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

BUREAU OF
INVESTIGATION
&
ENFORCEMENT

November 18, 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-2018-2640802 (Water)
Docket No. M-2018-2640803 (Wastewater)
I&E Exceptions

Dear Secretary Chiavetta:

Enclosed for filing, please find the Bureau of Investigation and Enforcement's (I&E) **Exceptions** 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,

Gina L. Miller
Prosecutor
Bureau of Investigation & Enforcement
PA Attorney I.D. No. 313863
(717) 787-8754
ginmiller@pa.gov

Enclosure
GLM/ac

cc: Honorable Mark A. Hoyer (*ALJ Pittsburgh*)
Honorable Conrad A. Johnson (*ALJ Pittsburgh*)
Office of Special Assistants (*via email only RA-OSA@pa.gov*)
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

EXCEPTIONS
OF THE
BUREAU OF INVESTIGATION AND ENFORCEMENT

Gina L. Miller
Prosecutor
Bureau of Investigation and Enforcement
PA Attorney I.D. No. 313863

John M. Coogan
Prosecutor
Bureau of Investigation and Enforcement
PA Attorney I.D. No. 313920

Bureau of Investigation and Enforcement
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor West
Harrisburg, Pennsylvania 17120

Dated: November 18, 2019

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I. INTRODUCTION

This novel and complex proceeding began on September 28, 2018 when Pittsburgh Water and Sewer Authority ("PWSA") filed its statutorily-required Compliance Plan[1] to bring its operations into compliance with the Pennsylvania Public Utility Code ("Code"), as well as applicable rules, regulations and orders of the Pennsylvania Public Utility Commission ("Commission").[2] The Bureau of Investigation and Enforcement ("I&E") notes that this proceeding represents the Commission's review of the first legislatively-required compliance plan under the Code. While I&E will not reiterate the lengthy procedural history of this case, which is thoroughly outlined in its Main Brief[3] and in the Recommended Decision[4] of Deputy Chief Administrative Law Judge Mark A. Hoyer and Administrative Law Judge Conrad A. Johnson (the "ALJs") a few salient points bear repeating to provide context for these Exceptions.

Specifically, it is important to recognize that on March 18, 2018, the Commission issued a Final Implementation Order,[5] which provided important guidance about its

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1 Three appendices were included with the Compliance Plan document. Appendix A is a 20-page document titled "Focusing on the Future", that PWSA characterizes as an "Organizational and Compliance Plan." Compliance Plan, p. 8 (not to be confused with the Chapter 32-mandated Compliance Plan). Appendix B includes the 1995 Cooperation Agreement between PWSA and the City of Pittsburgh and 2011 amendment thereto. Appendix C includes PWSA's Long-Term Infrastructure Improvement Plan ("LTIIP") which was required to accompany PWSA's Compliance Plan. 66 Pa. C.S. § 3204(b). The LTIIP was separately docketed at Docket Nos. P-2018-3005037 and P-2018-3005039. The LTIIP and Compliance Plan proceedings were consolidated on February 21, 2019 by the ALJs in their *Final Interim Order Granting Motion for Consolidation of Proceedings.*

2 66 Pa. C.S. § 3204(b).

3 I&E Main Brief, pp. 15-16.

4 Recommended Decision ("RD") at 2-8.

5 *Implementation of Chapter 32 of the Public Utility Code Re Pittsburgh Water and Sewer Authority*, M-2018-264802 et al, Final Implementation Order (entered on March 15, 2018) (hereinafter, "*Final Implementation Order.*")

expectation for PWSA's full compliance. Significantly, the Commission expressed an expectation that PWSA's compliance plans would detail how PWSA will reach "ultimate end-state compliance" with the Code and Commission regulations.[6] Additionally, the Commission noted that while "voluntary compliance is the preferred regulatory mode" and that it appeared that PWSA understood and acknowledged its regulation by the Commission, the Commission would act to achieve compulsory compliance if circumstances were to necessitate that approach.[7] I&E submits that PWSA largely met the Commission's expectation for voluntary compliance, which is exemplified by the fact that parties were able to resolve an estimated 75% of the 186 issues raised. [8] Yet, despite those efforts, the unresolved compliance issues in this case are in areas in which (1) PWSA's proposed plans will not achieve end-state compliance; and (2) PWSA will be unable to meet its obligation to adequately ensure and maintain its provision of adequate, efficient, safe, reliable and reasonable service. To cure these deficiencies, I&E recommended that PWSA 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 of 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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6 Id. at 33.

7 Id. at 18.

8 *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. 47. ¶ 47 (September 13, 2019).

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.

On October 29, 2019, the ALJs issued their Recommended Decision which, in part, adopted I&E's recommendations one through three (related to the Cooperation Agreement, costs of meter installation, and customer charge for unmetered properties, respectively) and five (determining the Code supersedes the MAA).[9]

However, as explained below, the Recommended Decision erred in its determinations regarding I&E's remaining recommendations regarding PWSA's non-compliant step-billing plan for fire hydrants, PWSA's non-compliant residency requirement, and the non-compliant income-based reimbursement provision of PWSA's lead service line replacement policy. First, the ALJs erred by failing to recommend that PWSA be ordered to revise its proposed step-billing approach for City of Pittsburgh ("City") public fire hydrant charges. Significantly, it appears that the ALJs have misunderstood that PWSA is proposing, as part of this case, to establish the same step-

[9] RD at 218.

billing proposal for fire hydrant charges that the ALJs determined was impermissible for unbilled properties. To that end, the ALJs' determination that no recommendation to address PWSA's fire hydrant proposal is needed at present[10] is squarely at odds with the record and with the ALJs' determination on the same issue with respect to unbilled metering. Additionally, the ALJs erred by failing to recommend that PWSA be ordered to set forth a plan to immediately eliminate its residency requirement because record evidence proves that the arbitrarily determined requirement produces a result that violates Sections 1301 and 1501 of the Code. The ALJs' conclusion that the requirement is a management decision outside the purview of the Commission's authority[11] is contrary to the facts of this case, applicable standards, and the Commission's own determination that it "will not defer to PWSA Board decisions as to compliance with the Public Utility Code (including Chapter 32) or Commission regulations."[12]

Furthermore, the ALJs erred by failing to recommend that PWSA be required to strike the income-based reimbursement provision of its Lead Service Line Replacement Program ("LSLR Program"). Although the ALJs' determination on this issue is predicated on their conclusion that the Commission lacks jurisdiction to order PWSA to replace customer-owned lead service lines,[13] that determination fails to account for provisions in the Code that uniquely apply to the circumstances of PWSA's service. More specifically, Sections 3205 and 1501 of the Code support the conclusion that the

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[10] RD at 129.

