



January 16, 2020

VIA E-File

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
400 North Street, Filing Room
Harrisburg, PA 17120

**RE: Implementation of Act 120 of 2018, Docket No. M-2019-3013286
Reply Comments of CAUSE-PA, GHHI, NRDC, and Pittsburgh UNITED**

Dear Secretary Chiavetta,

Please find the *Joint Reply Comments of the Coalition for Affordable Utility Service and Energy Efficiency in Pennsylvania (CAUSE-PA), the Green & Healthy Homes Initiative (GHHI), the Natural Resources Defense Council (NRDC), and Pittsburgh United (UNITED)*, which are respectfully submitted for filing in the above referenced docket. An electronic copy will be provided to Commission Staff, as indicated below.

Please do not hesitate to contact me with any questions or concerns.

Respectfully submitted,

A handwritten signature in black ink that reads "John W. Sweet". The signature is written in a cursive style with a horizontal line above the name.

John W. Sweet
Counsel for CAUSE-PA

Cc: pc-act120implementation@pagov.onmicrosoft.com

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

Implementation of Act 120 of 2018

:
:
:

Docket No. M-2019-3013286

JOINT REPLY COMMENTS OF

**THE COALITION FOR AFFORDABLE UTILITY SERVICES AND ENERGY
EFFICIENCY IN PENNSYLVANIA (CAUSE-PA),**

GREEN & HEALTHY HOMES INITIATIVE (GHHI),

THE NATURAL RESOURCES DEFENSE COUNCIL (NRDC)

AND

PITTSBURGH UNITED

January 16, 2020

I. INTRODUCTION AND BACKGROUND

The Natural Resources Defense Council (NRDC)¹, together with the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (CAUSE-PA)², the Green & Healthy Homes Initiative (GHHI)³, and Pittsburgh UNITED (UNITED)⁴ (collectively, Joint Commenters), file the following reply comments for the Commission's consideration in establishing standards and guidelines for lead service line (LSL) replacement programming. NRDC and CAUSE-PA, GHHI, and UNITED separately filed initial written comments in this proceeding, and were each active participants in the Commission's December 19, 2019 Stakeholder Meeting. We join together for these reply comments to underscore our unity on these issues and to streamline the Commission's review.

For the sake of brevity, the Joint Commenters will not reiterate the arguments previously raised in our written and verbal comments to the Commission in this matter, though we stand firmly on our previous recommendations and conclusions. Our reply comments will instead focus

¹ NRDC is a public health and environmental organization with more than 100,000 Pennsylvania-based members and online activists. NRDC works to safeguard the earth - its people, its plants and animals, and the natural systems on which all life depends.

² CAUSE-PA is a statewide unincorporated association of low-income individuals which advocates on behalf of its members to enable consumers of limited economic means to connect to and maintain affordable water, electric, heating and telecommunication services. CAUSE-PA membership is open to moderate- and low-income individuals residing in the Commonwealth of Pennsylvania who are committed to the goal of helping low-income families maintain affordable access to utility services and achieve economic independence and family well-being.

³ The Green & Healthy Homes Initiative (GHHI) is a nonprofit organization dedicated to the design, development and implementation of policies and practices to advance the stock of affordable and accessible healthy housing. GHHI is the nation's leading voice in the efforts to eradicate childhood lead poisoning and their related legislative and policy work has spanned 40 states and 65 cities. In Pennsylvania, GHHI serves as an advisor to the state childhood lead poisoning prevention program and provides technical assistance to Pittsburgh, Lancaster and Philadelphia to align, braid and coordinate evidence-based healthy, safe and energy efficient housing intervention programs.

⁴ Pittsburgh UNITED is a coalition of community, labor, faith, and environmental organizations in Pittsburgh, Pennsylvania committed to advancing the vision of a community and economy that work for all people. Its members work collectively to build a community whereby all workers are able to care for themselves and raise their families, sharing in the prosperity generated by economic growth and development.

on responding to issues raised by other stakeholders to which the Joint Commenters have not previously commented or which warrant further response.

Please note that the term “lead service line” – or LSL – is used throughout the following reply comments to refer both to service lines made of lead and those made of galvanized iron or steel. Galvanized service lines can become “seeded” with lead released from an upstream lead source, and that lead can later be released into drinking water. Consequently, utility LSL replacement programs should remove both lead and galvanized service lines.

