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August 27, 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 Pittsburgh Water and Sewer Authority's Preliminary Objections with regard to the above-referenced matter. Copies to be served in accordance with the attached Certificate of Service.

Sincerely,



Carl R. Shultz

CRS/jls
Enclosure

cc: Hon. Mark A. Hoyer, ALJ w/enc.
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 Email and/or 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

Patricia Schanck
2807 Homehurst Ave.
Pittsburgh, PA 15234

Honorable Mark A. Hoyer
Office of Administrative Law Judge
Pennsylvania Public Utility Commission
Piatt Place
301 5th Avenue, Suite 220
Pittsburgh, PA 15222

Date: August 27, 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, James Rauber, and : Docket No. C-2018-3000961
Patricia Schanck, :
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	Patricia Schanck 2807 Homehurst Ave. Pittsburgh, PA 15234

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 the Honorable Mark A. Hoyer as the Administrative Law Judge presiding over this proceeding.

File with:

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

With a copy to:

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



Carl R. Shultz, Esquire

Date: August 27, 2018

Attorneys for
The Pittsburgh Water and Sewer Authority

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

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

Pursuant to 52 Pa. Code § 5.101, The Pittsburgh Water and Sewer Authority (“PWSA” or “Authority”) submits the following Preliminary Objections to the Third Amended Complaint of Natalie Leon, Jaime Wagner, Louise Sell, Christopher Cratsley, James Rauber and Patricia Schanck (collectively, the “Complainants”) seeking dismissal of the Third Amended Complaint. Pursuant to 52 Pa. Code §§ 5.61 and 5.101(d), PWSA is also filing an Answer to the Third Amended Complaint and a Motion for An Interim Scheduling Order.¹ 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 Amended 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.

¹ As indicated in therein, the purpose of the Motion is request that a process be established to permit the Presiding Administrative Law Judge (“ALJ”) to decide the issues raised by PWSA’s Preliminary Objections and preclude the continued filing of amended complaints until such time as those Preliminary Objections are resolved. Complainants’ decision to keep filing amended complaints is (a) precluding any resolution of the deficiencies alleged by PWSA in its Preliminary Objections and (b) indefinitely delaying the resolution of the claim(s) raised by the Complainants.

For the reasons stated herein and in PWSA's Answer to the Third Amended Complaint (which, as noted below, is incorporated herein by reference), the Third Amended 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 Third Amended Complaint; and (c) the Third Amended 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, 2018.² PWSA's position is that the subject common sewer line serving the properties located at 2805, 2807, 2809, 2811, 2901, 2903, 2905, 2907, 2909, 2911, 2913, 2915 and 2917 Homehurst Avenue and 247, 249, 250 and 252 Elwyn 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 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;³ (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

² 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., Amended Complaint at ¶ 16.

³ 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.

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 Pleas⁴ regarding the responsibility for the repair and maintenance of the Disputed Line. That action will decide the 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 Third Amended Complaint seeks to have the Commission determine that the Disputed Line must be repaired (or replaced) and maintained by PWSA⁵ because it was (allegedly) leased to the PWSA by the City under the Capital Lease Agreement.⁶

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

⁴ 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 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.

⁵ See Third Amended Complaint at Introductory Paragraph, ¶¶ 43-44 and Prayer for Relief.

⁶ Only lines under the lease — as described "(a)" in Paragraph 2 of these Preliminary Objections — is implicated by the Third Amended Complaint, which explicitly alleges that control and responsibility for the Disputed Line was contractually transferred to PWSA from the City. See, e.g., Third Amended Complaint at ¶¶ 9 to 17, 42, 45-50. The Third Amended Complaint argues that the Disputed Line was transferred to the City before 1995. See, e.g., Third Amended Complaint at ¶¶ 9-11, 16.

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 Third Amended 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 Third Amended Complaint, there must not be a prior proceeding where the same rights and issues are being litigated.⁷ 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 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 Third Amended Complaint are being litigated before the Allegheny County Court of Common Pleas.