[11] RD at 163.

[12] Id. at 17-18.

[13] RD at 213

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 service lines present health and safety concerns to PWSA's customers and the public. That standard has been met in this case, and the ALJs erred by failing to recognize this fact. Finally, the ALJs erred by approving PWSA's LSLR Program without striking its income-based reimbursement provision, which evidence reveals is arbitrarily determined, cost-prohibitive, and will compromise safety by unnecessarily compromising lead line replacement goals.

II. EXCEPTIONS

1. The ALJs erred by finding the step-billing approach for City public fire hydrant charges is not before the Commission at this time.[14]

The ALJs erred by addressing the wrong issue regarding public fire hydrants. Specifically, I&E avers the ALJs confused parties' agreement regarding a phase-in of PWSA's rate design allocation for public fire hydrant costs with parties' agreement that PWSA's billing plan for public fire hydrant charges was ripe for adjudication in this proceeding.[15] PWSA's "billing plan" for public fire hydrant charges is the same five-year step-billing approach it proposes for all City of Pittsburgh ("City") property water usage charges.[16] By contrast, there is no specific proposal in the record for a "phase-in" and parties agreed to defer this issue to the next rate case.

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[14] RD at 129.

[15] *Joint Petition for Partial Settlement*, p. 23.

[16] *See, e.g.*, PWSA Main Brief, p. 30.

The parties explicitly agreed that PWSA's step-billing proposal for City water usage charges, including public fire hydrants, would be briefed in this proceeding. In the *Joint Petition for Partial Settlement*, parties agreed PWSA's billing plan for public fire hydrants was a distinct issue from a phase-in proposal, ripe for adjudication, as follows:[17]

> **A. Allocation of Public Fire Hydrant Costs**
>
> i) In the next rate case, PWSA will provide a class cost of service study reflecting all public fire hydrant costs. PWSA will present a rate design reflecting allocation of 25% of all public fire hydrant costs to the City with its next rate case proposal. PWSA reserves the right to propose a *phase-in* period at that time.
>
> ii) Because the *billing plan* for public fire hydrants within the City of Pittsburgh is an issue within the City Cooperation Agreement between PWSA and the City of Pittsburgh, the parties agree to submit briefs regarding their position to include their responses to the applicable Commission Directed Questions.

The ALJs already found that PWSA's step-billing proposal for City properties generally is unreasonable.[18] However, the ALJs stated that PWSA's "step-billing approach" for public fire hydrants is not before the Commission at this time.[19] I&E respectfully submits the ALJs confused the issues and interchangeably, but mistakenly, referred to step-billing and a phase-in as the same concept. The ALJs did not distinguish the two issues or otherwise clearly state both the phase-in *and* step-billing issues are not ready for Commission action. Because of this error, the Commission should grant this Exception and prohibit PWSA's use of a step-billing approach for public fire hydrant

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[17] *Joint Petition for Partial Settlement*, p. 23 (emphasis added).

[18] RD at 127-128.

[19] RD at 129.

charges for the same reasons the ALJs found a step-billing approach for City properties generally is unreasonable. To find otherwise would lead to inconsistent conclusions for City fire hydrant charges and all other City charges without a distinguishable basis.

Further background on a "phase in" versus "billing plan" may be helpful. Parties did not agree to a specific definition of a "phase-in", but presumably it would be a scenario where the City is charged less than a 25% cost allocation for public fire hydrants at first, with increasing amounts to be charged at a later time. This is different than PWSA's "step-billing" plan. PWSA's step-billing plan is a specific proposal to charge the City 20% of its bill for water usage in the first year, and for each successive year to charge an additional 20%, until 100% of the City's bill is charged.[20] I&E acknowledges PWSA could propose a phase-in approach that simply mimics its step-billing proposal. For instance, in the next rate case proceeding, PWSA may provide a 25% allocation to the City for fire hydrant costs, but propose that the City only be charged a 5% allocation per year, escalated to 25% over a five year period.[21] If PWSA simply attempts to introduce its step-billing plan under a different guise, but with the same rationale, I&E will likely oppose the plan. However, the shape and form of the "phase-in" has not been predetermined or otherwise vetted by the parties, and is not presently before the

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[20] *See, e.g.*, PWSA Compliance Plan, p. 110.

[21] This appears to be PWSA's intention regarding a "phase-in", revealed for the first time in briefing. PWSA Main Brief, p. 30; PWSA Reply Brief, pp. 12-13. The Commission should reject PWSA's characterization that a phase-in proposal would be the same as its step-billing proposal, and therefore the step-billing proposal for public fire hydrants should not now be considered by the Commission. Parties distinctly agreed these were separate issues. To find otherwise would render the distinction between a phase-in and billing plan agreed to by parties in the *Joint Petition for Partial Settlement* meaningless.

Commission. Recognizing that charging the City less than a 25% allocation is distinctly possible under the Code,[22] I&E agreed PWSA should be allowed to present some sort of proposal, if they wish, whatever it may be, so parties and the Commission will have an opportunity to fully evaluate any distinct rate design proposal for public fire hydrant costs. But the Commission should grant this Exception to be clear that PWSA cannot institute its 20/40/60/80/100 step-billing plan, whether for fire hydrants or any other City usage charges. Therefore, as stated in I&E's Main Brief, the Commission should order PWSA to charge the City the full amount (i.e., 100%) of whatever percent cost allocation is determined appropriate in the next proceeding.

