COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
COMMONWEALTH KEYSTONE BUILDING
400 NORTH STREET, HARRISBURG, PA 17120

BUREAU OF
INVESTIGATION
&
ENFORCEMENT

September 30, 2019

Via Electronic Filing
Secretary Rosemary Chiavetta
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

Re: Implementation of Chapter 32 of the Public Utility Code Re Pittsburgh Water and Sewer Authority
Docket No. M-2108-2640802 (Water)
Docket No. M-2018-2640803 (Wastewater)
I&E Reply Brief

Dear Secretary Chiavetta:

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

Copies are being served on parties as identified in the attached certificate of service. Should you have any questions or concerns, please do not hesitate to contact me.

Sincerely,

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Enclosure
GLM/ac

cc: Honorable Mark A. Hoyer (*ALJ Pittsburgh*)
Honorable Conrad A. Johnson (*ALJ Pittsburgh*)
Per Certificate of Service

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Implementation of Chapter 32 of the Public Utility Code Regarding Pittsburgh Water and Sewer Authority – Stage 1	:	M-2018-2640802 M-2018-2640803
Petition of The Pittsburgh Water and Sewer Authority for Approval of Its Long Term Infrastructure Improvement Plan	:	P-2018-3005037 P-2018-3005039

REPLY BRIEF
OF THE
BUREAU OF INVESTIGATION AND ENFORCEMENT

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Dated: September 30, 2019

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I. INTRODUCTION AND STATEMENT OF THE CASE

The Bureau of Investigation and Enforcement ("I&E") herein references and incorporates the Introduction and Statement of the Case sections of its Main Brief.[1] I&E's Main Brief included an extensive discussion of the facts, circumstances, and legislation that culminated in the General Assembly authorizing the Commission's regulatory jurisdiction over Pittsburgh Water and Sewer Authority ("PWSA").[2] While I&E will not repeat all of that information here, a few salient points bear reiteration to inform I&E's Reply Brief.

First, the determination that PWSA needed to become a regulated public utility was made by the Pennsylvania General Assembly in 2017 because it identified significant concerns about PWSA's operations and the integrity and safety of its service. The General Assembly's determination considered PWSA's well-publicized issues related to debt, uncollectibles, unmetered accounts, incorrect billing, system leaks and non-compliance with federal water quality mandates that "call into serious question the sustainability of PWSA and the health and safety of those served by the system."[3] Providing the Commission with jurisdiction over PWSA was determined to be necessary to, *inter alia*, fix PWSA's deteriorating system, restore the confidence of PWSA's customers, address acute and long-term systemic problems with PWSA, assure customers

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1 I&E Main Brief, pp. 1-5.

2 As acknowledged in I&E's Main Brief, the resulting legislation led to the amendment of Chapter 32 of the Public Utility Code in order to grant the Commission jurisdiction over the provision of utility water, wastewater, and stormwater service by entities created by Pennsylvania cities of the second class under the Municipal Authorities Act. At present, Pittsburgh is Pennsylvania's sole city of the second class.

3 House Co-Sponsorship Memoranda for HB 1490, PA House of Representatives, Session of 2017-2018 Regular Session, May 24, 2017.

of water safety, and protect the health and safety of citizens who reply upon PWSA for the provision of clean water.[4] I&E avers that these important legislative goals for PWSA's transition to the Commission's jurisdiction have been thwarted with respect to the litigated Compliance Plan issues I&E has identified below.[5]

Additionally, I&E's extensive investigation of PWSA's Compliance Plan concludes with the determinations that the Compliance Plan terms at issue here (1) fail to meet the standard required in Chapter 32 because they will not adequately ensure and maintain PWSA's provision of adequate, efficient, safe, reliable and reasonable service in several key respects;[6] and (2) are contrary to the public interest. As previously explained, I&E is uniquely positioned to assist the Commission in its evaluation of PWSA's Compliance Plan in these respects, because I&E's role in this case is directly aligned with its charge to represent the public interest in ratemaking and service matters, and to enforce compliance with the Code.[7]

While I&E addresses the substance of PWSA's Compliance Plan terms at issue thoroughly below, in the introduction of PWSA's Main Brief, PWSA makes a proposal that I&E must address here. Specifically, PWSA invites the Commission to consider the litigated issues at bar "concurrently" with the commitments that PWSA made in the Joint

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4 Id.

5 The "litigated issues" that I&E is referring to include (1) the Cooperation Agreement between PWSA and the City; (2) responsibility for payment of costs related to metering municipal properties within the City; (3) billing plan for public fire hydrants within the City; (4) applicability of the Commission's line extension regulations; (5) PWSA's residency requirement; and (6) income-based reimbursement for private-side lead lines by property owners.

6 66 Pa. C.S. § 3204(c).

7 66 Pa. C.S. §§ 101 *et seq.*, and Commission regulations, 52 Pa. Code §§ 1.1 *et seq. See Implementation of Act 129 of 2008; Organization of Bureaus and Offices,* Docket No. M-2008-2071852 (Order entered August 11, 2011)

Petition for Partial Settlement[8] ("Partial Settlement") filed in this case on September 13, 2019.[9] By considering the litigated issues concurrently with PWSA's Partial Settlement commitments, PWSA alleges that the Commission can ensure that PWSA's plans for full compliance are "achievable, reasonable, and in the public interest."[10] I&E submits that the converse is true. Instead, when viewed through the lens of the forfeited revenue, politically-driven and operationally detrimental policies, and compromised service that result from PWSA's proposals on the litigated issues, it is clear that the benefits of the Partial Settlement will be diluted and the positive impacts will be diminished if PWSA's proposals on the litigated issues prevail. Such action would produce a result that is unreasonable, inconsistent with PWSA's obligation to provide adequate, efficient, safe, reliable and reasonable service, and contrary to the public interest.

For the reasons explained in I&E Main Brief, and as again supported herein, PWSA should be required to revise its Compliance Plan to set forth a plan to:

1. transition from its 1995 Cooperation Agreement with the City to begin operating on a business-like, arm's-length basis with the City;

2. become responsible for the cost of all meter installation, including the installation at City properties, in accordance with 52 Pa. Code § 65.7;

3. introduce a flat rate, at minimum the customer charge for the customer's class, for all unbilled customers in its next base rate case, and, as customers are metered, to immediately bill full usage;

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8 PWSA Main Brief, p. 3.

9 *Implementation of Chapter 32 of the Public Utility Code Regarding Pittsburgh Water and Sewer Authority, Stage 1*, M-2018-2640802 et al, *Joint Petition for Partial Settlement* (September 13, 2019).

10 PWSA Main Brief, p. 3.

4. revise its proposed step-billing approach for City public fire hydrant charges and instead set forth a plan to charge the full amount of whatever percent allocation is determined in PWSA's next rate proceeding;

5. consistent with the recognition that where conflicts exist, the Code and Commission regulations and orders supersede the Municipality Authorities Act ("MAA"), comply with 52 Pa. Code §§ 65.21-65.23 regarding a utility's duty to make line extensions, and revise its tariff and operations accordingly;

6. immediately eliminate its residency requirement; and

7. strike the income-based reimbursement provision of its lead service line replacement policy in favor of a plan to replace all public and private residential lead lines in its distribution system.

II. PROCEDURAL HISTORY

The Bureau of Investigation & Enforcement ("I&E") incorporates, by reference, the Procedural History section[11] contained in its timely-filed Main Brief of September 19, 2019. By way of supplemental information, alongside I&E, PWSA, the Office of Consumer Advocate ("OCA"), the Office of the Small Business Advocate ("OSBA") and Pittsburgh UNITED ("UNITED") also timely filed Main Briefs in this case. Pursuant to the procedural schedule and in accordance with Sections 5.501- 5.502 of the Public Utility Code, I&E submits this Reply Brief.

[11] I&E Main Brief, pp. 8-11.

III. LEGAL STANDARDS AND BURDEN OF PROOF

PWSA's Burden of Proof

As I&E explained in its Main Brief,[12] PWSA, as the proponent of its Compliance Plan, bears the burden of proof to establish that its plan to come into compliance with the Code, Commission regulations, and orders will adequately ensure and maintain its provision of adequate, efficient, safe, reliable and reasonable service.[13] To meet its burden of proof, PWSA must establish "a preponderance of evidence which is substantial and legally credible."[14] In order to meet its burden of proof, PWSA must "present evidence more convincing, by even the smallest amount, than that presented by any opposing party."[15] In its Main Brief, PWSA acknowledges this burden,[16] but it correctly adds that it does not bear the burden of proof as to any other parties' proposals, as the party offering a proposal not included in the original filing bears the burden of that proposal.[17] The evidence in this case demonstrates that while PWSA has not met its burden with respect to each of the issues addressed herein, I&E has successfully borne its burden of proof with respect to each of its seven recommendations in this case.

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12 I&E Main Brief, pp. 17-18.