10. The Third Amended 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 Third Amended 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.

⁷ See 52 Pa.Code § 5.101(a)(6), 5.102.

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

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

13. To act on the Third Amended Complaint, the Commission must have jurisdiction.⁸ 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.⁹ The Commission must act within, and cannot exceed, its jurisdiction.¹⁰ Jurisdiction may not be conferred by the parties where none exists.¹¹ Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy.¹²

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.¹³ No power is conferred upon the Commission under the Public Utility Code to adjudicate property disputes such as the one here.¹⁴

⁸ See 52 Pa.Code § 5.101(a)(1), 5.102.

⁹ *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).

¹⁰ *City of Pittsburgh v. PUC*, 43 A.2d 348 (Pa.Super. 1945).

¹¹ *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967).

¹² *Hughes v. Pennsylvania State Police*, 619 A.2d 390 (Pa.Cmwlth. 1992), appeal denied, 637 A.2d 293 (Pa. 1993).

¹³ 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.

¹⁴ *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”).

15. On its face, the Third Amended Complaint calls for the Commission to interpret the Capital Lease Agreement between the PWSA and the City (based on parol evidence¹⁵ or otherwise¹⁶). In addition to agreements, the Third Amended Complaint also calls for the Commission to interpret ordinances, easements, records of the City of Pittsburgh and other municipalities.¹⁷ The Commission, however, lacks jurisdiction to interpret such documents.¹⁸

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

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

17. To act on the Third Amended Complaint, the Complainants must show that they are entitled to the requested relief.¹⁹ As the party seeking relief, the Complainants bear the

¹⁵ The Complainants do not identify any provision or language in the Capital Lease Agreement. They do, however, argue that actions outside of the Capital Lease Agreement show ownership of the Disputed Line by the City and subsequent transfer of the Disputed Line to PWSA. See Third Amended Complaint at ¶ 9 to 12, 38 to 40, 41 to 50. There is no legal justification for introducing parol evidence to interpret the language of the agreement through extrinsic evidence about the parties' intent in entering into the agreement. See, e.g., *Steuart v. McChesney*, 444 A.2d 659 (1982); *Samuel Rappaport Family Partnership*, 657 A.2d 17 (Pa.Super. 1995).

¹⁶ The Complainants allege that the Disputed Line was leased to the PWSA by the City under the Capital Lease Agreement. See, e.g., Third Amended Complaint at Introduction (alleging failure of PWSA to repair the Disputed Line "which it has leased and for which it is solely responsible.") and ¶ 42. PWSA continues to maintain that the Disputed Line was not leased to the PWSA by the City under the Capital Lease Agreement. See PWSA Answer at ¶ 13 to 17.

¹⁷ See, e.g., Third Amended Complaint at ¶ 9-12 (ordinances or municipal records); Third Amended Complaint at ¶ 43 (easement or right-of-way); Third Amended Complaint at ¶ 14-15, 42 (contract or agreements). Such interpretations are required to determine – according to the Complainants – to establish that the Disputed Line, following its construction, was actually dedicated to, and accepted by, the City. See Third Amended Complaint at Introduction ("dedicated City line") and Third Amended Complaint at ¶ 11, 12, 13, 17, 29, 33, 42, and 43 (same).

¹⁸ Regarding easements and property issues, see footnote 13. 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).

¹⁹ See 52 Pa.Code § 5.101(a)(4), 5.102.

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.²⁰

18. PWSA demurrers to claims in the Third Amended Complaint. The Commission is empowered to resolve all disputes or conflicts arising under PWSA's "prior tariff,"²¹ 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).²² 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.

19. PWSA demurrers to the issues of "property damage" suggested by Paragraph 50 of the Third Amended Complaint. The Pennsylvania Courts have long held that the powers of

²⁰ 66 Pa. C.S. § 332(a).

