

**PENNSYLVANIA PUBLIC UTILITY COMMISSION
HARRISBURG PENNSYLVANIA 17120**

Application of SUEZ Water Pennsylvania Inc., Pursuant to the Pennsylvania Public Utility Code, 66 Pa. C.S. § 1102(a), and 66 Pa. C.S. § 1329 For approval of 1) the transfer, by sale, of Substantially all of the Township of Mahoning's Assets, properties and rights related to its Wastewater collection and conveyance system to SUEZ Water Pennsylvania Inc., and 2) the rights Of SUEZ Water Pennsylvania Inc. to begin to Offer or furnish Wastewater collection and Conveyance service to the public in portions of the Townships of Mahoning, Cooper and Valley, Montour County, Pennsylvania

**Public Meeting held December 20, 2018
3003517-ALJ
Docket Number A-2018-3003517**

Application of SUEZ Water Pennsylvania Inc., Pursuant to the Pennsylvania Public Utility Code, 66 Pa. C.S. § 1102(a), and 66 Pa. C.S. § 1329 For approval of 1) the transfer, by sale, of Substantially all of the Township of Mahoning's Assets, properties and rights related to its water Distribution system to SUEZ Water Pennsylvania Inc., and 2) the rights of SUEZ Water Pennsylvania Inc. to begin to offer or furnish Water distribution service to the public in Portions of the Townships of Mahoning, Cooper And Valley, Montour County, Pennsylvania

Docket Number A-2018-3003519

MOTION OF COMMISSIONER DAVID W. SWEET

These applications come to us for consideration as a Recommended Decision (RD) of Administrative Law Judge Joel H. Cheskis (ALJ) approving a full settlement submitted by all parties of record without modification. While I have no issues with the settlement itself, there is an underlying issue which I believe needs to be addressed.

The Commonwealth Court has issued a decision in another water acquisition case, which also used the Section 1329 process, finding that the Commission's requirements for service of the application was inadequate in cases where the administrative action is adjudicatory in nature and involves substantial property rights. As the Court stated, "Because an increase in rates involves a substantial property right, ratepayers are entitled to notice of a Commission's administrative proceeding in which a decision is made

to increase rates in a subsequent rate base proceeding.”¹ The Court cites a prior decision² as well as the U.S. Constitution as support.³ The Court concludes that whether individualized notice is required depends on whether the outcome of the proceeding binds the Commission to increase rates, and that publication in the *Pennsylvania Bulletin* was not adequate notice to ratepayers.

Section 1329 cases will determine the rate base against which the rate of return and rate are calculated by determining the fair market value of the acquired assets, essential to determining rates. Accordingly, ratepayers must receive individual notice consistent with the Commission’s regulation requiring that the utility post specified notice in its offices, individualized mailing or bill inserts, and news releases.⁴

The Court characterizes the increase in rates as a property right requiring individual notice. While the Commonwealth Court’s decision is subject to a petition for allowance of appeal to the Pennsylvania Supreme Court, that Court has not yet accepted the case, and there is no stay of the Commonwealth Court case. Therefore, the decision of the Commonwealth Court is the law in Pennsylvania. The holding specifically finds that the Commission’s requirements for notice to ratepayers in Section 1329 cases is inadequate, then this Commission is bound by that holding and must act accordingly.

The Court’s holding and its interpretation of the statute raises significant impediments to the consummation of current transactions and the future of any new ones. It is my hope that there can be relief from either the Legislature or the Pennsylvania Supreme Court that both supports the public policy set forth by the Legislature in this statute while protecting the due process rights of consumers. This Commission recognizes that the role of the public advocates has been to participate in Commission cases and to protect those consumers that they are mandated by statute to represent.

Accordingly, the case should be returned to the Office of Administrative Law Judge to oversee the compliance with the service provisions of Commission regulations, and to handle as appropriate any protests which may be filed against these Applications. I recognize that this process has the potential to take the case beyond the six-month litigation period provided in the statute, and I regret that. However, this issue is too important to ignore, and the six-month litigation period is directory and not mandatory, meaning that no ill consequences will result from missing it just this once.⁵

The notice issue will not occur again in the future, as the parties and the Commission are on notice of the Commonwealth Court’s requirements and will take action to comply at the beginning of the cases.

¹ *McCloskey v Pa. Publ. Util. Comm’n*, No. 1624 C.D. 2017 (Pa.Cmwlth. 2018), 2018 Pa. Commw. LEXIS 559, petition for allowance of appeal filed November 8, 2018.

² *Barasch v. Pa. Publ. Util. Comm’n*, 546 A.2d 1296, 1305-1306 (Pa. Cmwlth. 1988).

³ U.S. Const. amend. XIV, § 1.

⁴ 52 Pa. Code § 53.45.

⁵ Where a statute directs that something be done and if the thing which is being directed to be done is the essence of what is required by the statute itself, then the requirement is mandatory and where the statute merely directs that certain proceedings be done in a certain manner or time, it is directory. *Public Service Water Co. v. Pa. Pub. Util. Comm’n*, 645 A.2d 423 (Pa. Cmwlth. 1994), 1994 Pa. Commw. LEXIS 349, citing *West Penn Power Co. v. Pa. Pub. Util. Comm’n*, 521 A.2d 74 (Pa.Cmwlth. 1985), 1987 Pa. Commw. LEXIS 1934. Where a statute fixes a time for an adjudicating body, the language of the statute will be construed as directory because the courts cannot punish any of the litigants for the actions of the adjudicator. *West Penn Power, cited in Shapiro v. State Bd. Of Accountancy*, 856 A.2d 864 (Pa.Cmwlth. 2004), 2004 Pa. Commw. LEXIS 560.

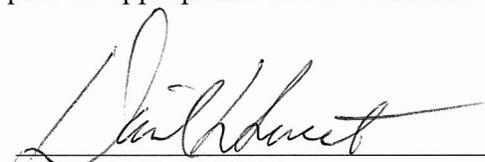
THEREFORE,

IT IS ORDERED:

1. That the Recommended Decision of Administrative Law Judge Joel H. Cheskis is held in abeyance consistent with this Motion.
2. That the Applications are remanded to the Office of Administrative Law Judge to oversee the compliance with the notice provisions of the Commission's regulations consistent with the Commonwealth Court Order in *McCloskey v. Pa. Publ. Util. Comm'n*, No. 1624 C.D. 2017 (Pa. Cmwlth. 2018) 2018 Pa.Comm. LEXIS 539.
3. That the Office of Special Assistants prepare an appropriate Order consistent with this Motion.

December 20, 2018

DATE



DAVID W. SWEET
COMMISSIONER