings to determine responsibility for repair and maintenance of the Disputed Line. *Id. See also In re: Common Sewer Lateral 2805-2915 Homehurst Avenue, Pittsburgh, PA 15234*, Decision issued December 22, 2016 regarding Notice of Violation to homeowners, which is available at: www.achd.net/legal/pub/pdf/Homehurst_Administrative_Decision.pdf.

⁴ See Compliant at Introductory Paragraph, ¶ 42-43 and Prayer for Relief.

⁵ Only lines under the lease — as described "(a)" in Paragraph 2 of these Preliminary Objections — is implicated by the Complaint, which explicitly alleges that control and responsibility for the Disputed Line was contractually transferred to PWSA from the City. See Complaint at ¶ 11-13, 15, 36, 40. The Complaint argues that the Disputed Line was transferred to the City before 1995. See, e.g., Complaint at ¶ 7-8, 9, 14.

⁶ See 52 Pa.Code § 5.101(a)(6), 5.102.

duplication of effort on the part of the parties, avoids wasting Commission resources, and avoids the unseemly spectacle of a race to resolution.

9. The same rights and issues that are being raised in the Complaint are being litigated before the Allegheny County Court of Common Pleas.

10. The Complaint is an effort to obtain Commission resolution of issues that are committed for initial resolution in the Allegheny County Court of Common Pleas.

11. The Commission must refuse to act on the issues raised by the Complaint because (a) they are the subject of a pending judicial proceeding and (b) they may constitute an improper collateral attack on the pending decision of Allegheny County Court of Common Pleas.

B. The Commission lacks primary jurisdiction to decide the issues raised by the Complaint.

12. Paragraphs 1 to 11 of these Preliminary Objections are incorporated herein by reference.

13. To act on the Complaint, the Commission must have jurisdiction.⁷ The Commission, as a creation of the General Assembly, has only the powers and authority granted to it by the General Assembly contained in the Public Utility Code.⁸ The Commission must act within, and cannot exceed, its jurisdiction.⁹ Jurisdiction may not be conferred by the parties

⁷ See 52 Pa.Code § 5.101(a)(1), 5.102.

⁸ *Tod and Lisa Shedlosky v. Pennsylvania Electric Co.*, Docket No. C-20066937, Opinion and Order entered May 28, 2008; *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791 (Pa. 1977).

⁹ *City of Pittsburgh v. PUC*, 43 A.2d 348 (Pa.Super. 1945).

where none exists.¹⁰ Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy.¹¹

14. The courts, not the Commission, must decide the public versus private nature of the Disputed Line. The courts, which have primary jurisdiction to adjudicate issues related to ownership and the dedication of property to the public use.¹² No power is conferred upon the Commission under the Public Utility Code to adjudicate property disputes such as the one here.¹³

15. On its face, the Complaint calls for the Commission to interpret ordinances, easements, records and/or agreements of the City of Pittsburgh and other municipalities.¹⁴ The Commission, however, lacks jurisdiction to interpret such documents.¹⁵

16. Under circumstances presented and for the reasons stated herein and in PWSA's Answer, the Commission lacks jurisdiction to act on the Complaint and the Complaint must be dismissed.

¹⁰ *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967).

¹¹ *Hughes v. Pennsylvania State Police*, 619 A.2d 390 (Pa.Cmwlth. 1992), appeal denied, 637 A.2d 293 (Pa. 1993).

¹² Property disputes belong in a court of general jurisdiction. *See, e.g., Anne E. Perrige v. Metropolitan Edison Co.*, PUC Docket No. C-00004110, Order entered July 11, 2003 (Commission had no jurisdiction to interpret the meaning of a written right-of-way agreement); *Lou Amati/Amati Service Station v. West Penn Power Co. and Bell Atlantic-Pennsylvania, Inc.*, PUC Docket No. C-00945842, Order entered October 25, 1995 (real property issues such as trespass and whether utility facilities are located pursuant to valid easements are within the exclusive jurisdiction of the Courts of Common Pleas); , PUC Docket No. C-20066937, Order entered May 28, 2008.