13 66 Pa. C.S. § 332(a); 66 Pa. C.S. § 3204.

14 *Samuel J. Lansberry, Inc. v. Pa. P.U.C.*, 578 A.2d 600, 602 (Pa. Commw. 1990).

15 *Se-Ling Hosiery v. Margulies,* 70 A.2d 854 (Pa. 1950).

16 PWSA Main Brief, pp. 9-10

17 PWSA Main Brief, pp. 10-11, referencing *Brockway Glass Co. v. PUC,* 437 A.2d 1067 (Pa.Cmwlth. 1981); *PUC v. Duquesne Light Company,* Docket Nos. R-2013-2372129, *et al.,* Opinion and Order (April 23, 2014). I&E also notes that PWSA accurately described the elements of the burden of proof, the burden of production and the burden of persuasion.

IV. SUMMARY OF THE ARGUMENT

Despite the many and commendable steps PWSA has undertaken to transition to compliance with the Code, Commission regulations, order, and rules, its operations are non-compliant in several critical areas that compromise its ability to adequately ensure and maintain the provision of adequate, efficient, safe, reliable and reasonable service to its customers. As noted in I&E's Main Brief, a troubling common theme that unites the remaining compliance issues is that each of them involves subordination of its jurisdictional obligations to municipal interests.[18] More specifically, and as borne out further below, PWSA Compliance Plan includes terms that continue to defer to City of Pittsburgh's ("City") interests at its own expense and the expense of ratepayers, and that clearly disregard the Commission's statutory and regulatory authority in favor of municipal law. I&E submits that the Commission must reject PWSA's attempt to placate municipal interests by abdicating its responsibilities as a jurisdictional utility where those responsibilities produce a result that is politically inconvenient.

Notably, PWSA begins its Main Brief by suggesting that the Commission disregard its 1995 Cooperation Agreement with the City, which now remains in place, in favor of a promised future agreement that has yet to materialize. I&E submits that it is irresponsible to ignore the detrimental impact of the 1995 Cooperation Agreement upon PWSA's operations, which subsumes revenue desperately needed for lead remediation, infrastructure repair, and operational improvements, simply because a new agreement may eventually be in place someday. More basically, ignoring the 1995 Cooperation

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[18] I&E Main Brief, p. 3.

Agreement is not possible because it still remains in effect. PWSA has extended its termination date multiple times, and the Commission cannot rely on uncertain promises it will be terminated in the future. Because of this, and in order to facilitate compliance with the Code, I&E recommends that the Commission require PWSA to revise its Compliance Plan to set forth a plan to begin operating on a business-like, arm's length basis with the City as soon as possible.[19]

Next, in a refusal to acknowledge the explicit language of Chapter 32, as well as recent and past legal precedent, PWSA continues to claim that the Section 5607(d)(24) of the Municipality Authorities Act ("MAA") governs its line extensions instead of the Commission's applicable regulations at 52 Pa. Code §§ 65.21-65.23. While PWSA's arguments here lack merit, it now has expanded its position to include a Plan B. Specifically, now, for the first time, in its Main Brief, PWSA requests that if the Commission determines that its line extension regulations prevail, it waive their application in favor of PWSA continuing to adhere to the MAA provision. I&E avers that PWSA's waiver request is untimely and unsupported. To the extent that PWSA has any viable basis to request a waiver, it has not been provided in this case, and it is not appropriate for consideration as part of PWSA's Main Brief. For now, I&E recommends that the Commission require PWSA to revise its Compliance Plan to set forth a plan to comply with the Commission's regulations 52 Pa. Code §§ 65.21-65.23 regarding its duty to make line extensions, and revise its tariff and operations accordingly

[19] I&E Main Brief, p. 32.

Additionally, despite PWSA's clear need to devote revenue to improvement of infrastructure and improvement of its operations, it continues to advocate a metering plan that treats the City more favorably than all other customers and that will enable PWSA to continue to provide free water to the City and evade full payment of tariffed rates for metered properties. Despite PWSA's claim that its proposal presents a reasonable path forward, the evidence in this case proves that PWSA's proposal is entirely unreasonable because compliance with Commission's regulations and the Code should not be unnecessarily delayed[20] and foregoing critical revenue compromises PWSA's ability to furnish and maintain adequate, efficient, safe, and reasonable service. Accordingly, I&E recommends that the Commission order PWSA to revise its Compliance Plan to (1) become responsible for the cost of all meter installation, including the installation of City properties, in accordance with 52 Pa. Code § 65.7; (2) introduce a flat rate, at minimum the customer charge for the customer's class, for all unbilled customers in its next base rate case, and, as customers are metered, to immediately bill full usage; and (3) revise its proposed step-billing approach for City public fire hydrant charges and instead set forth a plan to charge the full amount of whatever percent allocation is determined in PWSA's next rate proceeding.

Furthermore, by way of a proposal that subordinates the efficiency and cost-effectiveness of its operations to City appeasement, PWSA is asking the Commission to approve continuation of its residency requirement as a matter of managerial discretion. As I&E explains, "managerial discretion" is not a sufficient a basis to continue PWSA's

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[20] I&E Main Brief, pp. 33-35, pp. 41-43.

residency requirement, which harms operations, violates Sections 1301[21] and 1501[22] of the Code, and frustrates PWSA's ability to meet the Commission's policy goals for diversity. For these reasons, as and as explained in more depth below, the Commission should order PWSA to revise its Compliance Plan to set forth a plan to immediately eliminate its residency requirement.

Finally, PWSA's efforts to evade the Commission's jurisdiction over the replacement of its lead service lines by couching the issue as a water quality issue outside of the Commission's purview are faulty in that they rely on case law that is not determinative or relevant. Instead, as I&E explains, under Sections 1501[23] and 3205[24] of the Code, the Commission has clear authority to regulate PWSA's provision of water service as well as the lead infrastructure that compromises PWSA's ability to provide safe service. Furthermore, under the same authority, the Commission can and should require PWSA to replace all of the lead service lines in its system, even customer-owned lines, as long as lead presents health and safety concerns to PWSA's customers and the public. The evidence supports the conclusion that this standard is met. Finally, the Commission should order PWSA to strike the income-based provision of its lead service line replacement program in favor of a plan to replace all public and private residential lead lines in its distribution system. I&E submits such action is necessary to ensure PWSA's provision of safe service and to avoid diluting the value of the lead remediation efforts that PWSA has already taken.

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[21] 66 Pa. C.S. § 1301.

[22] 66 Pa. C.S. § 1501.

[23] Id.

[24] 66 Pa. C.S. § 3205.

V. ARGUMENT

A. The Cooperation Agreement Between PWSA and the City of Pittsburgh Effective January 1, 1995

The Commission should reject PWSA's request that it not consider the harmful operational realities and crippling loss of revenue it has suffered and continues to suffer under its 1995 Cooperation Agreement ("1995 Cooperation Agreement') with the City on the basis that a new agreement is pending. Despite PWSA's continued promises that a new, more equitable agreement would soon become available during the course of this proceeding, no new agreement has materialized; therefore, the terms and conditions of any pending or future agreement remain unidentified and cannot be evaluated. I&E submits that it is irresponsible to ignore the detrimental impact of the 1995 Cooperation Agreement upon PWSA's operations, which subsumes revenue desperately needed for lead remediation, infrastructure repair, and operational improvements, simply because a new agreement may eventually be in place someday. Because of this, and in order to become compliant with the Code, I&E recommended that PWSA begin operating on a business-like basis with the City as soon as possible and that it not be permitted to extend its 1995 Cooperation Agreement beyond the date currently set for termination, October 3, 2019.[25]

Additionally, it is worthy to note that this discussion will present the Commission with the opportunity to dissuade PWSA from entering into any other politically-driven agreement that provides for payment of phantom costs to the City, guarantees any type of

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[25] I&E Main Brief, p. 32. As I&E noted in its Main Brief, p. 24 footnote 50, PWSA has extended the term of the agreement several times, raising the possibility that an additional extension beyond October 3, 2019 may ensue.

free service, of contains provision that will hinder its operations and drive up costs for ratepayers to benefit the City. While PWSA characterizes any review of its 1995 Cooperation Agreement as "pointless," I&E is not advocating that the Commission review from a "validity and legality perspective" as PWSA suggests.[26] Instead, I&E avers that at the time the record closed in this case, and at the time of this Reply Brief, the 1995 Cooperation Agreement remains in place. Therefore, providing the Commission with answers to its Directed Questions and informing it of the realities of PWSA's operations is not only appropriate, but essential to protecting ratepayers.

