



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE
REFER TO OUR FILE

March 25, 2019

Secretary Rosemary Chiavetta
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: Pennsylvania Public Utility Commission, Bureau of Investigation and
Enforcement v. Exeter Township
Docket No. C-2019-3007920

Dear Secretary Chiavetta:

Enclosed for filing please find the Bureau of Investigation and Enforcement's
(I&E) **Reply to New Matter** for the above-captioned proceeding.

Copies are being served on all active parties of record. If you have any questions,
please contact me at 717-783-6170.

Sincerely,

Erika L. McLain
Prosecutor
Bureau of Investigation and Enforcement
PA Attorney I.D. No. 320526

ELM/seb
Enclosure

cc: Hon. Andrew M. Calvelli (Office of ALJ, Harrisburg)
Per Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission	:	
Bureau of Investigation and Enforcement,	:	
Complainant	:	
	:	
v.	:	Docket No. C-2019-3007920
	:	
Exeter Township,	:	
Respondent	:	

**THE REPLY OF THE BUREAU OF INVESTIGATION AND ENFORCEMENT
TO THE NEW MATTER OF EXETER TOWNSHIP**

NOW COMES, the Bureau of Investigation and Enforcement (“I&E” or “Complainant”) of the Pennsylvania Public Utility Commission (“Commission”) by and through its prosecuting attorney, and files this Reply to the New Matter of Exeter Township (“Exeter” or “Respondent”), pursuant to 52 Pa. Code § 5.63(a). In support thereof, I&E avers as follows:

24. I&E incorporates by reference all allegations set forth within its Complaint as if fully set forth at length herein.

25. Denied. The allegations of this paragraph constitute conclusions of law to which no response is required. To the extent a response is required, the averments are specifically denied. By way of further response, since 2014 Exeter Township has been serving 29 customers outside its corporate limits without a Certificate of Public Convenience. The Public Utility Code (“Code”) under 66 Pa. C.S. § 1102(a)(5) requires that an entity, such as a municipal corporation, serving customers beyond its corporate

limits obtain a Certificate of Public Convenience **prior to** rendering such service. Additionally, the Code, at 66 Pa. C.S. § 502, expressly states that whenever the Commission believes any entity, including municipal corporations such as Exeter Township, is violating provisions of the Public Utility Code the Commission may institute appropriate legal proceedings to restrain such violations. Exeter Township did not obtain a Certificate of Public Convenience prior to providing service to customers outside its corporate limits and therefore its actions violate the Public Utility Code. Violations of the Code, such as that exhibited by Exeter Township, are subject to I&E's authority to enforce provisions of the Public Utility Code under 66 Pa. C.S. § 308.2(a)(11) and 66 Pa C.S. § 501(a). Given Exeter's failure to comply with the Code, I&E filed its Complaint seeking fines and penalties.

26. Denied. The allegations of this paragraph constitute conclusions of law to which no response is required. To the extent a response is required, the averments are specifically denied. By way of further response, I&E has standing and authority to participate in all Commission proceedings and to initiate enforcement actions in the public interest.¹

27. Denied. The allegations of this paragraph constitute conclusions of law to which no response is required. To the extent a response is required, the averments are specifically denied. By way of further response, I&E's Complaint was filed as soon as practicable after it learned of Exeter Township's unlawful actions.

¹ Final Procedural Order at Docket No. M-2008-2071852, p. 5.

28. Denied. The allegations of this paragraph constitute conclusions of law to which no response is required. To the extent a response is required, the averments are specifically denied. By way of further response, Exeter Township has provided no justifiable reason for its unlawful actions.

29. Denied. The allegations of this paragraph constitute conclusions of law to which no response is required. To the extent a response is required, the averments are specifically denied. By way of further response, although the currently pending Application for a Certificate of Public Convenience *Nunc Pro Tunc* would cure future violations of the Public Utility Code by Exeter Township, violations from 2014 to present could only be cured by the relief requested in I&E's Complaint.

30. Denied. It is specifically denied that I&E acted unreasonably by filing its Complaint against Exeter Township and that the relief provided for by the current Application for Certificate of Public Convenience would be sufficient. By way of further response, I&E has the authority, in accordance with 66 Pa. C.S. § 308.2(a)(11) and 66 Pa C.S. § 501(a), to prosecute complaints against public utilities for violating the Public Utility Code. I&E, in the instant Complaint, is seeking relief through civil penalties which could not be addressed within Exeter's Application for Certificate of Public Convenience. As noted above, the Application for a Certificate of Public Convenience cures Exeter Township's unlawful actions on a forward-looking basis but does nothing to cure the past harm done to the ratepayers who were unlawfully charged rates without a Commission-approved tariff.