2. The ALJs erred by finding that the Commission lacks the power to alter PWSA's residency requirement[23] because the evidence in this case proves that the arbitrary requirement produces a result that violates Sections 1301 and 1501 of the Code.

At the outset, despite the ALJs' determination that PWSA's residency requirement is a management decision outside of the Commission's authority, they recognized that the Commission has the authority to intervene in a utility's management decisions in certain circumstances.[24] Specifically, the Commission has authority to intervene in utility management when the utility has abused its managerial discretion and thereby adversely affected the public interest.[25] I&E submits this standard has been met here, where the record evidence indicates that PWSA's arbitrary residency requirement produces a result

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22 66 Pa. C.S. § 1328.

23 RD at 163.

24 RD at 162-163.

25 RD at 163 citing *Metropolitan Edison Company v. Pa. Pub. Util. Comm'n*, 62 Pa. Cmwlth. 460, 437 A.2d at 80 (1981).

that violates the Code. Importantly, I&E notes that the Commission has already expressly repudiated acceptance of such result by way of its Final Implementation Order for Chapter 32, which noted that "the Commission will not defer to PWSA Board decisions as to compliance with the Public Utility Code (including Chapter 32) or Commission regulations."[26]

Despite the Commission's clear authority and the record evidence, in their Recommended Decision, the ALJs erroneously concluded that PWSA's residency requirement does not constitute a violation of the Code.[27] Instead, as the ALJs determined, the residency requirement is "essentially a management decision" that is not arbitrary because requiring workers to reside in the territory that PWSA serves may provide ready access to workers in the case of an emergency, make workers more invested in PWSA's issues, or make the workforce look more like the community it serves.[28] These determinations are erroneous for two reasons.

First, the ALJs' determination that PWSA's residency requirement does not violate the Code is contrary to the record evidence in this case. Because the ALJs' erroneous determination appears to hinge upon PWSA's inaccurate claim that I&E has not linked the residency requirement with non-compliance of the Code, or Commission regulations,[29] it too is inaccurate.[30] Notably, in its Reply Brief, PWSA appears to retract

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26 *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).

27 RD at 163.

28 Id.

29 PWSA Main Brief, pp. 49-50.

30 RD at 12, FOF #26; RD at 158.

its inaccurate claim by admitting that the record in this case "supports a Commission finding that the residency requirement is increasing costs to PWSA and impeding its ability to provide adequate and safe service."[31] To be sure, as the record supports, and as I&E explains below, these results directly violate Section 1301 and 1501 of the Code. Finally, while the proven Code violations independently provide a sufficient basis upon which to grant I&E's exception, the ALJs' determination that PWSA's residency requirement is not arbitrary provides an additional basis of support for I&E's exception because it is not based upon any record evidence. Accordingly, and as explained more thoroughly below, the Commission should order PWSA to revise its Compliance Plan to set forth a plan to immediately terminate its residency requirement.

A. Violation of Section 1301

In its Main Brief, I&E explained that the evidence in this case supports a determination that PWSA's residency requirement violates Section 1301 of the Code because it is a politically-driven policy that results in increased rates, without adding any value or benefit for ratepayers,[32] and leads to unjust and unreasonable rates.[33] By way of reference, Section 1301 requires that every rate made, demanded, or received by any public utility, or by any two or more public utilities jointly, shall be just and reasonable, and in conformity with regulations or orders of the Commission.[34] For purposes of

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[31] PWSA Reply Brief at 22.

[32] I&E Main Brief, p. 61.

[33] I&E Main Brief, pp. 57-63.

[34] 66 Pa. C.S. § 1301.

context, it is well-settled that the Commission has broad discretion in determining whether rates are reasonable.[35] Pertinent to the instant case, a determination that a utility's rates are unjust or unreasonable usually rests on a factual finding that the imposition of those rates unreasonably benefits the utility's investors at the expense of the utility's ratepayers; that is, that the rates constitute a species of "unlawful taxation of consumers."[36]

In this case, although PWSA is not an investor-owned utility and therefore does not answer to investors, the only record evidence of PWSA's motive in establishing its residency requirement is that it did so to appease or benefit the City.[37] The record supports this conclusion, as PWSA has not refuted it nor offered any rationale for adopting its residency requirement, but instead simply indicates that its Board chose to adopt "the City's residency requirement."[38] Furthermore, additional evidence in this case indicates that political interests are the reason that PWSA adopted the requirement. Specifically, the Pennsylvania Department of the Auditor General's 2017 Audit Report[39] makes it clear that City influence has impacted decisions and policies approved by PWSA's Board, including adoption of the Domicile policy.[40] The Auditor General's report stated that PWSA officials and Board members who were interviewed in

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35 *Popowsky v. Pa. P.U.C.*, 683 A.2d 958 (Pa. Commw. 1996).

36 *Nat'l Fuel Gas Distribution Corp. v. Pa. P.U.C.*, 76 Pa. Commw. 102, 139 (Pa. Commw. 1983).

37 I&E Main Brief, p. 60.

38 PWSA St. No. C-2R, p. 18.

39 Performance Audit Report of November 2017 issued by the Pennsylvania Department of the Auditor General ("Auditor General's Report"), p. 3 (I&E Exhibit No. 2, Schedule 4); PWSA Ex. Stip Doc-3.

40 I&E Ex. No. 2, Sch. 4, p. 8.

conjunction with the report, "indicated that the domiciliary requirement was influenced by the Mayor's Office because this policy is in place at all City government offices."[41] PWSA has not refuted this evidence, nor offered any other explanation for adoption of the residency requirement. Therefore, while there is no evidence that PWSA adopted its residency requirement to benefit ratepayers, the record does support a determination that PWSA adopted the requirement to either appease or benefit the City.