Through the record created in its case, and as summarized in its Main Brief,[27] I&E attempted to build a record for the Commission to answer its Directed Questions regarding the 1995 Cooperation Agreement and to explain the detrimental impact the terms of the 1995 Cooperation Agreement has had upon PWSA and its ratepayers. PWSA has not disputed I&E's argument that PWSA's continued failure to transition from its 1995 Cooperation Agreement with the City to conducting business with the City on an arm's-length, transactional basis produces a result that unfairly advantages the City at the expense of PWSA and its ratepayers. I&E submits that result is inconsistent with PWSA's obligation to provide reasonable service. To be sure, in its Main Brief, PWSA readily admits that it currently provides (1) water service to various City and City affiliated locations either without metering and billing them or metering them but without billing; (2) free storm water repairs in combined systems; (3) implementation of City-

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[26] PWSA Main Brief, p. 11.

[27] I&E Main Brief, pp. 22-32.

Wide Green First infrastructure programs; and (4) supports development of programs sponsored by the Urban Redevelopment Authority. [28]

Although no party can quantify the value of lost revenue from providing free water and wastewater service to the City, evidence suggests that this unbilled usage represents upwards of $11.4 million in foregone annual revenue.[29] While the loss of an estimated $11.4 million in annual revenue represents a crippling and devastating loss to PWSA and its customers, I&E cannot even begin to quantify the expenses that PWSA has incurred in its provision of free stormwater repair and support for City programs, which I&E has learned about for the first time in PWSA's Main Brief. Each dollar that PWSA inexplicably forfeits to the City and gratuitously pays to the City is one dollar more that ratepayers have to pay for compromised service. This result is completely antithetical to PWSA's obligations as a jurisdictional utility and it cannot be permitted to continue.

In its Main Brief, PWSA seeks to evade the topic of 1995 Cooperation Agreement in favor of an anticipated 2019 Cooperation Agreement ("Future Cooperation Agreement") that is pending changes from the City Mayor and acceptance by the PWSA Board. To that end, PWSA claims that an objective in negotiating a Future Cooperation Agreement is "so that annual payments reflect actual services being provided and the fair market value of those services,"[30] a goal that I&E believes is commendable. However, while I&E notes that the terms of the Future Cooperation Agreement are not identified or

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[28] PWSA Main Brief, p. 20.

[29] I&E St. No. 3, p. 55.

[30] PWSA Main Brief, p. 15.

available for evaluation, I&E has significant concerns about the alleged value of City-provided services and PWSA-provided services as alleged in PWSA's Main Brief[31] and I&E is concerned that distorted information in favor of the City could underlie the Future Cooperation Agreement.

Specifically, as I&E witness D.C. Patel indicated, certain costs assigned to PWSA by the City appeared completely unrelated to utility service, such as $4,722,317 for street sweeping, litter can cleaning, litter cans costs, "yard debris," and "landslides."[32] Now, the same figure at issue, $4,722,317, appears in PWSA's Main Brief as an alleged valid "Department of Public Works" expense payable to the City.[33] Additionally, as I&E explained above, although the value of City water and wastewater costs cannot accurately be measured without metering, it is estimated to be an annual loss of $11.4 million in revenue. Despite this, PWSA has somehow quantified the amount at $5,172,699 in its assessment of the value of services it provides to the City.[34] Thus, by undercutting the value of its services to the City and overvaluing the services it receives, it appears that PWSA may again be in the position of elevating the City's position above its own, potentially for purposes of the Future Cooperation Agreement. While I&E's concerns cannot be validated at this time because the Future Cooperation Agreement is not yet available, I&E submits that close scrutiny of the terms of any Future Cooperation Agreement is warranted.

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31 PWSA Main Brief, pp. 18-19.

32 I&E St. No. 2, pp. 19-21.

33 PWSA Main Brief, p. 19.

34 PWSA Main Brief, p. 18.

To that end, the appropriate level of scrutiny necessary to protect PWSA's ratepayers may not be possible if PWSA's request to operate under the terms of a Future Cooperation, while the Commission's Section 508[35] review is pending, is granted. I&E notes that in its Main Brief, PWSA proposes a process by which it will file the Future Cooperation Agreement (when available) and then request permission to being operating under it subject to retroactive revisions directed by the Commission and subject to future determinations regarding the impact on rates.[36] While PWSA appears to be outlining its proposed plan, and not asking for its preapproval, which is wholly inappropriate in this case, I&E avers that it is premature to evaluate PWSA's plan because ratepayers, parties and the Commission would assume the risk of any terms contained in the Future Cooperation Agreement. Instead, the merits of PWSA's plan to request to operate under the Future Cooperation Agreement should be considered only if and when PWSA's makes the appropriate filing.[37]

Nevertheless, under no circumstances should PWSA be permitted to extend its 1995 Cooperation Agreement beyond October 3, 2019. Additionally, whether by course of a Future Cooperation Agreement, or in the absence of any cooperation agreement, PWSA must begin operating on a business-like, arm's-length basis with the City. I&E respectfully requests that the Commission order PWSA to revise its Compliance Plan consistent with these recommendations.

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[35] 66 Pa. C.S. § 508.

[36] PWSA Main Brief, p. 16.

[37] I&E Main Brief, p. 28.

B. Municipal Properties And Public Fire Hydrants Within the City of Pittsburgh

PWSA contends that the relationship between it and the City is governed by the Cooperation Agreement, not the Code and Commission mandates.[38] Reliance on this argument to justify its metering or any other program in conflict with the Code and Commission mandates is absurd and meritless. In addition to the Commission's authority to reform contracts,[39] it is axiomatic that an illegal contract is unenforceable.[40] PWSA and the City cannot circumvent the Code and Commission mandates with a Cooperation Agreement. Moreover, the entire purpose of this proceeding, as required by the General Assembly, is for PWSA to come into compliance with the Code and Commission rules, regulations, and orders. Although PWSA and the City may not have had the "traditional 'independent'" utility-customer relationship before coming under Commission jurisdiction,[41] they must now. PWSA is an independent entity from the City, [42] now under the jurisdiction of the Commission. A new Cooperation Agreement will not change this fact.

Relatedly, PWSA states the resolution of litigated metering issues will not occur until a new Cooperation Agreement is subject to a future Commission proceeding.[43] I&E disagrees with this position and asserts the Commission must decide these issues related

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38 PWSA Main Brief, p. 22.

39 66 Pa. C.S. § 508.

40 *See, e.g.,* 16 Summ. Pa. Jur. 2d Commercial Law § 4:2 (2d ed.); Restatement (First) of Contracts § 580 (1932) (June 2019 update).

41 PWSA Main Brief, p. 22.

42 Both I&E and PWSA cite numerous authorities supporting this contention. I&E Main Brief, p. 31, fn. 80; PWSA Main Brief, p. 30, fn. 101

43 PWSA Main Brief, p. 23.

to metering in this proceeding for four reasons. First, parties never agreed metering issues would exclusively be determined in a future proceeding regarding a new Cooperation Agreement. The Partial Settlement does not state otherwise. Second, a Commission decision on these issues as soon as possible is necessary. There may be some overlap in proceedings if PWSA files a new Cooperation Agreement for review before a Commission decision in this proceeding is issued. However, this issue of timing should not preclude the Commission from issuing a decision in this proceeding. To the contrary, I&E advocated for briefing of this issue so the Commission has the opportunity to weigh-in on a contested, on-the-record issues as soon as possible. The timing of review of a new Cooperation Agreement is uncertain, and PWSA may file a new rate case soon. The question of foregone revenues will continue to be an issue and PWSA should receive direction from the Commission as soon as possible. Third, the Commission specifically asked that questions regarding these metering issues be discussed in this proceeding.[44] Therefore, it is appropriate to address these metering issues now. Fourth, as detailed in I&E's Main Brief,[45] PWSA explained its proposal to recover metering costs and its step-billing approach as part of its Compliance Plan generally, not exclusively in the context of a new Cooperation Agreement. Therefore, it is proper that the Commission consider these metering issues now and make a determination regarding PWSA's Compliance Plan metering proposals.

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[44] Pa. P.U.C. Docket Nos. M-2018-2640802 & M-2018-2640803, Corrected Technical Staff Directed Questions (November 28, 2018), pp. 6, 15-16.

[45] PWSA Main Brief, pp. 32-44.

Regarding its position that the City should receive special treatment, PWSA repeats its assertions from testimony. Generally, PWSA advocates for the City to have a "reasonable" amount of time to start receiving full bills, or else the City may simply may not pay.[46] This rationale should be rejected. There is no evidence in the record that the City will not pay its bills. The Commission should not and cannot be afraid to enforce the Code and its mandates on such unsubstantiated and unmerited grounds. To do so would create terrible precedent and invite other unwarranted tests of Commission power rooted in fears of non-compliance. Also, no other ratepayers are offered such outright deference. Customer assistance programs are typically the subject of extensive universal service proceedings regarding the payment ability of a utilities' low-income *residential* customers.[47] I&E is unaware of any situation where a municipality has been allowed to forego its utility payments based on supposed ability to pay, which, again, has not been established here. To approve such an exception here would create a dangerous precedent that other municipalities could cite.