31. Denied. The allegations of this paragraph constitute conclusions of law to which no response is required. To the extent a response is required, the averments are specifically denied. It is specifically denied that I&E is estopped from taking action against Exeter Township because of alleged representations of the Bureau of Technical Utility Services (“TUS”) and Law Bureau. This Commission has gone to great lengths to ensure the mandates in *Lyness* are not violated, including restructuring its Bureaus to ensure clear walls of separation between prosecutory and advisory functions.² As required by *Lyness*,³ I&E serves as the Commission’s independent prosecutory bureau with delegated authority to participate in all Commission proceedings and to initiate enforcement actions and prosecutions in the public interest before the Office of Administrative Law Judge (“OALJ”). I&E is entrusted with the full discretion to take any action it deems warranted, such as filing a complaint or seeking civil penalties, in order to fulfill its charge to enforce the Code. TUS and Law Bureau serve in an advisory, not prosecutory, capacity before the Commission; therefore, whether and to what extent any promises concerning civil penalties and refunds were made at this private meeting are not binding on I&E.

Further, as I&E was not privy to the alleged discussion between Exeter Township, Law Bureau, and TUS and whether the alleged promises were made, strict proof thereof is demanded.

32. Admitted.

² Final Procedural Order at Docket No. M-2008-2071852.

³ *Lyness v. State Board of Medicine*, 529 Pa. 525, 605 A.2d 1204 (1992).

33. Denied as stated. The allegations of this paragraph attempt to characterize a written document, the written document speaks for itself.

34. I&E lacks sufficient knowledge and information to admit or deny the allegations set forth in this paragraph. I&E was not present during the alleged discussions between Exeter Township, TUS and Law Bureau. The subject of this averment appears to be focused on discussions between those parties to cure Exeter's current *de facto* service in order to move forward with the proposed Section 1329 transaction. This, however, does not cure the past *de facto* service from 2014 to the present, which is the subject of I&E's Complaint. Exeter avers that during its meeting with TUS and Law Bureau it proposed to file a petition for declaratory order in order to be found exempt from Commission regulations but that it did not do so because TUS and Law Bureau informed it that the 1329 Application would be rejected. Regardless of whether Exeter filed a petition for declaratory order or a certificate of public convenience, I&E always had the ability to file a Complaint against Exeter's extraterritorial service. Exeter followed the direction that was allegedly provided at the meeting and, consistent with that alleged recommendation, the Section 1329 Application was not rejected. However, following the alleged recommendation to prevent the rejection of the Section 1329 Application does not mean that Exeter is exempt from fines and penalties for its past and ongoing provision of *de facto* service. Therefore, any conversations between Exeter and other Commission Bureaus that occurred to remedy this extraterritorial service issue in order to procedurally move the Section 1329 forward

in no way prohibits the Commission's prosecutory bureau from filing a Complaint due to Exeter's past and ongoing failure to comply with the Code.

35. Denied. The Commission delegated its authority to file complaints to staff with enforcement responsibility, more specifically I&E. Conversely, TUS and Law Bureau do not have the authority to file complaints such as those of the nature at issue here. I&E is the Commission's independent prosecutory bureau charged with representing the public interest before the Commission and has been delegated the authority to initiate Commission proceedings before the OALJ by filing complaints or by other appropriate means. As noted above, I&E is entrusted with the full discretion to determine whether prosecutory actions are necessary and, therefore, is not bound by the alleged promises made by another Bureau of this Commission. I&E is not bound by promises that Exeter alleges were made by TUS and Law Bureau.

36. Denied. I&E is the Commission's independent prosecutory bureau charged with representing the public interest before the Commission. I&E has the authority to file formal complaints to enforce the Public Utility Code, therefore I&E is not bound by alleged promises of other Bureaus.

37. Denied. I&E was not involved in the alleged discussions between Exeter Township, TUS, and Law Bureau, therefore, is unaware of any promises in which Exeter Township relied upon to file its Application.

38. Admitted in part and denied in part. It is admitted that I&E filed a Complaint on February 13, 2019 against Exeter Township seeking penalties for its violations of the Public Utility Code, more specifically, for acting as a *de facto* public

utility. It is denied that I&E acted in violation of alleged promises made to Exeter by TUS and Law Bureau. By way of further response, I&E is the Commission's independent prosecutory bureau charged with representing the public interest before the Commission. I&E has the authority to file formal complaints to enforce the Public Utility Code, therefore I&E is not bound by alleged promises of other Bureaus within the Commission.