Additionally, although there is no record evidence to support a determination that ratepayers benefit from PWSA's residency requirement, there is substantial evidence that they are financially harmed by the result it produces. More specifically, the evidence in this case reveals that the residency requirement has thwarted PWSA's ability to hire qualified staff. Specifically, PWSA has had difficulty in hiring water treatment operators, plumbers, laboratory staff, project managers, welders, electricians, and mechanics who are necessary to address its everyday maintenance and operational needs.[42] As a result of its inability to fill such positions, PWSA has needed to engage specialty contractors to address daily operational needs, which comes at a premium cost to ratepayers. Notably, PWSA indicates that as a result of its residency requirement more than 10% of its workforce is comprised of contractors who are needed to address operational needs. The cost premium for these contractors is estimated to be 150% to 200%, which equates to an addition of more than $2 million in annual costs to PWSA's

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41 I&E Ex. No. 2, Sch. 4, pp. 8-9.

42 I&E St. No. 2, p. 38; I&E Ex. No. 2, Sch. 7, p. 2.

non-unionized workforce.[43] As I&E witness Patel explained, the escalated costs resulting from PWSA's residency requirement drives up costs for ratepayers while simultaneously compromising PWSA's ability to make timely repairs and improvements that are necessary to provide and maintain safe and effective service.[44]

PWSA has not disputed I&E's position that the increased costs are imprudent, unreasonable costs that result in the type of "unlawful taxation of consumers" that the Commission must prohibit. Accordingly, the undisputed evidence proves that the costs that PWSA is imposing upon ratepayers to facilitate its residency requirement, which is not alleged to and does not provide any benefits to those ratepayers, produces unjust and reasonable rates. Therefore, PWSA's residency requirement violates Section 1301 of the Code. While the ALJs erred by failing to make this determination, which is wholly supported by the record, it nonetheless provides a valid basis for the Commission to order PWSA to revise its Compliance Plan to set forth a plan to immediately terminate its residency requirement.

B. Violation of Section 1501

Although a sufficient basis for terminating PWSA's residency requirement already exists because it produces a result that violates Section 1301of the Code, an additional basis exists as well. Specifically, the ALJs also erred by failing to determine that PWSA's residency requirement violates Section 1501 of the Code. Despite this error,

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[43] I&E Ex. No. 2, Sch. 7, p. 2.

[44] I&E St. No. 2, p. 39.

record evidence proves that by artificially restricting its qualified applicant pool by an estimated 84% of the otherwise available population,[45] PWSA has imposed unwarranted and imprudent obstacles upon its operations that compromise its ability to furnish and maintain adequate, efficient, safe, and reasonable service. By way of reference, in pertinent part, Section 1501 of the Code requires as follows:

> Every public utility shall 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. Such service also shall be reasonably continuous and without unreasonable interruptions or delay. Such service and facilities shall be in conformity with the regulations and orders of the commission.[46]

As the above passage makes clear, in order to comply with its obligations under Section 1501, PWSA must furnish and maintain adequate, efficient, safe, and reasonable service for the accommodation, convenience, and safety of its ratepayers, employees, and the public.

In this case, the undisputed evidence, as proffered by PWSA, indicates that PWSA's residency requirement has thwarted its ability to hire qualified water treatment operators, plumbers, laboratory staff, project managers, welders, electricians, and mechanics who are necessary to address its everyday maintenance and operational needs.[47] As an example, PWSA witness Weimar testified that PWSA's residency

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[45] PWSA St. No. C-2, p. 15

[46] 66 Pa. C.S. § 1501.

[47] I&E St. No. 2, p. 38; I&E Ex. No. 2, Sch. 7, p. 2.

requirement hindered its ability to hire trade staff, including qualified and licensed plumbers who are necessary to, among other things, test and, if appropriate, replace customers' meter for compliance.[48] I&E submits by compromising PWSA's ability to hire plumbers who are essential to its operations and to ensuring that customers' meters are functioning accurately, the residency requirement impedes PWSA's ability to ensure adequate, efficient, and reasonable service. This is a violation of Section 1501.

Additionally, PWSA witness Lestitian noted that the restrictions imposed by the residency requirement make it difficult for PWSA to have redundancy among its staff.[49] As I&E explained in its Main Brief, by impeding PWSA's ability to have redundancy among staff, PWSA's residency requirement also produces a result that is inconsistent with its obligation to provide reasonable and efficient service that is reasonably continuous and without unreasonable interruptions or delay.[50] This too is a violation of Section 1501.

Accordingly, the Commission should order PWSA to revise its Compliance Plan to set forth a plan to immediately terminate its residency requirement.

C. The ALJs' Determination that PWSA's Residency Requirement Cannot be Determined to be Arbitrary Has No Basis in the Record

Although the illegal results of PWSA's residency requirement each independently provide a basis for termination of the requirement, another error in the Recommended Decision is that it inaccurately concludes that the requirement is not arbitrary. This

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[48] PWSA St. No. C-1. 23.

[49] PWSA St. No. C-2. p. 16, 32.

[50] I&E Main Brief. p. 64.

determination is contrary to the record evidence because as noted in the discussion above, PWSA has not offered any rationale for adopting its residency requirement. Instead, PWSA simply indicates that its Board chose to adopt "the City's residency requirement."[51] Of particular import here is that the record is completely void of any evidence from PWSA that its residency requirement was adopted to further the interests of its operations, its ratepayers, or for any other conceivable reason other than that the Board "chose" to adopt it. Despite this, in their Recommended Decision, the ALJs concluded that PWSA's residency requirement cannot be deemed arbitrary, and to defend that position, they posited the following potential sources of support for it:

> Requiring workers to reside in the territory served by PWSA may provide ready access to workers in case of an emergency such as a water main break on a freezing night in Pittsburgh; or the resident workers may be more invested in the issues confronted by the Authority; or in the case of diversity the Authority may wish for the workforce to look like the community it serves.[52]

While I&E is uncertain of the basis for the above listing of potential support for PWSA's residency requirement, the determinative fact here is that none of these hypothetical reasons contained in the RD were ever offered in this case.