PWSA states the Compliance Plan proceeding only requires a plan for compliance, not immediate compliance.[48] PWSA mischaracterizes parties' positions.[49] Adoption of I&E's recommendation would not culminate in full bills until metering is complete, which could be as late as 2024.[50] Further, I&E's proposal would not even be *introduced*

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46 PWSA Main Brief, p. 24.

47 *See, e.g.,* 52 Pa. Code § 69.262 ("Low income customers – A residential utility customer whose annual household gross income is at or below 150% of the Federal poverty income guidelines (emphasis added)").

48 PWSA Main Brief, pp. 24-25.

49 PWSA claims "because [PWSA's proposals] will not lead to full payment by the City immediately…some parties have taken the view that PWSA's proposals in this regard should be rejected." PWSA Main Brief, p. 23.

50 I&E Main Brief, p. 43.

until the next rate case is filed, so actual implementation would not occur until after PWSA's next rate case concludes. There is no demand for immediate, full compliance. However, PWSA's proposal would allow the City to continue to receive free water service until 2024 for unmetered properties.[51] Such undue generosity in the face of a historic expansion in capital spending and associated rate increases would exacerbate the already unjust favoring of the City at the expense of all other ratepayers. PWSA should push the City to pay for *at least some of* (i.e., the customer charge) *all* (i.e., including unmetered usage) water service until metering is complete. Once metering is complete, the City should be billed its full amount immediately. Neither PWSA nor the City (which elected not to participate in this proceeding, despite ample notice)[52] have provided an evidentiary basis to find otherwise.

1. Responsibility for Payment of Costs Related to Metering Municipal Properties within the City of Pittsburgh

PWSA devotes little detailed discussion to this topic.[53] PWSA generally asserts the 50/50 split proposal is reasonable because of the historical relationship with the City, the City will need to fund a new cost, PWSA's tariff allocates costs differently in different circumstances, and PWSA should receive recovery for some of its costs. First, as stated repeatedly herein and I&E's Main Brief, the "historical relationship" between the City and PWSA does not entitle PWSA or the City to violate Commission

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51 *See, e.g.,* PWSA Main Brief, p. 26 ("Pursuant to the proposed plan, the City would agree to start paying for usage for all *metered* properties at a specific percentage until that percentage reaches 100% (emphasis added).")

52 I&E Main Brief, p. 41.

53 PWSA Main Brief, pp. 25-26.

regulations.[54] Second, any concern about the City's ability to fund a new cost is immaterial to this issue. To comply with 52 Pa. Code § 65.7, PWSA, not the City, will be responsible for metering costs.[55] Third, it is unclear what point PWSA is trying to make by saying its tariff allocates costs differently. Without discussion of the relevance of this statement to its tariff provisions, the City, and 52 Pa. Code § 65.7, this statement is unsupported.[56] Last, the fact that PWSA would receive payments under the 50/50 arrangement does not entitle it to violate Commission regulations. I&E asserts the Commission should enforce the Code and its mandates indiscriminately, whether or not it benefits PWSA or the City. Otherwise, PWSA will not be able to have or maintain and arm's-length, businesslike relationship with the City. I&E notes that of the litigated issues, enforcement of the Code here will benefit the City rather than PWSA. That is what Commission regulations dictate. Therefore, the Commission should require PWSA to be responsible for the costs of meter installation in accordance with 52 Pa. Code § 65.7.

2. Billing Plan For Unmetered and/or Unbilled Municipal Properties Within The City Of Pittsburgh

PWSA states it foregoes $3.6 million annually in billed usage from currently metered City facilities.[57] However, total unbilled usage is upwards of $11.4 million

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[54] *See, e.g.,* I&E Main Brief, p. 31, asserting the General Assembly's purpose of placing PWSA under Commission oversight was to prevent unfair relationships from continuing.

[55] I&E Main Brief, pp. 32-36.

[56] PWSA cites to its Water Tariff at 42 (Feeds for New Meters), 43 (New Meters) and 49 (Customer Facilities Fee). PWSA Main Brief, p. 26, fn. 81. Although PWSA currently charges for these costs, pursuant to the Joint Petition for Settlement, for non-municipal properties, PWSA will pay for the costs of meters and meter installation. Joint Petition for Settlement, Section III.G.3.a.

[57] PWSA Main Brief, p. 27.

annually.[58] Rather than collect this $3.6 million as soon as possible (i.e., after the next rate case), PWSA states the City should only be billed in intervals of 20% annually for its metered usage. For unmetered usage, PWSA decries the "time and expense that would be involved in trying to find a way to estimate usage" for unmetered locations.[59] Regarding billing at least a customer charge, PWSA does not as much object to its technical implementation as it does claim immediate implementation will cause "rate shock" to the City, resulting in unpaid charges.[60] As explained above and in I&E's Main Brief,[61] implementation of I&E's proposal to fully bill metered municipal properties and at least a customer charge for unmetered properties will not cause rate shock. The earliest such proposal would be implemented is at the conclusion of the next rate case, i.e., late-2020 or later. Further, PWSA has provided no evidence of the City's finances or how I&E's proposal will actually result in "rate shock."[62] In reality, I&E's proposal recognizes PWSA's concerns by not implementing full bills for City properties until 2024, or when metering is complete. I&E asserts its approach balances the need to implementing a fair compliance plan while lessening the impact on non-municipal PWSA ratepayers burdened by the legacy of the unfair relationship between PWSA and the City.

3. Billing Plan For Public Fire Hydrants Within The City Of Pittsburgh

I&E already agreed PWSA would provide a rate design reflecting 25% of all public fire hydrant costs with its next rate proposal.[63] Although the appropriate percent

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58 I&E Main Brief, p. 39.
59 PWSA Main Brief, pp. 27-28.
60 PWSA Main Brief, p. 28.
61 I&E Main Brief, p. 42.
62 I&E Main Brief, pp. 41-42.
63 I&E Main Brief, p. 44.

allocation may be at issue in the next rate case, PWSA should not be allowed to extend its "step-billing" proposal to public fire hydrants. For the same reasons discussed above and in I&E's Main Brief regarding unbilled and unmetered city properties, the City should be charged the full amount of whatever percent allocation is determined in PWSA's next rate proceeding.

C. Applicability Of The Municipal Authorities Act, 53 Pa. C.S. § 5601 Et. Seq., And The Commission's Line Extension Regulations At 52 Pa. Code §§ 65.1, 65.21-65.23

PWSA again acknowledges the MAA and Commission regulations regarding line extensions cannot be reconciled.[64] In support of its assertion the MAA controls, PWSA states the Code does not include specific provisions on line extensions and Commission regulations cannot prevail over a statute.[65] As discussed in I&E's Main Brief regarding rules of statutory construction, pitting specific reference to line extensions in the Code or Commission regulations versus the MAA is not the correct analysis.[66] Chapter 32, a statute, mandates PWSA's compliance with the Code and Commission rules, regulations and orders, and the Code otherwise mandates compliance with Commission regulations. Therefore, PWSA's analysis of whether or not the Code specifically mentions line extensions or whether Commission regulations supersede the MAA independent of Chapter 32 is incorrect and irrelevant.

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64 PWSA Main Brief, pp. 36-37.

65 PWSA Main Brief, pp. 35, 42.

66 I&E Main Brief, pp. 48-51.

PWSA further states that, even if it were found that the Code conflicts with MAA,[67] the MAA would prevail.[68] To support its position, PWSA states the rule of statutory construction found at 1 Pa. C.S. § 1933 that specific statutory language prevails over general statutory language.[69] However, PWSA omits from its analysis the crucial language at the end of this statute, that the general principle prevails "*unless the general provision shall be enacted later and it shall be the manifest intention of the General Assembly that such general provision shall prevail.*"[70] Chapter 32 was passed by the General Assembly after the relevant portions of the MAA, and the General Assembly clearly intended Commission rules, regulations, and orders to apply to PWSA like any other public utility.[71] Therefore, the conflict should be viewed in favor of Chapter 32 and Commission regulations.

PWSA appears to contend use of the word "applicable" in Chapter 32 regarding bringing PWSA into compliance with "applicable" Code and Commission mandates means conflicting legal authority supersedes the Code and Commission mandates.[72] I&E asserts this is incorrect and omits key pertinent language. The word "applicable" is used in context to bringing PWSA into compliance with the Code and Commission mandates "applicable to *jurisdictional water and wastewater utilities*."[73] In other words, the

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67 PWSA asserts Act 65 (which added Chapter 32 to the Code) does not explicitly conflict with the MAA. PWSA Main Brief, p. 37. Therefore, PWSA states the MAA may coexist with the Code as long as it results in just and reasonable rates. PWSA Main Brief, p. 38.

68 PWSA Main Brief, p. 39.

69 PWSA Main Brief, p. 39.

70 1 Pa. C.S. § 1933 (emphasis added).