¹³ *Id.* The private character of mains does not change in the absence of evidence that they were dedicated to the public use. *See Overlook Development Co. v. Public Service Commission*, 158 A. 869 (Pa. 1932) (main continued to be private property, and did not become devoted to a public use); *In re Water Distribution Mains*, 466 A.2d 239 (Pa.Cmwlth. 1983) (regarding taking of private mains by the Borough of Boyertown for public use) (“Boyertown”).

¹⁴ *See, e.g.,* Complaint at ¶ 7-8 (ordinances or municipal records); Complaint at ¶ 32, 39 (easement or right-of-way); Complaint at ¶ 12-13 (contract or agreements).

¹⁵ Regarding easements and property issues, *see* footnote 12. Regarding contracts and agreements, *see, e.g.,* Allport Water Auth. v. Winburne Water Co., 393 A.2d 673 (Pa. Super. Ct. 1978); Behrend v. Bell Tel. Co., 363 A.2d 1162 (Pa. Super. Ct. 1976), subsequent history omitted; Adams, et al. v. Pa. PUC, 819 A.2d 631 (Pa. Cmwlth. 2003); Leveto v. Nat'l Fuel Gas Dist. Co., 366 A.2d 270 (Pa. Super. Ct. 1976); and Litman v. Peoples Natural Gas Co., 449 A.2d 720 (Pa. Super. Ct. 1982).

C. The Complaint is insufficient to show that the Complainants are entitled to requested relief.

17. To act on the Complaint, the Complainants must show that they are entitled to the requested relief.¹⁶ As the party seeking relief, the Complainants bear the burden proving (a) that PWSA is in violation of the Public Utility Code, the Commission's Regulations or the Commission's Order and (b) their right to the requested relief.¹⁷

18. PWSA demurs to claims in the Complaint. The Commission is empowered to resolve all disputes or conflicts arising under PWSA's "prior tariff,"¹⁸ which allocates responsibility for repair and maintenance of a sewer line based on upon the ownership of that sewer line. PWSA has consistently maintained that the Disputed Line is a private Sewer Lateral. As noted above, under PWSA's existing Rules (which continue to be applicable until the Commission approves a new tariff) or under well-established Commission precedent, PWSA is only responsible for the repair and maintenance of Sewer Mains: (a) leased to the PWSA by the City under the Capital Lease Agreement effective July 27, 1995, as amended; (b) constructed by the City or the Authority for public use since July 27, 1995; and (c) dedicated to public use and accepted by the Authority on or after July 27, 1995. Responsibility for the repair and maintenance of sewer line(s) that are not within (a), (b) or (c) as described above — including but not limited to Sewer Laterals — lies with the constructing party and/or the Owners of the property or properties served by such line(s).¹⁹ The facility at issue does not fit into any of these categories. Moreover, the public versus private nature of the Disputed Line must be resolved, as discussed herein, by the Courts — not the Commission.

¹⁶ See 52 Pa.Code § 5.101(a)(4), 5.102.

¹⁷ 66 Pa. C.S. § 332(a).

¹⁸ 66 Pa.C.S. § 3203. The prior tariff was filed with the Commission, and is available at: <http://www.puc.state.pa.us/pcdocs/1559805.pdf>.

¹⁹ See PWSA Prior Tariff, Chapter 6.

19. The Complainants have not shown that they have stated a basis on which relief may be granted to them by the Commission under generally applicable public utility law. PWSA is regulated as a public utility by the Commission.²⁰ Section 1501 of the Public Utility Code²¹ requires PWSA — as a public utility — to furnish and maintain adequate, efficient, safe, and reasonable service and facilities. That provision, however, does not require PWSA to bear all repair and maintenance responsibility for any and all sewer lines in the City, regardless of ownership. Nor does that or any other provision in the Public Utility Code empower the Commission to direct PWSA to use public utility funds to the benefit private individual(s) by repairing and maintaining a privately-owned sewer line.²²

20. The Complainant is insufficient because it fails to conform to the Commission's regulations.²³ First, the Complaint references documents (that are not tariffs, regulations, or reports on file with the Commission).²⁴ However, the Complaint fails (a) to attach such documents, or the materials parts thereof or (b) explain the failure to attach such documents, as required by 52 Pa.Code § 5.22(a)(7). Second, the Complaint does not contain an affidavit or a verification, as required by 52 Pa.Code § 5.22(b). A complaint submitted without a valid

²⁰ See 66 Pa.C.S. §§ 102, 3201, 3202(a).