39. Denied. It is denied that I&E knew of the alleged promises of TUS and Law Bureau before filing its Complaint at issue here. A brief discussion was held after the Prehearing Conference for Exeter's Application for Certificate of Public Convenience where I&E informed Exeter that the instant Complaint would be filed later that day. During the brief conversation Counsel for Exeter Township represented that certain promises were made by TUS and Law Bureau. I&E was not present at the meeting between Exeter, TUS and Law Bureau and has not had any discussion with TUS or Law Bureau concerning Exeter's unlawful provision of public utility service. Exeter's conversation with TUS and Law Bureau and any alleged promises that may have been made does not eclipse I&E's assigned prosecutory duty. I&E, as an independent prosecutory bureau of the Commission, is not bound by alleged promises made by other Bureaus within the Commission; therefore, despite the brief conversation with Exeter Counsel informing I&E about the alleged promises, I&E was well within its right to file its Complaint.

40. Denied. I&E was not involved in the alleged discussions between Exeter Township, TUS, and Law Bureau, therefore, is unaware of any promises in which Exeter

Township relied upon to file its Application. To the extent that any promises were made upon which Exeter Township relied, I&E is not bound by those promises when it makes its determination regarding whether or not to prosecute a matter at hand.

41. Denied. It is specifically denied that I&E should be bound by any promises of other Commission Bureaus. I&E is the Commission's independent prosecutory bureau charged with representing the public interest before the Commission. As the bureau delegated with enforcement authority, it is within I&E's discretion, without other bureau influence, to file a formal complaint against a public utility in violation of the Public Utility Code. It would be unjust and improper to bind I&E, an independent prosecutory bureau, to alleged promises made in private conversations with Commission Bureaus serving in an advisory capacity.

42. Denied. It is specifically denied that I&E should be bound by any promises of other Commission Bureaus. I&E is the Commission's independent prosecutory bureau charged with representing the public interest before the Commission. As the bureau delegated with enforcement authority, it is within I&E's discretion, without other bureau influence, to file a formal complaint against a public utility in violation of the Public Utility Code. It would be unjust and improper to bind I&E, an independent prosecutory bureau, to alleged promises made in private conversations with Commission Bureaus serving in an advisory capacity. Further, I&E asserts that Commission jurisdiction over the 29 residential customers in Lower Alsace is not questionable but instead clearly spelled out in 66 Pa. C.S. § 1102(a)(5) which states that Exeter Township was required to have a Certificate of Public Convenience prior to rendering service to those customers

beyond its corporate limits. Exeter Township has been rendering service to those 29 customers since 2014, in clear violation of the Public Utility Code.

43. Denied. Exeter Township's provision of wastewater service to 29 customers beyond its corporate boundaries requires it to obtain a certificate of public convenience pursuant to 66 Pa. C.S. § 1102(a)(5) and therefore subjects it to Commission jurisdiction. The Code at 66 Pa. C.S. § 3301(a) allows a Complainant to seek civil penalties for violations of the Public Utility Code by a public utility, or any other person or corporation subject to the Commission's authority, for violations of the Public Utility Code and/or Commission regulations. Contrary to Exeter Township's assertion, the Commission can, and does where necessary, impose civil penalties on municipal utilities.⁴

44. Denied. Exeter Township's operation of wastewater service to 29 customers beyond its corporate boundaries requires it to obtain a certificate of public convenience pursuant to 66 Pa. C.S. § 1102(a)(5) and therefore subjects it to Commission jurisdiction. The Code at 66 Pa. C.S. § 3301(a) allows a Complainant to seek civil penalties for violations of the Public Utility Code by a public utility, or any other person or corporation subject to the Commission's authority, for violations of the Public Utility Code and/or Commission regulations. As noted above, the Commission, at its discretion has the authority to impose civil penalties on municipal utilities.

⁴ See *Pa PUC BIE v. Phila. Gas Works*, at Docket No. C-2011-2278312 (Order Entered January 15, 2013) in which the Commission imposed a \$400,000 civil penalty on a municipal gas utility.

WHEREFORE, for all the foregoing reasons, the Bureau of Investigation and Enforcement of the Pennsylvania Public Utility Commission respectfully requests that, after consideration of the record, the Office of Administrative Law Judge and the Commission deny Exeter Township's New Matter and find Exeter Township in violation of each and every count as set forth in the Complaint.

Respectfully submitted,

A handwritten signature in cursive script, reading "Erika L. McLain", written over a horizontal line.

Erika L. McLain
Prosecutor
PA Attorney ID No. 320526

Pennsylvania Public Utility Commission
Bureau of Investigation and Enforcement
400 North Street
Harrisburg, PA 17120
(717) 783-6170

Date: March 25, 2019

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission	:	
	:	
v.	:	Docket No. C-2019-3007920
	:	
Exeter Township	:	

CERTIFICATE OF SERVICE

I hereby certify that I am serving the foregoing **I&E Reply to New Matter** dated March 25, 2019, in the manner and upon the persons listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party):

Served via First Class and Electronic Mail

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A handwritten signature in cursive script, reading "Erika L. McLain", written over a horizontal line.

Erika L. McLain
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