**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission : R-2018-3000834

:

Office of Consumer Advocate : C-2018-3001786

:

Office of Small Business Advocate : C-2018-3002132

:

James and Reva Crownover : C-2018-3003017

:

v. :

:

Suez Water Pennsylvania, Inc. :

**ORDER GRANTING PETITION TO INTERVENE**

**OF THE PENNSYLVANIA BUILDERS ASSOCIATION**

On July 3, 2018, the Pennsylvania Builders Association (PBA) filed a petition to intervene in this proceeding. PBA’s petition alleges that it is a professional trade association representing approximately 5,000 members, some of whom are in the service territory of Suez Water Pennsylvania, Inc. (Suez). The members of PBA are involved in the building industry, primarily as builders, developers, remodelers, material suppliers, subcontractors and consultants.

According to the petition, the Federal Tax Cuts and Jobs Act (TCJA) requires water and sewer utilities to recognize Contributions in Aid of Construction (CIAC) as taxable income. TCJA eliminated the exemption for water and sewer utilities from recognizing CIAC as taxable income.

PBA’s petition alleges that it has a substantial and direct interest in this proceeding because Suez’ proposal in its rate filing will require developers to assume the entirety of the income tax consequences of (CAIC). Suez’ proposal will therefore place new financial obligations on developers and other members of PBA.

PBA’s petition argues that Suez proposal concerning the income tax treatment of CIAC is inconsistent with reasonable ratemaking policy and inconsistent with other methods used and proposed by other Pennsylvania utilities with taxable CIACs.

PBA also contends that it has an interest in ensuring that the proposals of other parties to this proceeding do not adversely impact PBA’s interest.

PBA’s petition alleges that it has a direct and substantial interest in this proceeding that cannot be adequately represented by any other party to this proceeding.

PBA’s petition asserts that its members will be bound by the action of the Commission in this proceeding. PBA requests that the Commission grant its petition to intervene.

As of the date of this order, none of the parties to this proceeding have filed an answer opposing PBA’s petition to intervene.

The Petitioners’ petition to intervene is ready for decision. For the reasons set forth below, I will grant the petition.

The Commission’s Rules of Practice and Procedure permit petitions to intervene. 52 Pa.Code §§ 5.71-5.76. The provision at 52 Pa.Code § 5.72 governs what entities are eligible to intervene in a proceeding and states as follows:

**§ 5.72. Eligibility to intervene.**

(a)  *Persons*. A petition to intervene may be filed by a person claiming a right to intervene or an interest of such nature that intervention is necessary or appropriate to the administration of the statute under which the proceeding is brought. The right or interest may be one of the following:

(1)  A right conferred by statute of the United States or of the Commonwealth.

(2)  An interest which may be directly affected and which is not adequately represented by existing participants, and as to which the petitioner may be bound by the action of the Commission in the proceeding.

(3)  Another interest of such nature that participation of the petitioner may be in the public interest.

(b)  *Commonwealth*. The Commonwealth or an officer or agency thereof may intervene as of right in a proceeding subject to subsection (a)(1)—(3).

(c)  *Supersession*. Subsections (a) and (b) supersede 1 Pa. Code § 35.28 (relating to eligibility to intervene).

PBA’s petition claims that it is eligible to intervene in this proceeding, pursuant to 52 Pa.Code §§ 5.72(a)(2) and (a)(3) since, pursuant to 52 Pa.Code § 5.72(a)(2) it has an interest that may be directly affected and that interest is not adequately represented by the existing participants and its interest may be bound by the action of the Commission in this proceeding.

PBA’s eligibility to intervene in this proceeding is governed by 52 Pa.Code § 5.72(a)(2) since it is not a Commonwealth agency pursuant to 52 Pa.Code § 5.72(b) and a statute of either the United States or the Commonwealth does not confer on it a right to intervene pursuant to 52 Pa.Code § 5.72(a)(1). PBA’s interest in this proceeding must be of such a nature that intervention is necessary or appropriate to the administration of the statute under which the proceeding is brought.

The Commission has defined the language in 52 Pa.Code §§ 5.72(a)(2), requiring that any person filing a petition to intervene have an interest which may be directly affected, as equivalent to an interest that is substantial, immediate and direct. Re Equitable Gas Co., 76 Pa. P.U.C. 23 (1992). This is the same requirement that an entity must meet in order to have standing to initiate a proceeding.