Significantly, during the entire year that this case has been pending, the hypothetical rationale that the ALJs now posit as basis for their determination that PWSA's residency requirement is not arbitrary has never been advanced by PWSA. I&E submits that it is improper to now advance this rationale at the expense of parties'

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[51] PWSA St. No. C-2R, p. 18.

[52] RD at 163.

inability to investigate and bear out such hypothetical claims. Importantly, absent such extraneous, hypothetical rationale, there is no basis to support any other conclusion other than that the residency requirement is arbitrary. The error of the Recommended Decision's contrived determination to the contrary is further compounded by the fact that while the record lacks any support for the hypothetical rationale, it does provide evidentiary support for the conclusion that PWSA's residency requirement is thwarting its ability to maintain and provide safe, efficient, adequate service at just and reasonable rates.[53] For these reasons, the ALJs have erred in determining that PWSA's residency requirement is not arbitrary; accordingly, the Commission should order PWSA to revise its Compliance Plan to set forth a plan to immediately terminate its residency requirement.

3. The ALJs correctly concluded that the Commission has jurisdiction over PWSA's water service;[54] however, they incorrectly determined that the Commission lacks jurisdiction to order PWSA to replace customer-owned service lines[55] in this case.

In this case, the ALJs properly rejected PWSA's argument that the Commission lacks jurisdiction to address the lead levels in its water on the alleged basis that lead is a water quality issue within the sole province of the Pennsylvania Department of Environmental Protection ("PA DEP").[56] However, despite their recognition of the Commission's jurisdiction, the ALJs erred by failing to determine that, under the unique

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53 I&E Main Brief, pp. 61-64.

54 RD at 208.

55 RD at 208.

56 RD at 207-208.

circumstances present in this case, the Commission has the authority to order PWSA to replace residential lead service lines.[57] To be sure, this error is evident in that the application of the same statutory authorities that support the ALJs' determination of the Commission's jurisdiction over water lead levels also support the Commission's authority to protect PWSA's customers and the public from the health and safety concerns posed by lead. More specifically, Sections 1501 and 3205 of the Code also support the conclusion that 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. That standard has been met in this case. Although the ALJs recognize these authorities, they dismiss their applicability by way of concluding that the Commission does not have the power to order PWSA to enter upon an owner's property and replace lead lines without the owner's consent.[58] To be sure, I&E concedes that the Commission's power to order PWSA to replace privately-owned lead lines, with owners' consent,[59] must be narrowly tailored to apply only to circumstances where replacement is necessary to protect public safety. However, the ALJs have erred by failing to recognize that Sections 1501 and

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[57] RD at 208-209.

[58] RD at p. 208.

[59] For purposes of clarity, I&E has not argued that PWSA should be required to replace a private side lead service line if the line's owner does not permit the replacement, which would otherwise be inconsistent with pp. 89-90 of *Joint Petition for Partial Settlement*'s recognition of the requirement that homeowners grant PWSA permission to replace their private side lead service lines. These same pages of the Joint Petition also contemplate scenarios in which PWSA may not be able to replace a private side lead service line due to technical issues or unsafe conditions. I&E submits that in such instances, if the private side lead service line represents a health and safety hazard, PWSA would have the authority to terminate service in those instances until the access issue or safety issue was resolved via the Code provision 66 Pa. C.S. § 1406(a)(4). citing authority for termination of service for failure to permit access to meters, service connections or other property of the public utility for the purpose of replacement, maintenance, repair or meter reading.

3205 of the Code provide authority for the Commission to order PWSA to replace private side lead lines when health and safety are at issue.

To properly frame this argument, it is important to understand that PWSA's ability to provide safe and effective service to its ratepayers and to make repairs and improvements necessary for the safety of its customers, as required by Section 1501 of the Code is, in part, contingent upon its ability to effectively address actionable lead levels in its system. By way of further context, PA DEP regulations establish an action level for lead at 0.015 mg/L, and provide that the action level is exceeded when the concentration of more than 10% of tap water samples collected during the monitoring period (known as the 90th percentile amount) is greater than the action level.[60] 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. 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.[61] Unfortunately, to date, lead testing in PWSA's service territory reveals that the lead levels in PWSA's water remain actionable.

Importantly, 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."[62] Therefore, PWSA

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60 25 Pa. Code § 109.1102(a).

61 UNITED St. No. C-3, pp. 8-9.

62 PWSA Compliance Plan, p. 119.

explicitly acknowledges that all lead service lines are susceptible to leaching lead into PWSA's water, not just publicly-owned service lines. The fact that the origin of actionable lead levels in PWSA's water is lead infrastructure, utility facilities, is determinative here, because the Code has specifically granted the Commission authority to require that PWSA's facilities are safe. Specifically, Section 1501 of the Code requires PWSA to make repairs, changes, alterations, substitutions, extensions, and improvements to facilities as necessary for the safety of its patrons, employees, and the public. Precedent establishes that the Commission's jurisdiction covers matters including "hazards to public safety due to the use of utility facilities. . ."[63] As the Office of Consumer Advocate has explained in its Reply Brief, Commission precedent establishes the requirement that jurisdictional customers are entitled to water that is fit for basic household purposes, and that standard is measured at the tap.[64] Here, regardless of whether they are owned by PWSA or its customers, the lead lines used to provide service in PWSA's territory have been proven to present a health hazard.