²¹ 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>.

²² See PWSA Prior Tariff, Chapter 6.

the Commission do not include the power to award monetary damages,²³ such as damages to property,

20. 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.²⁴ Section 1501 of the Public Utility Code²⁵ 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 of private individual(s) by repairing and maintaining a privately-owned sewer line.²⁶

21. PWSA demurrers to the Complainants position that they are acting to protect the all citizens along the Disputed Line and “public at large.”²⁷ Complainants have not shown that they have standing to represent the interests of others.

22. The Third Amended Complaint is insufficient because it does not join an indispensable party.²⁸ The Disputed Line serves seventeen (17) properties. Only six of those

²³ See, e.g., *Elkin v. Bell Telephone of Pennsylvania*, 420 A.2d 371 (Pa. 1980); *Feingold v. Bell of Pennsylvania*, 383 A.2d 791 (Pa. 1978).

²⁴ See 66 Pa.C.S. §§ 102, 3201, 3202(a).

²⁵ 66 Pa C.S. § 1501.

²⁶ 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.).

²⁷ Third Amended Complaint at ¶ 50.

²⁸ Preliminary objections can challenge the failure to join an indispensable party. 52 Pa. Code § 5.101(a)(5). Commission ALJs have held that individual complainants do not have standing to represent the interests of others “similarly situated” before the Commission. See *C Leslie Pettko v. Pennsylvania Water Company*, Docket No. C-2011-2226096, Order Granting in Part and Denying in Part Motion for Judgment on the Pleadings at 6 (Oct. 5,

properties are part of this Third Amended Complaint.²⁹ All seventeen (17) properties are indispensable parties to this Third Amended Complaint because their rights (and obligations) to repair the Disputed Line are directly connected with and may be affected by the outcome of this Third Amended Complaint.

23. The Third Amended Complaint by James Rauber must be dismissed for lack of standing.³⁰ Mr. Rauber does not reside at 252 Elwyn Avenue. He resides at 1801 Bynwick Drive, Pittsburgh, Pennsylvania. Mr. Rauber lacks a direct, immediate and substantial interest in ownership, repair and maintenance of the Disputed Line. Additionally, Mr. Rauber is not acting in a fiduciary or representative capacity of Elwyn Family Trust. The Elwyn Family Trust is not a party to this proceeding. Since the property at 252 Elwyn Avenue in the City of Pittsburgh, Pennsylvania is owned by a trust, that property must be represented by an attorney licensed to practice law in the Commonwealth.³¹ Mr. Rauber does not indicate that he is commencing the action on behalf of the real party in interest. See Pa.R.C.P. No. 2001-2025. The Elwyn Family Trust is not listed in the caption of this proceeding.

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

2011) (Pettko); see also *Commonwealth of Pennsylvania, et. al. v. IDT Energy, Inc.*, Docket No. C-2014-2427657, Order Granting Petition to Intervene at 5 (May 1, 2015); see also *Commonwealth of Pennsylvania, et. al. v. Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric*, Docket No. C-2014-2427656, Order Granting Petition to Intervene at 6 (April 23, 2015) (PaG&E).

²⁹ See Third Amended Complaint at ¶ 1-6; PWSA New Matter at ¶ 56-57.

³⁰ 52 Pa.Code § 5.101(a)(7).

³¹ 52 Pa. Code §§ 1.21(b), 1.22.

III. CONCLUSION

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

Respectfully submitted,



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Date: August 27, 2018

Attorneys for
The Pittsburgh Water and Sewer Authority

Verification

I, Debbie Lestitian, am the Chief Corporate Counsel/Chief of Administration for The Pittsburgh Water and Sewer Authority ("PWSA" or "Authority"), and I hereby state that the facts set forth in the foregoing **Preliminary Objections** 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).



Debbie Lestitian, CPA, Esquire
Chief Corporate Counsel/Chief of Administration
The Pittsburgh Water and Sewer Authority