Standing to participate in proceedings before an administrative agency is primarily within the discretion of the agency. Pennsylvania National Gas Association v. T.W. Phillips Gas and Oil Co., 75 Pa. P.U.C. 598, 603 (1991). The Commission has held that a person or entity has standing when the person or entity has a direct, immediate and substantial interest in the subject matter of a proceeding. Joint Application of Pennsylvania‑American Water Co. and Evansburg Water Co. for Approval of the transfer, by sale, of the water works property and rights of Evansburg Water Co. to Pennsylvania-American Water Co., A‑212285F0046/47 and A‑210870F01 (Opinion and Order entered July 9, 1998); William Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975); Landlord Service Bureau, Inc. v. Equitable Gas Co., 79 Pa. P.U.C. 342 (1993); Manufacturers’ Association of Erie v. City of Erie - Bureau of Water, 50 Pa. P.U.C. 43 (1976); Waddington v. Pa. Pub. Util. Comm’n, 670 A.2d 199 (Pa.Cmwlth. 1995), alloc. denied, 678 A.2d 368 (Pa. 1996). Requiring a person or entity to have a direct, immediate and substantial interest in the subject matter of a proceeding helps avoid frivolous, harassing lawsuits whose costs are ultimately borne, at least in part, by utility ratepayers. Pa. Pub. Util. Comm’n v. National Fuel Gas Distribution Corp., 73 Pa. P.U.C. 552 (1990).

Here, PBA’s interest in the subject matter of the proceeding is direct if its interest is adversely affected by the actions proposed in Suez’ filing, is immediate if there is a close causal nexus between its asserted injury and the actions challenged in Suez’ filing and is substantial if it has a discernible interest other than the general interest of all citizens in seeking compliance with the law. Ken R. ex rel. C.R. v. Arthur Z., 682 A.2d 1267 (Pa. 1996); In re El Rancho Grande, Inc., 437 A.2d 1150 (Pa. 1981); William Penn Parking Garage, Inc.; Empire Coal Mining & Development, Inc. v. Department of Environmental Resources, 623 A.2d 897 (Pa.Cmwlth. 1993); Landlord Service Bureau, Inc. Mere conjecture about possible future harm does not confer a direct interest in the subject matter of a proceeding. Official Court Reporters of the Court of Common Pleas of Philadelphia County v. Pennsylvania Labor Relations Board, 467 A.2d 311 (Pa. 1983).

PBA’s interest is direct since its members pay CIAC to Suez and Suez proposes to require developers to pay income tax on any CIAC a developer makes to Suez. PBA’s interest is immediate because its members may suffer injury through monetary loss as a result of paying income tax on CIAC to Suez. PBA’s interest is substantial because it has a discernible interest other than the general interest of all citizens in seeking compliance with the law. PBA has standing to intervene in this proceeding.

PBA’s interest in this proceeding is direct. An entity’s interest in the subject matter of a proceeding is direct if its interest is adversely affected by the Commission’s actions in this proceeding. PBA’s members make CIAC payments to Suez as part of various construction projects. Currently PBA’s members do not pay federal income tax on CIAC.

However, if the Commission were to approve Suez’ proposal, PBA’s members will have to pay income tax on CIAC. PBA’s members will have to pay money for federal income taxes in addition to CIAC. The economic interest of PBA’s members would be adversely affected by a Commission decision approving Suez’ proposal.

PBA has an immediate interest in the proceeding because it can demonstrate a close causal nexus between Suez’ CIAC proposal and the injuries its members may suffer. Suez’ CIAC proposal will impact PBA’s members ability to fund projects in Suez’ service territory by making those projects more expensive. If PBA’s members have to pay more money for federal income taxes to fund a project, it may impair their ability to commence or complete projects and cause them injury.

Finally, PBA’s interest is substantial since it has a discernible interest, other than the concern that Suez comply with the Commission’s regulations. PBA can demonstrate a causal connection between Suez’ CIAC proposal and the damages it may suffer.

Next, I must determine whether PBA’s interest is not adequately represented by an existing party. In this proceeding, Suez’, OCA’s, OSBA’s and I&E’s interests do not coincide with PBA’s interest as a representative of builders, developers, remodelers, material suppliers, subcontractors and consultants who will be responsible for federal income taxes on CIAC contributions under Suez’ proposal.

Suez’ interest in this proceeding is to recover expenses arising from the taxation of CIAC. It cannot adequately represent the interests of PBA.

OCA’s OSBA’s and I&E’s interest in this proceeding is to act on behalf of the general public taking into account the broad public interest in providing safe, reasonable water service at reasonable cost. OCA’s OSBA’s and I&E’s role in this proceeding is not to act as private counsel to an individual builder or developer. OCA’s OSBA’s and I&E’s representation of the broad public interest may conflict with PBA’s interest in preventing its members from incurring additional costs. I conclude that PBA’s interest in this proceeding is not adequately represented by an existing party.