In this case, the uncontested health hazards imposed by elevated lead level were best explained by UNITED witness Dr. Bruce Lanphear. Dr. Lanphear, a medical doctor and a Professor on the Faculty of Health Sciences at Simon Fraser University, testified that Pittsburgh residents are at risk of lead exposure from drinking water.[65] Dr. Lanphear explained that over the past three years, PWSA's tap water showed consistently high

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

64 OCA Main Brief, pp. 5-7.

65 UNITED St. No. C-3, p. 10.

levels of lead, and he indicated that the risk of lead exposure to Pittsburgh residents, especially children and other vulnerable populations, is unacceptably high.[66] In explaining the risks of lead exposure, Dr. Lanphear indicated 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.[67] Significantly, no party presented any evidence to refute Dr. Lanphear's testimony about the detrimental effects of lead exposure. Nor has any party disputed that the existence of lead service lines in PWSA's distribution system have resulted in actionable lead levels in its water. Accordingly, the undisputed record in this case indicates that the lead service lines in PWSA's service territory are not providing safe service to PWSA's ratepayers, and the Commission has clear authority under Section 1501 to compel PWSA to remedy the safety issue through replacement of lead service lines.

As I&E explained in its Main Brief, while Section 1501 independently provides PWSA with authority to address all lead lines in PWSA's system, this statutory authority is further compounded because it works in tandem with another section of the Code that is specifically applicable to PWSA. By way of further explanation, in Section 3205, "Maintenance, repair and replacement of facilities and equipment"[68] the General

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[66] UNITED St. No. C-3, pp. 11, 14.

[67] UNITED St. No. C-3, pp. 8-9.

[68] 66 Pa. C.S. § 3205.

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).[69]

Through the above language, there can be no doubt that the General Assembly expressly granted the Commission power to require the only currently regulated authority, PWSA, to replace any facilities as long as they are used to provide service. 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. Although the Commission's authority here is explicit, as explained in I&E's Reply Brief, it is also wholly consistent with the General Assembly's intent to protect the health and safety of citizens relying on PWSA for the provision of clean water and safe service.[70] Thus, the Commission has express authority to order the replacement of all lead lines used to facilitate water service provided by PWSA.

Although the ALJs acknowledge the Commission's authority in Sections 1501 and 3205, they dismiss application of them here in favor of federal regulations that require less. Specifically, the ALJs point to the EPA's Cooper and Lead Rules to conclude that those federal regulations indicate that a water utility has no obligation to replace the

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[69] 66 Pa. C.S. § 3205(a) (emphasis added).

[70] I&E Reply Brief, pp. 34-35.

owner's privately-owned service line.[71] Specifically, the ALJs cite to 40 CFR Part 141.84(d) as follows:

> A water system shall replace that portion of the lead service line that it owns. In cases where the system does not own the entire lead service line, the system shall notify the owner of the line, or the owner's authorized agent, that the system will replace the portion of the service line that it owns and shall offer to replace the owner's portion of the line. A system is not required to bear the cost of replacing the privately-owned portion of the line, nor is it required to replace the privately-owned portion where the owner chooses not to pay the cost of replacing the privately-owned portion of the line, or where replacing the privately-owned portion would be precluded by State, local or common law.

However, contrary to the ALJs' position, I&E submits that the above language is not determinative here. Instead, none of the above-mentioned circumstances that would exempt PWSA from being required to replace privately-owned lead service lines are operative here.

Specifically, PWSA is not required to bear the cost of private-side replacement, because as explained above, it can pursue cost recovery consistent with Section 1311(b) of the Code. By way of Section 1311(b), even if an owner was unable to pay the cost of the private side lead line replacement, PWSA would not be forced to absorb the cost because it could spread the cost among all ratepayers.[72] Additionally, there is no State, local, or common law prohibition against PWSA's replacement of private side lead lines; on the contrary, as explained above, by way of Sections 1501 and 3205, State law

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[71] RD at 208.

[72] See I&E Main Brief, pp. 88-93.

requires PWSA to replace them when health and safety is at issue, as they are in this case. Accordingly, the ALJs erred by relying upon the above-quoted federal regulations as a basis to refute the Commission's authority to order PWSA to replace private side lead lines. Therefore, I&E respectfully requests the Commission grant its exception, and consistent with recognition of the Commission's authority to order the replacement of private side lead lines in the circumstances present in this case, 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.

4. The ALJs Erred by Failing to Strike the Income-Based Reimbursement Provision of PWSA's Lead Service Line Replacement Program[73]

Although I&E avers that clear authority exists, even assuming, arguendo, that the Commission agrees with the ALJs and determines that it does not have the authority to order PWSA to replace private side lead lines, the ALJs nonetheless erred by failing to recommend that the income-based reimbursement provision of PWSA's LSLR Program be stricken. In their Recommended Decision, the ALJs recommended that the Commission approve PWSA's LSLR Program without any modification, irrespective of, and without any evaluation of, substantial evidence warranting rejection of the income-based reimbursement provision it contains. More specifically, although the record demonstrates that that lead service line replacement is the most effective way to address actionable lead levels in PWSA's water,[74] it unfortunately also demonstrates that the

[73] RD at pp. 208-209.

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

income-based reimbursement component of PWSA's LSLR Program is (1) arbitrary, (2) cost-prohibitive, (3) will hinder certain residential customers' ability to replace their lead lines, and (4) will unnecessarily compromise lead line replacement goals at a time when the lead levels in PWSA's water remain actionable. These results are antithetical to PWSA's obligation to provide safe water service under Section 1501 of the Code; accordingly, and as explained more thoroughly below, ALJs erred by recommending approval of the PWSA's LSLR Program without striking its income-based reimbursement provision.