71 66 Pa. C.S. § 3202(a)(1); I&E Main Brief, pp. 48-51. PWSA claims that Section 1971 of the Statutory Construction Act is not satisfied, in part because there is not an irreconcilable conflict between statutes. PWSA Main Brief, pp. 39-40. Again, as explained above, Chapter 32 does conflict with the MAA.

72 PWSA Main Brief, pp. 43-44.

73 66 Pa. C.S. § 3204(b) (emphasis added).

meaning of the word "applicable" in this context is that PWSA needs to comply with mandates for jurisdictional water and wastewater utilities, not with requirements applicable only to gas utilities, electric utilities, etc. "Applicable" does not simply indicate any legal authority to the contrary supersedes the Code. Any conflicting authority should be subject of its own analysis, but for line extensions, as explained herein and in I&E's Main Brief, Commission regulations regarding line extensions should control. Chapter 32 otherwise authoritatively states the Code "*shall apply* to an authority in the same manner as a public utility."[74]

PWSA also contends inclusion of a waiver provision in Chapter 32 supports its assertion that the General Assembly did not mandate compliance with the Code and Commission mandates.[75] I&E disagrees. To the contrary, it is precisely because Chapter 32 requires comprehensive compliance with the Code that the General Assembly included the ability to seek specific waiver. The Code mandates compliance with Commission regulations.[76] As explained further below, PWSA's untimely and unjustified request for a waiver should be rejected.

PWSA also relies heavily on 53 Pa. C.S. § 5607(d)(24) to support its claim that it only has the power to apply "one line extension formula" for customers, i.e., the MAA formula.[77] PWSA's reliance on paragraph (24) is incorrect for several reasons. Paragraph

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74 66 Pa. C.S. § 3202 (a) (with limited exceptions regarding Chapters 11 and 21 not relevant here).

75 PWSA Main Brief, p. 43.

76 *See, e.g.,* 66 Pa. C.S. § 501(c) ("Every public utility…subject to the provisions of this part, affected by or subject to any regulations or orders of the commission or of any court, made, issued, or entered under the provisions of this part, shall observe, obey, and comply with such regulations or orders, and the terms and conditions thereof"); 66 Pa. C.S. § 1501 ("[A public utility's] service and facilities shall be in conformity with the regulations and orders of the commission").

77 PWSA Main Brief, pp. 31-32.

(24) only applies to connection fees, customer facilities fees, and tapping fees, or similar fees. The MAA's rules regarding "line extensions" are found not only at paragraph (24), but also 53 Pa. C.S. §§ 5601(d)(21) – (23), (30) – (31). Although the MAA does not actually use the term "line extension," I&E asserts 53 Pa. C.S. §§ 5607(d)(21) through (23) are the more relevant corollaries to Commission regulations regarding line extensions, i.e., these sections apply to main construction and their financing. As defined by Commission regulations, "line extension" refers to the "addition to the utility's *main* line which is necessary to serve the premises of a customer."[78] 53 Pa. C.S. §§ 5607(d)(21) and (22) address what costs a municipal authority can charge for construction of water and sewer mains, and paragraph (23) discusses financing of line extensions. There is no specific discussion of paragraph (24) type fees in Commission regulations. It is telling PWSA does not specifically assert paragraphs (21) through (23) preempt Commission regulations, but only paragraph (24)[79] Any doubt whether 53 Pa. C.S. § 5607(d)(24)(iii) does not apply to paragraphs (21) and (22) is also dispelled by paragraph (24) itself. Specifically, "[Paragraph 24] fees shall be *in addition to* any charges assessed against the property in the construction of a sewer or water main by the authority under paragraphs (21) and (22)."[80] Therefore, any limiting provisions of paragraph (24) are inapplicable to paragraphs (21) and (22).

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[78] 52 Pa. Code § 65.1 (emphasis added).

[79] Nonetheless, for the reasons explained herein and in Main Brief, I&E asserts any conflict should be read in favor of Chapter 32 and Commission regulations.

[80] 53 Pa. C.S. § 5607(d)(24).

Nonetheless, I&E asserts PWSA is incorrect that 53 Pa. C.S. § 5607(d)(24)(iii) supersedes Commission regulations.[81] First, the purpose of 53 Pa. C.S. § 5607(d)(24)(iii) is to limit what fees can be charged under the MAA, not to supplant any subsequent legislative directives to the contrary. Second, PWSA appears to believe Chapter 32 simply provides persons questioning the rates and services of PWSA the opportunity to appear before the Commission for the Commission's determination of consistency with the MAA.[82] This was not the General Assembly's intention in passing Chapter 32. Chapter 32 clearly mandates PWSA's compliance with the Code and Commission rules, regulations, and orders, including 52 Pa. Code §§ 65.21 through 65.23.[83]

The express limitations the General Assembly included in Chapter 32 regarding setting rates to comply with PWSA financial obligations and for the City of Pittsburgh "to determine the powers and functions of [PWSA]" does not otherwise indicate the Commission is bound to the MAA's line extension rules.[84] To the contrary, these limitations demonstrate how the General Assembly included only a few, limited exceptions to its mandate that PWSA comply with the Code and Commission rules, regulations, and orders.[85] PWSA argues with broad strokes that if the Commission found its regulations applied here, the Commission could then direct PWSA to no longer

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81 I&E Main Brief, pp. 52-53.

82 PWSA Main Brief, p. 40.

83 I&E Main Brief, pp. 50-51.

84 *See* PWSA Main Brief, pp. 40-41.

85 I&E Main Brief, p. 51. I&E avers the General Assembly did not intend for its reservation to the City of Pittsburgh "to determine the powers and functions of [PWSA]" to mean the City can decide whether or how PWSA shall comply with the Code and Commission mandates. Such a reading would be absurd and unreasonable considering the entire purpose of Chapter 32 was to bring PWSA under Commission jurisdiction. *See* 1 Pa. C.S. § 1922 ("In ascertaining the intention of the General Assembly in enactment of a statute the following presumptions, among others, may be use: (1) That the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable.")

comply with other MAA provisions and state wide environmental laws.[86] This argument is hyperbolic and not what the Commission is being asked to decide here. The limited issue here is whether Chapter 32 and the Commission's line extension regulations supersede the MAA provisions regarding line extensions. Any other potential conflict will need to be subject of its own independent analysis.

PWSA cites concerns of "litigation and potential damage awards before the courts" should it comply with Commission line extension regulations.[87] First, PWSA did not address this claim in testimony and it is inappropriate to now bring it up for the first time in briefing when no investigation is possible. Second, PWSA's concerns are not valid reasons to forego enforcement of Commission regulations. PWSA is generally reordering its business operations to comply with the Code and Commission regulations. Customers must comply with the law and fear of meritless litigation is not valid grounds for avoiding compliance with Chapter 32. Additionally, PWSA customers are on notice that its tariff provisions regarding line extensions may change. Specifically, PWSA's current water and wastewater tariffs expressly state its current MAA-compliant line extension provisions are subject to change based on this compliance plan proceeding.[88]

Last, PWSA requests that even if the Commission finds PWSA must follow Commission regulations for line extensions, it should waive these regulations to permit PWSA to use Section 5607(d)(24) of the MAA. I&E objects to PWSA's request. First, nowhere in the Compliance Plan or otherwise in the record did PWSA indicate it would

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86 PWSA Main Brief, pp. 41-42.

87 PWSA Main Brief, p. 35.

88 Water Tariff, Part III, Section G; Wastewater Tariff, Part III, Section G

seek such a waiver. Therefore, this request is untimely and the Commission should reject this request on this basis alone. Parties have had no opportunity to develop the record regarding the prudency of this request. Unlike the legal question of whether Commission regulations or the MAA controls regarding line extensions, I&E asserts such a waiver request should be supported on a factual basis. For instance, PWSA claims that the Commission's regulations place a larger burden on the utility,[89] but the accuracy of this claim has no basis in the record. Because PWSA was presenting the issue as a pure legal conflict question, rather than the prudency of waiving regulations, I&E did not have an opportunity to evaluate this new proposal. Second, as explained in I&E's Main Brief, PWSA's claimed hardships in changing its systems is not a valid basis to abandon compliance with Chapter 32.[90] PWSA does and will continue to face many challenges coming under the Commission's jurisdiction. This should be expected for any utility transitioning its practices from one legal regime to another. However, these challenges should not by themselves serve as a basis to waive Commission regulations in the context of this Compliance Plan proceeding. Last, the fact that PWSA's current tariff includes line extension provisions reflecting the MAA is not significant. As mentioned above, its tariffs include terms stating the current line extensions provisions may change based on the results of this Compliance Plan proceeding. For all the foregoing reasons, the Commission should order PWSA to revise its tariff provisions regarding line extensions to comply with 52 Pa. Code §§ 65.21-65.23.

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89 PWSA Main Brief, p. 46.