²¹ 66 Pa C.S. § 1501.

²² 53 Pa.C.S. § 5612; *Price v. Philadelphia Parking Authority*, 221 A.2d 138 (Pa. 1966) (A public corporation, exercises public powers and its engagements are public in nature, and its facilities are public property. Empowered to act only for the public benefit, a public corporation may not employ its resources for the primary and paramount benefit of a private endeavor. An engagement essentially private in nature may not be justified on the theory that the public will be incidentally benefited.).

²³ Preliminary objection can challenge the failure to comply with the Commission's regulations. 52 Pa.Code § 5.101(a)(2).

²⁴ See footnote 14. See also Complaint at ¶ 19-34, 41 (actions or decisions of ACHD); Complaint at ¶ 29, 35 (proceedings before Allegheny County Court of Common Pleas).

verification is deficient²⁵ and is not a perfected complaint entitled to a hearing before the Commission.²⁶

21. The Complaint is insufficient because it does not join an indispensable party.²⁷ The Disputed Line serves eleven properties. Only four of those properties are part of this Complaint.²⁸ All eleven (11) properties are indispensable parties to this Complaint because the City's rights (and obligations) are directly connected with and may be affected by the outcome of this Complaint.

22. Under circumstances presented and for the reasons stated herein and in PWSA's Answer, the Complaint must be dismissed as being legally insufficient.

III. CONCLUSION

23. The Pittsburgh Water and Sewer Authority respectfully requests that the Commission grant: (a) these Preliminary Objections so as to dismiss the Complaint; and (b) grant any other relief in favor of PWSA that is deemed to be reasonable, appropriate and in the public interest.

²⁵ See, e.g., *PUC v. Professional Courier International, Inc., t/d/b/a ProEX*, Docket No. C-2009-2049566; A-00106638F0002, Opinion and Order entered June 7, 2010 (pleading not official without verification); *Samall Associates, Inc. v. Delaware Valley Utilities, Inc.*, Docket No. C-20016060; C-00004517, Opinion and Order entered February 28, 2002 (a complaint submitted without a valid verification is not a perfected complaint).

²⁶ *Id.* A document filed with the Commission which does not include an affidavit or verification is not entitled to notice and hearing before the Commission. See *Schellhammer v. PUC*, 629 A.2d 189 (Pa. Cmwlth., 1993).

²⁷ Preliminary objections can challenge the failure to join an indispensable party. 52 Pa. Code § 5.101(a)(5).

²⁸ See Complaint at ¶ 1-4.

Respectfully submitted,



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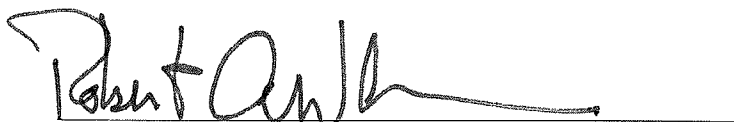
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Date: April 24, 2018

Attorneys for
The Pittsburgh Water and Sewer Authority

Verification

I, Robert A. Weimar, am an Executive Director for The Pittsburgh Water and Sewer Authority ("PWSA" or "Authority"), and I hereby state that the facts set forth in the foregoing **Answer** are true and correct to the best of my knowledge, information and belief and that I expect the Authority to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 (relating to sworn falsification to authorities).



[Name] Robert A. Weimar
[Title] Executive Director
The Pittsburgh Water and Sewer Authority