A. Arbitrarily Determined Income Parameters

By way of additional context, the income-based provision of PWSA's LSLR policy provides for levels of reimbursement of private side lead service line replacements for residential households based upon arbitrarily determined income parameters.[75] Specifically, the policy will reimburse (1) the entire cost of the private side lead service line replacement for households with income levels below 300 percent of the federal poverty level, as adjusted annually; (2) 75 percent of the cost of the private side lead service line replacement for households with income levels between 301 and 400 percent of the federal poverty level, as adjusted annually; (3) 50 percent of the cost of the private side lead service line replacement for households with income levels between 401 and 500 percent of the federal poverty level, as adjusted annually; and (4) all other households will be offered a $1,000 stipend towards the replacement cost of a private

[75] I&E will hereinafter refer to this policy collectively as "the income-based provision" of PWSA's LSLR policy.

side lead service line replacement.[76] As I&E witness Gray points out, PWSA has not explained how the sliding scale for the reimbursement policy was developed.[77]

PWSA has never explained the basis for the income parameters it established. Instead, PWSA simply indicates that it developed the policy after considering the "availability of public funds, equipment, personnel and facilities and the competing demands of the authority for public funds, equipment, personnel and facilities."[78] However, PWSA's general claim regarding the resources it considered offers no explanation of how the determined parameters are tied to ratepayer affordability or the likelihood of those parameters facilitating private side lead line replacement. On the contrary, the record is completely void of any affordability analysis and any statistics to support PWSA's self-determined conclusion that the reimbursement policy fairly balances the needs and concerns of the community with its other construction and operational obligations.[79] Accordingly, the income-based parameters of PWSA's LSLR Program are unsupported and arbitrary; therefore, the ALJs erred by recommending approval of those parameters, which should be stricken from the LSLR Program.

B. Excessive Administrative Costs Compromise Program Goals

Additionally, the ALJs erred by failing to determine that the excessive administrative costs that PWSA estimates incurring to administer the arbitrary income parameters in the income-based reimbursement provision of PWSA's LSLR Program

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[76] PWSA Ex. RAW C-46 p. 4. paragraph 10(d)).

[77] I&E St. No. 4-RS. p. 4.

[78] PWSA St. No. C-1RJ.

[79] PWSA St. No. C-1SD.

compromise safety goals by diverting precious construction dollars. As I&E witness Gray explains, PWSA's high estimated cost for administering the policy is the same amount that some customers will be reimbursed for their private side lead line replacement-$1,000.[80] PWSA stresses that while the $1,000 figure represents an estimate, it intends do everything reasonable to keep costs low.[81] Nonetheless, I&E witness Gray also noted PWSA did not prepare a detailed cost estimate to establish its administrative budget; therefore, a breakdown of the type of costs and anticipated costs were not available.[82] Alongside the lack of any support for the excessive estimated cost, I&E witness Gray noted that the high cost of administering the policy would be better spent as construction dollars towards the replacement of private side lead lines.[83] PWSA has not disputed this point. Accordingly, while minimal information is available to support PWSA's estimated administrative cost of $1,000 per applicant, I&E submits that the estimate, which is the only information available, is excessive and unsupported, representing an additional basis for striking the income-based reimbursement provision of PWSA's LSLR Program.

C. Replacement of Certain Customers' Lead Lines Will Unnecessarily Become Cost-Prohibitive

Finally, the ALJs erred by failing to recommend that the income-based reimbursement provision of PWSA's LSLR Program be stricken because undisputed

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

81 PWSA St. No. C-1RJ, p. 13.

82 I&E St. No. 4-RS, p. 5.

83 I&E St. No. 4-RS, p. 6.

evidence demonstrates that the policy will make customer replacement of lead lines cost-prohibitive. More specifically, PWSA indicates that the average cost to replace private side lead lines if $5,500,[84] and the evidence in this case reveals that requiring customers to pay this cost up front and await reimbursement will reduce private side replacements. As explained by UNITED witness Miller, most of the affected households cannot afford the upfront cost, particularly Pittsburgh's low and moderate income customers.[85] UNITED witness Mitchell Miller testified that aside from just the high cost of replacement, the need to wait reimbursement would impose an insurmountable obstacle for customers who cannot afford to front the cost of replacement and then wait to be reimbursed.[86] In support of UNITED witness Miller's testimony, he cites to a 2018 Federal Reserve report that indicates that 40% of the adults in the United States cannot afford an unexpected $400 expense, and 22% of adults cannot cover their monthly bills.[87] No party has refuted Mr. Miller's testimony.

Additionally, as OCA witness Rubin explains, PWSA's income-based reimbursement policy's adoption of federal poverty level guidelines as guidelines for reimbursement levels may be insufficient to enable replacement. OCA witness Scott Rubin indicates that federal poverty level calculation may not adequately represent the cost of living for people who live on their own, and elderly people in particular. To explain that point, OCA witness Rubin provides an example of a single elderly person

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84 PWSA Ex. RAW C-46, p. 2.

85 UNITED St. C-1-Supp-R, p. 5.

86 UNITED St. C-1-Supp-R, p. 6.

87 UNITED St. C-1-Supp-R, p. 5, footnote 10.

with social security and retirement income of $37,500 per year, which exceeds 300% of the federal poverty level. However, in his example, OCA witness Rubin indicates that the elderly customer's costs for necessities including food, housing, medical care, insurance, taxes, and transportation, could conceivably consume all of that income.[88] In witness Rubin's example, the elderly customer may have no funds available to pay any of $5,500 up front for a private side lead line replacement while waiting an indeterminate amount of time to be reimbursed for a fraction of that expense.

Importantly, witness Rubin indicates that his example does not merely represent a hypothetical example, as U.S. Census data indicates that there are more than 18,000 housing units in Pittsburgh that are headed by a person age 65 or older, and that as many as 8,000 of those households may be a single, elderly person living alone.[89] Finally, witness Rubin notes that the affordability concerns he identified are not just limited to elderly customers, as one or two-person households headed by younger people may also not have an extra money available to replace a lead service line, even though their income might exceed 300% of the federal poverty level.[90]

The Commission must also reject PWSA's late-made claim that it is possible that it may not structure its program to require reimbursements. This claim is too little, too late. First, there is inadequate evidence in the record to support this claim. This claim,

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[88] OCA St. No. 2R-Supp, pp. 5-6.

[89] OCA St. No. 2R-Supp, p. 6.