90 I&E Main Brief, pp. 55-56.

D. PWSA's Residency Requirement

In the face of a choice between operating efficiently, cost-effectively, and in conformance with its compliance obligations, or placating the City by continuing to enforce a City residency requirement that harms its operations, PWSA unfathomably chooses the latter. I&E submits that PWSA proposal to continue enforcing its residency requirement, even as its Main Brief acknowledges that the requirements "makes it challenging to meet its obligations under the Public Utility Code"[91] exemplifies PWSA's apparent unwillingness or inability to put its operations above City interests. The Commission must reject PWSA's proposal and order it to revise its Compliance Plan to eliminate the residency requirement.

In its Main Brief, I&E explained the politically-motivated genesis of PWSA Board's adoption of the residency requirement,[92] which, notably, PWSA does not allege to provide any benefit to its operations or to its ratepayers. Instead, among other things, PWSA has previously admitted that its residency requirement results in increased costs, challenges its ability to hired skilled and necessary employees, and compromises its ability to pursue diversity goals. Specifically, PWSA admits that the cost premium for contractors that it must hire to circumvent the residency requirement is estimated to be 150% to 200%, which equates to an addition of more than $2 million in annual costs to PWSA's non-unionized workforce.[93] Additionally, PWSA indicates that requirement has thwarted its ability to hire qualified water treatment operators, plumbers, laboratory staff,

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91 PWSA Main Brief, p. 12.

92 I&E Main Brief, pp. 58, 60.

93 I&E Main Brief, pp. 62-63 I&E Ex. No. 2, Sch. 7, p. 2.

project manager, welders, electrician, and mechanics who are necessary to address its everyday maintenance and operational needs.[94] Finally, PWSA claimed that its residency requirement hinders its ability to achieve the Commission's policy goals for diversity at 52 Pa. Code §§ 69.801-69.809[95]

In its Main Brief, PWSA erroneously claims that I&E has not linked its residency requirement with non-compliance of the Code, or Commission regulations, although I&E clearly demonstrated such non-compliance.[96] More specifically, I&E demonstrated violations of Section 1501[97] and 1301[98] of the Code, and frustration of the Commission' diversity policy goals at 52 Pa. Code §§ 69.801-69.809,[99] respectively as follows: (1) PWSA's residency requirement frustrates its ability to hire skilled employees who are necessary to address its everyday maintenance and operational needs, resulting in a violation of Section 1501[100] of the Code which requires utilities to furnish and maintain adequate, efficient, safe, and reasonable service;[101] (2) by producing at least an estimated $2 million annually in increased costs without adding any added value to PWSA or its ratepayers, PWSA's residency requirement violates Section 1301 of the Code which requires PWSA to charge only just and reasonable rates;[102] (3) PWSA's residency requirement frustrates its ability to achieve the diversity goals articulated in the

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94 I&E Main Brief, pp. 63-65, I&E St. No. 2, p. 38; I&E Ex. No. 2, Sch. 7, p. 2.

95 PWSA St. No. C-2, p. 15.

96 PWSA Main Brief, pp. 49-50.

97 66 Pa. C.S. § 1501.

98 66 Pa. C.S. § 1301.

99 I&E Main Brief, pp. 65-67; 52 Pa. Code § 69.801-§ 69.809.

100 66 Pa. C.S. § 1501.

101 I&E Main Brief, pp. 63-65.

102 I&E Main Brief, pp. 62-63.

Commission's Policy Statement at 52 Pa. Code §§ 69.801-69.809, because its candidate pool is artificially limited.[103]

Notably, PWSA has not refuted the Code and regulatory violations that I&E alleges. On the contrary, in its Main Brief, PWSA provides additional support for I&E's position that its residency requirement results in wasteful costs. Specifically, PWSA indicates that because of the residency requirement, it must pay a staffing agency, Peak Staffing Services, to hire temporary employees. Additionally, PWSA must pay Peak Staffing Services an additional "royalty" payment if it wishes to hire the temporary employee for permanent employment.[104] I&E submits that this costly arrangement provides additional foundation for I&E's position that PWSA's residency requirement violates Section 1301[105] since payments to Peak Staffing Services result in increased costs to PWSA. I&E notes PWSA's payments to Peak Staffing Services are necessary only to circumvent application of PWSA's residency requirement, and there is no evidence of any value to ratepayers that derives from this contrived arrangement. Accordingly, although PWSA has not provided any evidence to dispel the conclusion that its residency requirement violates the Code, it has provided an additional basis for that conclusion.

The uncontroverted evidence proves that PWSA's residency requirement produces a result that violates the Code, frustrates diversity goals, and that challenges its ability to provide adequate, efficient, safe, reliable and reasonable service to its ratepayers.

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[103] I&E Main Brief, pp. 65-67.

[104] PWSA Main Brief, p. 49.

[105] 66 Pa. C.S. § 1301.

Because it is unable to refute the evidence, PWSA instead attempts to support its residency requirement as being within its Board's managerial discretion. According to PWSA, its decision to enforce the residency requirement is the type of utility decision that should not be subject to the Commission's micromanagement when the utility exercises reasonable judgment in choosing how it will meet its statutory and other legal obligations.

The fatal flaw in PWSA's argument is that the evidence proves its adoption of the residency requirement is completely antithetical to meeting its statutory and other legal obligations. PWSA completely ignores the Commission's clear authority and obligation to enforcement the Code and its regulations, which as explained above, prohibit results that PWSA's residency requirement is proven to produce. Furthermore, the fact that PWSA's Board views the residency requirement as a management decision is of no consequence here because the Commission previously determined that it "will not defer to PWSA Board decisions as to compliance with the Public Utility Code (including Chapter 32) or Commission regulations."[106] Instead, the Commission expects PWSA's "ultimate end-state compliance" with the Code and Commission regulations,[107] and because PWSA's residency requirement prohibits that outcome, the Commission must order PWSA to revise its Compliance Plan to eliminate the requirement.

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[106] *Implementation of Chapter 32 of the Public Utility Code Re Pittsburgh Water and Sewer Authority*, M-2018-264802 et al, Final Implementation Order, pp. 17-18 (entered on March 15, 2018).

[107] Id. at p. 33.

E. Lead Remediation Issues

1. Replacement of Private-Side Lead Service Lines Not Scheduled For Replacement Through PWSA's Current Lead Service Line Replacement Program

a) Income-Based Reimbursement for Private-Side Lead Service Line Replacements Initiated By Property Owner

(i) The Commission's Clear Authority Over Service Issues Resulting Solely From Lead Infrastructure

At the outset, the Commission should reject PWSA's attempt to avoid accountability for replacing all residential lead service lines in its system. PWSA's attempt to avoid accountability is predicated on PWSA's faulty attempt to evade the Commission's clear authority to address the quality of service and safety of service issues arising because of lead infrastructure. PWSA's makes this attempt by couching the lead infrastructure issue as a water quality issue within the purview of the Pennsylvania Department of Environmental Protection ("PA DEP"). As I&E explained in its Main Brief, while elevated lead levels in PWSA's water do now present a water quality issue, the uncontroverted evidence in this case proves that the genesis of the elevated lead levels is a direct result of water service that it distributed through lead infrastructure.[108]

Although PWSA seeks shelter from the Commission's authority to address its lead lines through alleged "seminal cases," the precedent it cites is not determinative or relevant here. The cases cited, *Rovin* and *Pickford* are not determinative or relevant because this is not a case where PWSA added a chemical into its water that impacts water quality, which is the origin of the issues underlying both *Rovin* and *Pickford*. On the

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[108] I&E Main Brief, p. 69; PWSA Compliance Plan, p. 119.

contrary, this is a case in which a water quality issue resulted directly from the provision of service through unsafe lead infrastructure. As I&E explained in its Main Brief, I&E acknowledges precedent that provides for a distinction between **water** *service,* which the Commission may regulate, and **water** quality, which may only be regulated by the DEP.[109] The distinction is determinative because precedent establishes that the Commission's jurisdiction covers matters including "hazards to public safety due to the use of utility facilities. . . ."[110] PWSA fails to acknowledge this distinction, which it cannot overcome, and instead it attempts to rely on *Rovin* and *Pickford*, which as illustrated below, address water quality issues that result from chemicals that utilities directly added into their water.

By way of further context, in *Rovin*, the question pending before the Commonwealth Court was "Does the PUC have authority to decide a complaint wherein a water company customer alleges that the practices of the company regarding fluoridation of the water it supplies its customers are not "adequate, ... safe and reasonable" as required by [Section 1501 of the Code]?"[111] Similarly, In *Pickford*, the petitioners' central issue was whether it was more prudent for the utility to use an alternate decontaminant additive to his water, as opposed to the additives used and that DEP permitted, chloramines.[112] As made clear in the issues posed in *Rovin* and *Pickford*, the focal point of the jurisdictional determination was whether a fluoride and chloramines, chemicals directly added by a public utility into its water supply, failed to

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[109] *Pickford v. Pa. P.U.C.*, 4 A.3d 707, 713 (Pa. Commw. 2010) (emphasis added).