II. REPLY COMMENTS

a. The Commission has jurisdiction over the replacement of lead service lines.

In its initial comments in this proceeding, the Pittsburgh Water and Sewer Authority (PWSA) concedes that the Commission has authority over “how water utilities recover the costs of replacing customer-owned lead service lines,” but asserts that the Commission lacks jurisdiction over “a water utility’s obligation to replace LSLs, or the technical manner in which such replacements will occur.”⁵ PWSA’s assertion is wrong, and ignores the provisions of the Public Utility Code vesting the Commission with that jurisdiction.

First, the text of Act 120 plainly sets out the Commission’s jurisdiction. It states that “a public utility providing water or wastewater service must obtain prior approval from the commission for the replacement of a customer-owned lead water service line.”⁶ In requiring Commission approval for such replacements, Act 120 does not restrict the Commission to simply rubber stamp all utility-proposed LSL replacement plans. Instead, the Commission review

⁵ PWSA Comments at 1.

⁶ 66 Pa. C.S. § 1311(b)(2)(v).

contemplated by Act 120 is the same as that which applies to all ratepayer-funded programs (whether mandated by the Commission or voluntarily initiated by the utility): ensuring that the plans are just, reasonable, and nondiscriminatory, prior to a program’s approval.⁷ Thus, contrary to PWSA’s contentions, the text of Act 120 confirms the Commission’s authority to evaluate the design and implementation of utility-proposed programs for the replacement of service lines on private property.

In addition, sections 1501, 1505(a), and 3205 of the Public Utility Code provide a separate source for Commission jurisdiction, as they give the Commission authority to order utilities to “replace facilities” that render water service not “safe.”⁸ The Public Utility Code’s definition of “facilities” encompasses all service lines, including private-side service lines.⁹ And it is indisputable that LSLs can render customers’ water unsafe—that is, unfit “for basic domestic purposes,” such as drinking and cooking.¹⁰ Consequently, the Commission has authority to order utilities to replace LSLs, including private-side LSLs, when necessary to ensure safe service.

Through its initial comments, PWSA also raises the specter of “conflicting directives” from the Commission and DEP regarding lead remediation. But it is settled law that the Commission has joint and concurrent jurisdiction with DEP over matters affecting the safety of drinking water—particularly where, as here, the utility’s infrastructure is responsible for making the drinking water unsafe.¹¹ Moreover, PWSA provides no specific examples of how Commission

⁷ See *id.* §§ 1301 (rates must be just and reasonable), 1304 (rates must be nondiscriminatory); 1311(b)(3) (“Nothing in this section shall be construed to limit the existing ratemaking authority of the commission . . .”).

⁸ 66 Pa. C.S. §§ 1501, 1505(a), 3205.

⁹ *Id.* §§ 102 (defining “facilities” as “any and all means and instrumentalities . . . used” by a utility, even if not “owned” by the utility); see also *Overlook Dev. Co. v. Pub. Serv. Comm’n*, 158 A. 869, 871-72 (Pa. 1932) (holding that privately owned water mains are “facilities” of the utility); *Petition of Borough of Boyertown*, 466 A.2d 239, 247-48 (Pa. Commw. Ct. 1983) (same, applying 66 Pa. C.S. § 102).

¹⁰ *PUC v. Pa. Gas & Water Co.*, Docket Nos. R-850178 et al., (Opinion and Order entered Apr. 24, 1986).

¹¹ *Pickford v. Pa. Am. Water Co.*, Docket Nos. C-20078029 et al., at 16 (Opinion and Order entered Mar. 20, 2008); see also PUC, Secretarial Letter - Assignment of the Pittsburgh Water and Sewer Authority Compliance Plan to the

guidelines or regulations stemming from this Act 120 proceeding could conflict with the federal Lead and Copper Rule, EPA’s proposed revisions to that Rule,¹² or existing DEP orders. Commission jurisdiction cannot be defeated by vague allegations of hypothetical conflicts.

In fact, the federal Lead and Copper Rule does not even attempt to answer key issues put to the Commission by the Public Utility Code and posed by the Commission in this proceeding under Act 120: how can utilities design and implement LSL replacement programs that will ensure safe service and utilize ratepayer funds in a just, reasonable, and non-discriminatory manner? Directed questions M-11 and M-12, for example, inquire about strategies for prioritizing LSL replacements. These questions reflect the fact that some consumers are more likely to have lead pipes than others, and, among the consumers who have lead pipes, some—pregnant women and children, for example—face a greater risk of harm from lead exposure.¹³ To date, the federal Lead and Copper Rule does not address these issues.¹⁴ But they are areas where the Commission’s authority and expertise can be brought to bear for the benefit of customers.