[90] OCA St. No. 2R-Supp, p. 6.

inconsistent with PWSA July 26, 2019 Board policy[91] and the entire record of this proceeding, is only first raised by PWSA witness Weimar in rejoinder testimony. Specifically, Mr. Weimar states PWSA "is exploring this option and would very much like to do this" but "there are certain legal and operational hurdles."[92] This statement is extremely equivocal and contains no commitment to revise PWSA's LSLR Program reimbursement policy. Second, in its Main Brief, PWSA overstates its own witness testimony, claiming PWSA "intended to structure the 'reimbursement' so that PWSA would pay the contractor [directly]…."[93] The only "intention" Mr. Weimar stated at the cited source was "PWSA intends to work on the details of the customer reimbursement program with CLRAC."[94] Mr. Weimar made no definitive statement that the reimbursement program will be reformed. Without support for its claims in witness testimony, PWSA's Briefs claiming the reimbursement program will be reformed or abandoned with any certainty lack credibility. On this record, the Commission should have no faith that PWSA has committed or will commit to change its reimbursement program. Because of this uncertainty, the Commission should reject PWSA's income-based program in favor of an approach that will not default into an unworkable and unfair reimbursement program should the legal and operational hurdles prove insurmountable.

In summary, the record reveals that the income-based reimbursement provision of PWSA's LSLR Program would be cost-prohibitive to PWSA ratepayers, and PWSA has

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91 PWSA Ex. RAW C-46.

92 PWSA St. No. C-1RJ, p. 11.

93 PWSA Main Brief, p. 74, citing PWSA St. C-1RJ, p. 11. PWSA makes similar claims in its Reply Brief, p. 29.

94 PWSA St. No. C-1RJ, p. 11.

not refuted those claims. Instead, the evidence serves to support I&E witness Gray's concern that ratepayers who cannot afford to pay up front will be unable to replace their private-side lead service lines, compromising the goal of removing lead service lines from PWSA's water distribution system.[95] As I&E discussed in its Main Brief,[96] This result is unnecessary and unwarranted in light of the fact that PWSA has a mechanism available to avoid this outcome by replacing these customer-owned lines and recovering the cost of such replacement by way of Section 1311(b). Accordingly, the ALJs erred by failing to evaluate the substantial evidence and recommending that the income-based reimbursement provision of PWSA's LSLR Program be stricken.

III. CONCLUSION

For the reasons stated herein, I&E respectfully requests that the Commission find that the ALJs erred in failing to recommend that the Commission order PWSA to revise its Compliance Plan to (1) 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; (2) immediately eliminate its residency requirement; and (3) strike the income-based reimbursement 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. To reverse these errors, I&E

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[95] I&E St. No. 4-RS, p. 6.

[96] I&E Main Brief, pp. 88-91.

respectfully requests that the Commission order PWSA to make those three revisions to its Compliance Plan as are necessary for PWSA to achieve end-state compliance.

Respectfully submitted,

Gina L. Miller
Prosecutor
Bureau of Investigation and Enforcement
PA Attorney I.D. No. 313863

John M. Coogan
Prosecutor
Bureau of Investigation and Enforcement
PA Attorney I.D. No. 313920

Bureau of Investigation and Enforcement
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor West
Harrisburg, Pennsylvania 17120

Dated: November 18, 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 **Exceptions** dated November 18, 2019, in the manner and upon the persons listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party):

Served via First Class and Electronic Mail

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

Daniel Clearfield, Esq.
Deanne M. O'Dell, Esq.
Karen O. Moury, Esq.
Carl R. Shultz, Esq.
Sarah D. Stoner, Esq.
Eckert Seamans Cherin & Mellott LLC
213 Market Street, 8th Floor
Harrisburg, PA 17101
dclearfield@eckertseamans.com
dodell@eckertseamans.com
kmoury@eckertseamans.com
cshultz@eckertseamans.com
sstoner@eckertseamans.com
Counsel for Pittsburgh Water & Sewer Authority

Christine Maloni Hoover, Esq.
Erin L. Gannon, Esq.
Lauren E. Guerra, Esq.
Office of Consumer Advocate
Forum Place
555 Walnut Street, 5th Floor
Harrisburg, PA 17101
ocapwsa2018@paoca.org

Sharon E. Webb, Esq.
Erin K. Fure, Esq.
Office of Small Business Advocate
Forum Place
555 Walnut Street, 1st Floor
Harrisburg, PA 17101
swebb@pa.gov
efure@pa.gov

Elizabeth R. Marx, Esq.
John W. Sweet, Esq.
Patrick M. Cicero, Esq.
PA Utility Law Project
118 Locust Street
Harrisburg, PA 17101
pulp@palegalaid.net
Counsel for Pittsburgh United

Linda R. Evers, Esq.
Stevens & Lee
111 North Sixth Street
Reading, PA 19603
lre@stevenslee.com
Counsel for Pennsylvania-American Water Company

Michael A. Gruin, Esq.
Stevens & Lee
17 North Second Street, 16th Floor
Harrisburg, PA 17101
mag@stevenslee.com
Counsel for Pennsylvania-American Water Company

Susan Simms Marsh, Esq.
Pennsylvania-American Water Company
852 Wesley Drive
Mechanicsburg, PA 17055
susan.marsh@amwater.com

Peter DeMarco, Esq.
Dimple Chaudhary, Esq.
Cecilia Segal, Esq.
Natural Resources Defense Counsel
1152 15th Street Northwest, Suite 300
Washington DC, 20005
pdemarco@nrdc.org
dchaudhary@nrdc.org
csegal@nrdc.org

Served via First Class Mail Only

Michelle Naccarati Chapkis
Mayor's Blue Ribbon Panel on Restructuring the PWSA
c/o Women for a Healthy Environment
5877 Commerce Street
Pittsburgh, PA 15206

Gina L. Miller
Prosecutor
Bureau of Investigation & Enforcement
PA Attorney I.D. No. 313863