[110] *PECO Energy Co. v. Township of Upper Dublin*, 922 A.2d 996, 1001 (Pa. Commw. 2007).

[111] *Rovin v. Pa P.U.C.*, 94 Pa. Cmwlth. 71, 73, 502 A.2d 785, 786 (1986).

[112] *Pickford v. Pa. PUC,* 4 A.3d 707, 714 (Pa. Cmwlth. 2010).

provide the utility's customer with adequate, safe, and reasonable water service. Accordingly, while PWSA is correct that the Commonwealth answered the question in the negative, those outcomes are not determinative, or even relevant, here.

Instead, what is determinative and relevant here is that PWSA is not providing adequate, safe, and reasonable water service to its customers because the lead service lines now providing service to its customers are comprised of a dangerous material. No party in this case disputes this fact. Although water quality issues result from lead leaching from the service lines into the water supply, the undisputed, determinative fact here is that providing water service through lead service lines is unsafe and antithetical to PWSA's obligation to provide adequate, safe, and reasonable water service. PWSA is providing unsafe service that, in turn, produces unsafe water, not vice versa. Therefore, under Section 1501 of the Code,[113] the Commission has clear authority to address lead service lines in PWSA's system and to prescribe standards and conditions necessary for the provision of adequate, safe, and reasonable service through replacement of those lines.

Acknowledging the Commission's clear authority over PWSA's lead infrastructure is necessary to honor both the legislative intent that drove the General Assembly to convey the Commission's jurisdiction over PWSA, as well as the express language of the resulting statute that memorialized that jurisdiction. First, as I&E explained in its Main Brief,[114] the sponsors of the legislation that now underlies the

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[113] 66 Pa. C.S. § 1501.

[114] I&E Main Brief, pp. 5-6.

Commission's jurisdiction of PWSA explained that the basis for jurisdiction lay, in part, because "customers of PWSA need to know that their water is safe."[115] Additionally, the legislate sponsors also indicated that "this is about providing necessary help to protect the health and safety of those citizens relying on PWSA for provision of clean water."[116] I&E submits that by these words, the legislature expressly indicted that it was relying on the Commission to use its authority to ensure that PWSA's provided safe service to customers as necessary to ensure that customers could have confidence in their water service. By denying the Commission authority to address PWSA's lead service lines, a key action necessary to both restore customer confidence and to protect their health and safety, express and essential legislative goals would be thwarted.

To the extent that the legislative guidance behind Chapter 32 leaves any doubt that the legislature empowered the Commission to address PWSA's lead service lines, Chapter 32 itself resolves the doubt in favor of the Commission. More specifically, through Section 3205, "Maintenance, repair and replacement of facilities and equipment"[117] the General Assembly provided express authorization for the Commission to address PWSA's service lines:

> The commission may require an **authority to maintain, repair and replace facilities and equipment used to provide services** under this chapter to ensure that the equipment and facilities comply with section 1501 (relating to character of service and facilities).[118]

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[115] House Co-Sponsorship Memoranda for HB 1490, PA House of Representatives, Session of 2017-2018 Regular Session, May 24, 2017.

[116] Id.

[117] 66 Pa. C.S. § 3205.

[118] 66 Pa. C.S. § 3205(a) (emphasis added).

In this case, it is clear and undisputed that lead service lines, regardless of whether they are customer-owned or owned by PWSA, are facilities used to provide water service to PWSA's customers. Thus, the Commission has express authority over all lead lines used to facilitate water service provided by PWSA. Although PWSA fails to acknowledge this authority, its failure does not diminish the Commission's clear mandate. Accordingly, PWSA's argument that the Commission has no jurisdiction over the replacement of PWSA's lead lines is without merit and contrary to legislative intent as well as the clear and unambiguous statutory language of chapter 32; therefore, it must rejected.

(ii) PWSA Can and Should Address Private Water Service Lines in Order to Provide Adequate, Safe, and Reasonable Water Service

A key component of PWSA's argument against any requirement that it replace private-side lead service lines is that those lines are customer-owned and therefore any PWSA efforts to replace those lines are voluntary, not compulsory.[119] In defense of its position, PWSA claims that the Commission does not have the authority to order the replacement of private-side lead lines and that replacing these lines is not necessary from a health and safety standpoint.[120] I&E submits that PWSA is wrong in both respects.

First, although PWSA is correct that the only specific Code reference regarding replacement of customer-owned lead lines are in Section 1311(b)[121] regarding rate recovery for a utility's voluntary replacement of those lines,[122] PWSA ignores other implicit Code authority. By way of further explanation, through Chapter 32, the General

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[119] PWSA Main Brief, p. 56.

[120] PWSA Main Brief, p. 59.

[121] 66 Pa. C.S. § 1311(b).

[122] PWSA Main Brief, pp. 70-71.

Assembly provided express authorization for the Commission to address PWSA's service lines, and it did not limit the authority to public service lines:

> The commission may require an **authority to maintain, repair and replace facilities and equipment used to provide services** under this chapter to ensure that the equipment and facilities comply with section 1501 (relating to character of service and facilities).[123]

As indicated above, the General Assembly gave the Commission clear authority to address the replacement of all PWSA facilities used to provide service as necessary to comply with Section 1501.[124] In this case, it is clear and undisputed that lead service lines, regardless of whether they are customer-owned or owned by PWSA, are facilities used to provide water service to PWSA's customers.

PWSA has failed to recognize the Commission's authority under Section 3205, which the legislature enacted specific to PWSA's jurisdictional transition, just as it fails to recognize the interrelated authority of Section 1501. Specifically, Section 1501 requires PWSA to do the following:

> furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public.[125]

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[123] 66 Pa. C.S. § 3205(a) (emphasis added).

[124] 66 Pa. C.S. § 1501.

[125] 66 Pa. C.S. § 1501.

Accordingly, the clear language of Section 1501[126] imposes an obligation upon PWSA to make repairs and changes to facilities necessary to ensure safe service and public safety. I&E submits that Sections 3205 and 1501 work in tandem to provide the Commission with authority over the replacement of lead service lines, even if they are customer-owned lines, Specifically, Section 3205[127] provides the Commission with authority to require PWSA to replace facilities used to provide service, as necessary to effectuate Section 1501. In turn, Section 1501 requires PWSA to make repairs and changes necessary for the safety of its patrons and the public. PWSA fails to acknowledge these authorities, but that failure does not make them any less operative.

On a related point, PWSA's argument that replacing private-side lead lines is not necessary from a health and safety standpoint is against the weight of evidence. Instead, in its Compliance Plan, PWSA directly admits that while there is no detectable lead in its water when the water leaves the treatment plant, "lead can enter drinking water through lead service lines and household plumbing."[128] Here, PWSA explicitly acknowledges that all lead service lines are susceptible to leaching lead into PWSA's water, not just publicly-owned service lines. Furthermore, PWSA's specific reference to "household plumbing" acts as an acknowledgment that private-side lead is a notable contributing factor of lead levels in PWSA's water.

At the same time, no party has disputed that lead is a public health concern, the recognition of which was a motivating factor that led to legislation that permitted water

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126 Id.

127 66 Pa. C.S. § 3205.

128 PWSA Compliance Plan, p. 119.

utilities to recover the cost of private-side lead line replacements.[129] On the contrary, the undisputed record evidence offered in the testimony of UNITED witness Dr. Bruce Lanphear indicates that that lead is toxic to the central nervous system and to the cardiovascular system, and it damages numerous organ systems and causes permanent, irreversible injuries to children's developing brains. Dr. Lanphear also indicated that lead exposure has also been associated with increased incidence of miscarriage, delays in time to achieve pregnancy, and irreversible neuropsychological and developmental effects in children.[130]

Accordingly, I&E avers that by way of Sections 1501 and 3205 of the Code, the Commission has authority to compel PWSA to replace private-side lead lines as long as they represent a safety risk to PWSA's customers in the course of PWSA's service. To be sure, I&E submits that the application of this standard must be used judiciously for use in only those situations where health and safety issues result from dangerous infrastructure used in the course of delivering jurisdictional service. Those standards are met here. For these reasons, and as explained above, PWSA's arguments to the contrary are without merit.

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[129] I&E Main Brief, pp. 90-91. House Co-Sponsorship Memoranda for HB 2075, PA House of Representatives, Session of 2017-2018 Regular Session, February 1, 2018 (emphasis added).

[130] I&E Main Brief, p. 82; UNITED St. No. C-3, pp. 8-9.