Commission jurisdiction over LSL replacements complements, rather than conflicts with, DEP’s oversight. This situation is not unique to lead remediation. The Commission routinely exercises its jurisdiction as part of larger regulatory regimes that include other state and federal

Office of Administrative Law Judge (Corrected), Docket Nos. M-2018-2640802, -2640803, at 3 (Nov. 28, 2018) (recognizing the “joint regulatory roles” played by the Commission and DEP in overseeing PWSA’s lead remediation efforts).

¹² See 84 Fed. Reg. 61,684 (Nov. 13, 2019).

¹³ See, e.g., General Assembly of the Commonwealth of Pennsylvania, Lead Exposure Risks and Responses in Pennsylvania: Report of the Advisory Committee and Task Force on Lead Exposure 46-49 (April 2019) (describing the health effects of lead exposure, particularly on children); Allegheny Cty. Lead Task Force, Final Report & Recommendations 12 (2017) (describing the “disproportionate effect of legacy lead issues on disadvantaged communities”).

¹⁴ In its notice of proposed revisions to the Lead and Copper Rule, EPA requested comment on strategies for prioritizing LSL replacements and whether water systems should be required to include a prioritization strategy in their LSL replacement plans. 84 Fed. Reg. at 61,735. EPA, however, has yet to propose, let alone adopt such a requirement.

agencies and associated regulatory standards.¹⁵ The Commission has jurisdiction to address the issues related to LSL replacements raised in Staff's directed questions.

Finally, although we disagree with PWSA's position on the Commission's jurisdiction, we commend the utility's efforts to improve and expand its LSL replacement programming. Many aspects of that programming, including PWSA's prioritization of LSL replacements in vulnerable communities based on public-health data, could serve as a model for other utilities in the Commonwealth and beyond.

b. The Commission should act swiftly to develop interim guidelines, and should take steps to standardize lead service line replacement program planning requirements and review process.

As explained in our respective initial Comments, Pennsylvania is in the midst of a lead crisis that poses a serious and immediate hazard to public health and safety to residents throughout the state.¹⁶ The immediacy of the current health risks – especially to Pennsylvania's children and other uniquely vulnerable populations – requires urgent action. The Joint Commenters recommend that the Commission issue interim guidelines, followed by a more extensive policy statement or rulemaking process. While we recognize the need to develop clear parameters for programming, this public health emergency poses a dire risk to Pennsylvania's children and does not afford the time typically necessary to draft and implement formal regulations. Thus, we urge the Commission to adopt clear interim guidelines while it works to establish more certain rules to govern the terms and conditions of LSL replacement programs and associated cost recovery considerations.

¹⁵ See, e.g., Harrisburg Taxicab & Baggage Co. v. PUC, 786 A.2d 288, 292 (Pa. Commw. Ct. 2001) (“The Public Utility Code clearly assigns the PUC the authority and the duty to regulate taxicab services for safety. Although this creates an overlap with the authority of DOT under the Vehicle Code, such overlap does not divest the PUC of its statutory authority or duty.”); Kuniegel v. Pa.-Am. Water Co., Docket No. C-20078223, at 4 (Opinion and Order entered May 2, 2008) (“This case illustrates well the overlapping enforcement duties and responsibilities of the Commission and the DEP.”).

¹⁶ Joint Comments of CAUSE-PA, GHHI, and UNITED at 3.

Moreover, regardless of how the Commission ultimately chooses to proceed, the Joint Commenters urge the Commission to include provisions governing the submission and review process for LSL replacement program plans. For example, the Commission should provide a common outline or template for utility plans, and should specify the information that must be filed in support thereof. The process for review should also be established, including the development of a record before an Administrative Law Judge to assist the Commission in determining whether each utility's Act 120 plan is appropriately funded and designed to reach affected consumers. This type of specificity will help ensure that all stakeholders can meaningfully participate in and provide comment on recommendations regarding the design and implementation of ratepayer funded LSL replacement programming.

c. The Commission should require water utilities to propose and implement cost-saving policies.

