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March 29, 2019

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, James Rauber, Patricia Schanck and Elwyn Family 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 Answer to the Motion to Strike 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.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**THE PITTSBURGH WATER AND SEWER AUTHORITY'S
ANSWER TO THE MOTION TO STRIKE**

The Pittsburgh Water and Sewer Authority (“PWSA” or “Authority” or Respondent”) submits this Answer in opposition to the Motion to Strike filed by Natalie Leon, Jaime Wagner, Louise Sell, Christopher Cratsley, James Rauber, Patricia Schanck, and Elwyn Family Trust (collectively, the “Complainants”). The issues raised by Complainants lack merit and the Motion should be denied for the following reasons:

First, Complainants’ contention that PWSA’s Answer with New Matter to the Fourth Amended Complaint was untimely are incorrect. The First Interim Order Staying Proceeding (entered September 21, 2018) indicated that PWSA may file responsive pleadings to Complainants’ Fourth Amended Complaint within twenty (20) days of the entry of a final order by the Court of Common Pleas of Allegheny County, Pennsylvania in the matter at Docket No. SA-17-886. A “final” order is not in effect until after the appellate period has passed because during that time either party retains the right to file an appeal. Accepting the contrary interpretation of the Complainants’ would place the parties in the same position they were in pending the end of the appellate period, i.e. awaiting final direction regarding the pending

litigation before the Courts. Such interpretation is not logical in these circumstances. Accordingly, the Court's Order dated January 16, 2019 became **final** on February 15, 2019 which was the last date by which any party had the right to appeal the action. While no party exercised that right, PWSA did utilize that period of time to evaluate its options and determine whether or not to proceed with an appeal. PWSA's Answer with New Matter to the Fourth Amended Complaint was filed with the Commission on March 7, 2019 (which is twenty days from February 15, 2019) and was, therefore, timely filed.¹

Second, Complainant's contention that the doctrine of *res judicata* bars PWSA from filing a responsive pleading to the Fourth Amended Complaint lacks merit. Aside from the fact that the First Interim Order clearly directed PWSA to file a responsive pleading, the doctrine of *res judicata* (claim preclusion) reflects the refusal of law to tolerate the relitigation of a matter decided by a court of competent jurisdiction. Importantly, the Answer and New Matter do not seek relitigation of the matter decided by the Court. On the contrary, the Answer and New

¹ Even if deemed untimely, PWSA's responsive pleading should not be stricken. The Complainants' Motion does not allege that they incurred any disadvantage from the (alleged) untimely filing. Under the Commission's Rules of Practice and Procedure, a deemed default and deemed factual admissions are not automatic or required outcomes under 52 Pa.Code § 5.61(c). Rather, pleadings generally are not evidence (52 Pa. Code § 5.405), and the decision of whether to deem a party in default or deem the admission of certain facts is discretion of Your Honor (and the Commission), which are empowered to disregard an error or defect of procedure and to act so as to secure the just, speedy and inexpensive determination of every case. See 52 Pa.Code § 1.2. In fact, hearings can be held despite the lack of an actual answer from a respondent. See *PUC v. Steven J. Butts*, C-2012-2325083, Order entered September 12, 2013 (case was presented as litigated, despite the lack of an actual answer from the respondent); *PUC v. Scott A. Dechert t/a Distinctive Limousine Service*, C-2012-2334904, Order entered October 17, 2013 (case was presented as litigated, despite the lack of an actual answer from the respondent).

The "Section 1501" issues presented by the Complainants should proceed to a hearing. Here, the relief requested by the Motion suggests that more (unspecified) action must be taken by PWSA to prevent a harm that may (or may not) occur at some point in the future. This suggestion appears to touch upon the adequacy of facilities/service provided by PWSA. Such issues have been (and continue to be) disputed by PWSA (e.g., PWSA's position is that the Subject Line does not presently pose a risk to public health or safety). Accordingly, hearings are necessary to resolve disputed questions of fact. See, e.g., *Dee-Dee Cab, Inc. v. PUC*, 817 A.2d 593 (Pa.Cmwlth. 2003), petition for allowance of appeal denied, 836 A.2d 123 (Pa. 2003). Due process is provided when the parties are afforded notice and the opportunity to appear and be heard. *Schneider v. PUC*, 479 A.2d 10 (Pa. Cmwlth. 1984). The Complainants bear the burden of proving by a preponderance of the evidence that the PWSA has violated the Public Utility Code or a regulation or order of the PUC. 66 Pa.C.S. § 332(a); *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950). If any violations are established, the penalty to be imposed by the PUC upon the PWSA needs to be supported by evidence in the record. See 52 Pa.Code § 69.1201; *Butts, supra*; *Dechert, supra*.

Matter repeatedly acknowledge the existence of the Court's order and explain that, as PWSA has been found by the Court to be responsible to maintain the Subject Line, PWSA has agreed to repair and maintain the Subject Line. Furthermore, the doctrine is inapplicable to PWSA's Answer and New Matter since the required elements for the doctrine's application are not present.² These elements are: (1) identity of issues; (2) identity of causes of action; (3) identity of persons and parties to the action; and (4) identity of the quality and capacity of the parties suing or being sued.³ Here, the issues and cause of action before the Court (ownership of the Subject Line) are not the same as the issues before the Commission (adequate facilities/service). Additionally, with the addition of the Elwyn Family Trust,⁴ the parties and their capacities to this action are not the same as those before the Court.

[Signature appears on next page]

² If the doctrine of *res judicata* is applicable, the doctrine would more appropriately bar the Complainants' from raising issues before the Commission that were decided by the Court. Simply put, the Motion suggests that Court resolved all of the issues and, therefore, PWSA cannot raise any defense to the Complaint. However, the focus should be on the Complaint, not on the responsive pleading by PWSA. Stated otherwise, if it is accepted by Your Honor (and the Commission) that the Court resolved all of the issues being presented to the Commission by the Fourth Amended Complaint (so as to preclude any defense thereto), the proper outcome would be dismiss the Fourth Amended Complaint in its entirety since there are no remaining issues to be resolved by the Commission.

³ *Volkswagenwerk Aktiengesellschaft*, 474 A.2d 1313, 1316, 1317 (Pa.Super. 1983).

⁴ The Fourth Amended Complaint explains that Elwyn Family Trust (as opposed to James Rauber) is the real party in interest with regard to the property at 252 Elwyn Avenue.

WHEREFORE, PWSA respectfully requests that the Commission deny the Motion filed by the Complainants.

Respectfully submitted,



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Date: March 29, 2019

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CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of the foregoing **Answer to Motion to Strike** 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

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Honorable Mark A. Hoyer
Office of Administrative Law Judge
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Date: March 29, 2019



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