Finally, I must determine whether PBA may be bound by the actions of the Commission in this proceeding. PBA and its member will be bound by the actions of the Commission in this proceeding to the extent that if the Commission approves Suez’ CIAC proposal, that approval and its effect on the costs PBA’s members incur would be binding on PBA and its members. I conclude that PBA and its members would be bound by the Commission’s determinations regarding taxation of CIAC.

Next, I will address the timeliness of PBA’s petition to intervene. The regulation at 52 Pa. Code §5.74, governing the filing of petitions to intervene states as follows:

#### § 5.74. Filing of petitions to intervene.

(a)  Petitions to intervene may be filed following the filing of an application, petition, complaint or other document seeking Commission action.

(b)  Petitions to intervene shall be filed:

(1)  No later than the date fixed for the filing of responsive pleadings in an order or notice with respect to the proceedings but not less than the notice and protest period established under § §  5.14 and 5.53 (relating to applications requiring notice; and time of filing) absent good cause shown.

(2)  No later than the date fixed for filing protests as published in the *Pennsylvania Bulletin* except for good cause shown.

(3)  In accordance with §  5.53 if no deadline is set in an order or notice with respect to the proceedings.

(4)  A statutory advocate may exercise a right of participation or file a notice of intervention consistent with law at any time in a proceeding. A statutory advocate exercising a right of participation or filing a notice of intervention following expiration of any protest or intervention period shall take the record as developed unless determined otherwise in exceptional circumstances for good cause shown.

(c)  Except with regard to statutory advocates under subsection (b)(4), intervention will not be permitted once an evidentiary hearing has concluded absent extraordinary circumstances.

(d)  The Commission or presiding officer may, when the circumstances warrant, permit the waiver of the requirements of § 5.409 (relating to copies and form of documentary evidence) with respect to copies of exhibits for the intervenor.

(e)  Subsections (a)—(d) supersede 1 Pa. Code § 35.30 (relating to filing of petitions to intervene).

The Commission addressed the timeliness of petitions to intervene, pursuant to 52 Pa. Code §5.74, in its final rulemaking order at Final Rulemaking for the Revision of Chapters 1, 3 and 5 of Title 52 of the Pennsylvania Code Pertaining to Practice and Procedure Before the Commission, Docket No. L-00020156 (Order entered January 4, 2006) (Final Rulemaking Order). The Final Rulemaking Order was also published in the Pennsylvania Bulletin on April 29, 2012 at 36 Pa.B. 2097.

In the Final Rulemaking Order at page 55, the Commission addressed the time limits set forth in 52 Pa. Code §5.74. The Final Rulemaking Order states that the right of the statutory advocates to intervene at any time, pursuant to 52 Pa. Code §5.74(b)(4), extends to private litigants with that right limited by 52 Pa. Code §5.74(c), prohibiting intervention after the conclusion of an evidentiary hearing. The Final Rulemaking Order also notes that any party intervening after the expiration of an established protest period takes the record as it exists.

In this case, PBA’s petition to intervene is not untimely since an evidentiary hearing has not been held. However, PBA takes the record as it exists at the time of the order granting its petition to intervene.

In conclusion, PBA has demonstrated that it has standing to intervene in this proceeding by demonstrating that it has a direct, immediate and substantial interest in the subject matter of the complaint, is not adequately represented by any of the existing parties and may be bound by the actions of the Commission in this proceeding. I will grant the petition to intervene.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the petition to intervene filed on July 3, 2018 by the Pennsylvania Builders Association at R-2018-3000834 is granted.

2. That the Pennsylvania Builders Association is admitted as an intervenor at R-2018-3000834.

3. That admission of the Pennsylvania Builders Association as intervenors, will not be construed as recognition by the Pennsylvania Public Utility Commission that they have a direct interest in the proceeding or might be aggrieved by an order of the Commission in the proceeding.

4. That the Pennsylvania Builders Association be added as an intervenor to the service list at R-2018-3000834.

Date: July 24, 2018 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

David A. Salapa

Administrative Law Judge

**R-2018-3000834 - C-2018-3001786- C-2018-3002132 - C-2018-3003017 - PENNSYLVANIA PUBLIC UTILITY COMMISSION & OFFICE OF CONSUMER ADVOCATE & OFFICE OF SMALL BUSINESS ADVOCATE & JAMES AND REVA CROWNOVER v. SUEZ WATER PENNSYLVANIA, INC.**

**Revised 7/25/2018**

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