(iii) PWSA's Significant and Commendable Lead Remediation Efforts Will Be Diminished in Value and Effectiveness If Private Side Lean Lines Remain

Although PWSA argues that the extraordinary efforts is has made towards lead remediation and lead line replacement "are not enough for opposing parties,"[131] its argument misconstrues I&E's position in this case. To be sure, I&E recognizes and commends the efforts and hard work that PWSA has undertaken to address lead levels in its water.[132] Unfortunately, the value of PWSA efforts will be eroded over time if the income-based reimbursement provision of PWSA's lead line replacement program is approved because it will compromise customers' ability to replace private-side lead lines. As a result, more lead lines will remain in PWSA's system, which, over time, could result in "serious episodes of lead release" as a result of unintended changes in water quality, physical disturbance, or through changes in water chemistry.[133]

The evidence in this case supports I&E's position. First, evidence demonstrates that the best way to prevent lead from leaching from water lines and home plumbing systems into PWSA's water is to remove lead lines completely,[134] and no party has successfully refuted this conclusion. Additionally, the evidence proves that the income-based reimbursement provision of PWSA's will be cost-prohibitive. Significantly, PWSA's existing LSLR policy indicates that the average cost to replace private side lead lines is $5,500, and it requires impacted ratepayers to pay for replacement and then await

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[131] PWSA Main Brief, p. 55.

[132] I&E Main Brief, p. 73.

[133] UNITED St. No. C-2 SUPP-R, p. 9.

[134] PWSA Ex. Stip Doc. 1, p. 58; UNITED St. No. C-2 SUPP-R, p. 9.

the level of reimbursement PWSA's deems appropriate.[135] OCA witness Rubin and UNITED witness Miller provided fact-based testimony and cited statistics to support that customers in PWSA's service territory cannot afford the high cost of such replacement, let alone wait for reimbursement of those costs, presenting an insurmountable obstacle to private-side lead replacement.[136]

In its Main Brief, PWSA attempts to circumvent these realities by alleging that it intended to structure its reimbursement program in a manner that would require PWSA to pay the contractor to eliminate the need for the customer to "front" payments and await reimbursement.[137] However, PWSA's attempt is ineffective because its alleged intended plan to "front" costs is not part of the LSLR policy its Board adopted on July 26, 2019,[138] which is currently in place. Even assuming, *arguendo*, that PWSA would commit to "fronting" replacement costs, it still has not addressed the fact that many impacted ratepayers will not be able to afford the replacement, regardless of when payment is due and regardless of which entity accepts the payment. I&E submits, and the evidence in this case demonstrates, the lack of affordability resulting from the income-based provision of PWSA's LSLR program will compromise lead line replacement goals.[139]

Yet another way that the income-based provision of PWSA's LSLR program will diminish the value of its lead line replacement efforts is through the high costs necessary to administer the program. Specifically, PWSA's high estimated cost for administering

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[135] PWSA Ex. RAW C-46, p. 2.

[136] I&E Main Brief, pp. 86-88; UNITED St. C-1-Supp-R, pp. 5-6; OCA St. No. 2R-Supp, pp. 5-6.

[137] PWSA Main Brief, pp. 73-74.

[138] PWSA Ex. RAW C-46.

[139] I&E Main Brief, pp. 87-88; I&E St. No. 4-RS, p. 6.

the policy, $1,000 per customer,[140] will significantly dilute PWSA funds that could otherwise be used towards lead line replacement. Specifically, as I&E explained in its Main Brief, the high cost of administering the policy would be better spent as construction dollars towards the replacement of private side lead lines.[141] PWSA has not refuted this position.

(iv) PWSA's Cost Concerns Improperly Subordinate Public Safety to City Interests

PWSA alleges that its ratepayers will save $8 million- $18 million as a result of implementation of the income-based provision of PWSA's LSLR program,[142] but even if true, the savings will come at the expense of safety for the reasons I&E explained above. In clear elevation of City interests above ratepayer safety, PWSA proposes the income-based provision of its LSLR program, which will put private-side lead line replacement out of reach for many impacted ratepayers, in this proceeding while simultaneously requesting that the City be permitted to continue to receive free or reduced cost water and wastewater service, among other things.[143] As I&E noted in its Main Brief, to the extent that PWSA's concern is for ratepayer costs, it is well-positioned to either completely alleviate or mitigate those concerns by (1) eliminating free water and wastewater service to the City, charging the City tariffed rates, and otherwise transacting with the City on an arm's-length, business-like basis, and (2) eliminating its residency requirement which is escalating costs without adding any value to ratepayers.[144] Instead of taking these actions

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[140] I&E St. No. 4-RS, p. 6; I&E Ex. No. 4-RS, Sch. 1.

[141] I&E Main Brief, p. 85; I&E St. No. 4-RS, p. 6.

[142] PWSA Main Brief, pp. pp. 63-64.

[143] I&E Main Brief, p. 92.

[144] I&E Main Brief, p. 93.

to recoup forfeited revenue, which may annually meet or exceed the $8 million- $18 million savings PWSA touts, PWSA elects to impose a policy that will thwart the replacement of lead service lines that detrimentally impacts its system. Under these circumstances, its alleged concern for ratepayer costs are misplaced and without merit.

b) Continuation of Neighborhood-Based Replacement Program

As indicated in I&E's Main Brief,[145] I&E has addressed its concerns regarding PWSA's proposal to transition its lead replacement program from a neighborhood-based program to its Small Diameter Water Main Replacement Program ("SDWMRP")[146] through the Partial Settlement.[147] However, I&E continues to note that PWSA has not provided any evidence to support that its SDWMRP alone will remove all lead-service lines by 2026, the target goal for replacement.[148] To that end, while I&E is not litigating this issue, its absence of litigation on this issue should not be construed to either support or oppose any position offered by any party.

2. Replacement of Non-Residential Lead Service Lines

As indicated in I&E's Main Brief,[149] I&E has not taken a position on whether and how PWSA should be compelled to replace non-residential lead service lines as part of this Compliance Plan proceeding. The lack of an I&E position is not a result of indifference. Instead, I&E has been unable to take an informed position on this case

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[145] I&E Main Brief, pp. 95-96.

[146] I&E St. No. 4, p. 23.

[147] *Implementation of Chapter 32 of the Public Utility Code Regarding Pittsburgh Water and Sewer Authority, Stage 1,* M-2018-2640802 et al, *Joint Petition for Partial Settlement,* p. 46, ¶¶ III(QQ)(2)(c) (September 13, 2019).

[148] I&E St. No. 4, p. 28.

[149] I&E Main Brief, pp. 96-97.

because critical information necessary to the resolution of this issue, the number and composition type of the service lines at issue, is pending and will be developed on a PA DEP-prescribed timeline; therefore is not available and may not be available until 2022.[150] For these reasons, the lack of an I&E position should not be interpreted to either support or oppose any position offered by any party.

VI. CONCLUSION

As explained above, the evidence supports the conclusion that PWSA's Compliance Plan is deficient in several areas that will prevent PWSA from adequately ensuring and maintaining provision of adequate, efficient, safe, reliable and reasonable service to its ratepayers. In its Main Brief, as well as in its case-in chief, PWSA has failed to overcome this evidence. In order to remedy the identified deficiencies, and to ensure that PWSA's Compliance Plan is sufficient to ensure and maintain its ability to provide adequate, efficient, safe, reliable and reasonable service to its ratepayers, I&E respectfully requests that the Commission require PWSA to revise its Compliance Plan to set forth a plan to:

1. transition from its 1995 Cooperation Agreement with the City to begin operating on a business-like, arm's-length basis with the City;

2. become responsible for the cost of all meter installation, including the installation at City properties, in accordance with 52 Pa. Code § 65.7;

3. introduce a flat rate, at minimum the customer charge for the customer's class, for all unbilled customers in its next base rate case, and, as customers are metered, to immediately bill full usage;

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[150] UNITED St. No. C-2, Appendix C, pp. 13-14. See also PWSA St. No. C-1R, pp. 42-43 and PWSA St. No. C-1R-Supp, p. 5 (each referencing the November 17, 2017 Consent Order and Agreement entered into by PWSA and the PA DEP).

4. revise its proposed step-billing approach for City public fire hydrant charges and instead set forth a plan to charge the full amount of whatever percent allocation is determined in PWSA's next rate proceeding;

5. consistent with the recognition that where conflicts exist, the Code and Commission regulations and orders supersede the Municipality Authorities Act ("MAA"), comply with 52 Pa. Code §§ 65.21-65.23 regarding a utility's duty to make line extensions, and revise its tariff and operations accordingly;

6. immediately eliminate its residency requirement; and

7. strike the income-based reimbursement provision of its lead service line replacement policy in favor of a plan to replace all public and private residential lead lines in its distribution system.

Respectfully submitted,

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Dated: September 30, 2019

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Implementation of Chapter 32 of the Public Utility Code Re Pittsburgh Water and Sewer Authority	:	Docket Nos. M-2018-2640802 (Water) M-2018-2640803 (Wastewater)

CERTIFICATE OF SERVICE

I hereby certify that I am serving the foregoing **Reply Brief** dated September 30, 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):

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