The Commission has sought feedback on managing costs. We recommend the following strategies as a non-exclusive list of cost-saving measures:

1. Utilize trenchless pipe replacements, when feasible.¹⁷
2. Engage in multiple replacements in one neighborhood to maximize economies of scale, when feasible and consistent with prioritization of vulnerable populations.
3. Leverage and coordinate with existing lead remediation programming in the service territory to more effectively reach target populations and communities.¹⁸

As the Joint Commenters noted at the December 19 Stakeholder meeting, we recommend that water utilities establish an advisory committee, consisting of various stakeholders. One of the charges of an advisory committee such as this could be to help identify additional cost savings and

¹⁷ Pennsylvania American Water supported the prioritization of trenchless replacement methods at the December 19, 2019 Stakeholder Meeting.

¹⁸ See Joint Comments of CAUSE-PA, GHHI, and UNITED at 11.

program efficiencies that the utility could use to more effectively implement its Act 120 LSL remediation programming.

d. All consumers, including tenants, must be notified of the existence of a lead service line to their home.

In light of discussion at the December meeting, the Joint Commenters wish to stress the responsibility that utilities have to inform and educate all customers, including renters, about the presence of LSLs, the risk of lead exposure, and the steps consumers can take to protect themselves from harm.

The existence of a landlord-tenant relationship is not an acceptable reason for refusing to inform tenants about the existence of a LSL in their home. The presence of LSLs presents a health hazard to tenants and their children that would not be apparent unless the tenant is directly informed. Thus, it is critical that utilities develop a comprehensive outreach and education plan to help ensure that all affected consumers, including tenants, can protect themselves.¹⁹

Utilities have a responsibility to provide safe service and facilities.²⁰ The existence of a lead line in a residential unit is a serious safety issue related to the utility's facilities, and poses a significant health risk to the end user.²¹ It is imperative that all consumers – especially children and pregnant women, who are at the highest risks of health effects of lead exposure – are fully informed when they are at risk of lead exposure, and provided with appropriate tools to remediate that exposure.

¹⁹ Id. at 8-10.

²⁰ 66 Pa. C.S. § 1501.

²¹ 66 Pa. C.S. § 102 (“Facilities” include all tangible property or instrumentalities used for or in connection with the business of any public utility.).

As noted in our initial Comments, low income consumers more often live in poorly maintained rental housing, and often face increased health risks associated with lead exposure from multiple sources.²² While landlords are legally required to disclose the presence of lead-based paint in rental units,²³ the law surrounding the disclosure of LSLs is less clear. It is therefore imperative that the Commission explicitly require water utilities to inform all consumers – including tenants – when it discovers that a residential property is served by a LSL. Without clear tenant notice requirements, many tenants – especially those who are low income – will unknowingly consume lead tainted water.

The Public Utility Code not only permits utilities to communicate directly with tenants at a residential property served by the utility, it requires utilities to do so. The Discontinuance of Service to Leased Premises Act²⁴ requires utilities to identify and track tenant-occupied properties and to provide advanced notice of a pending termination to any residential property that is “reasonably likely” to be occupied by a tenant.²⁵ In turn, DSLPA provides tenants with distinct right to take immediate actions to prevent the loss of service to their residence service.²⁶ In other words, DSLPA protects tenants from service terminations resulting from a landlord’s deliberate actions or inaction, and does not rely solely on the landlord to convey critical information to the tenant that will necessarily impact the tenant’s ongoing access to safe, stable water service. Regarding identified LSLs, tenants similarly need to be protected from consuming lead tainted water due to a landlord’s inaction. Indeed, the need to convey accurate and timely information about the presence of lead in drinking water, and the steps a tenant could take to remediate the

²² Joint Comments of CAUSE-PA, GHHI, and UNITED at 9.

²³ Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S. Code § 4852d (a)(1)(B).

²⁴ 66 Pa. C.S. Ch. 15, Subch. B.

²⁵ 66 Pa. C.S. §§ 1523, 1524, 1526.

²⁶ 66 Pa. C.S. § 1527

associated risk of lead exposure, deserves the same level of direct disclosure to tenants that is required in DSLPA.

The Joint Commenters support active and creative efforts to communicate risks to consumers. For example, utilities may note risks on bills and door hangers, a strategy mentioned at the December meeting, and reach customers by phone and on social media.²⁷ Again, an advisory committee could serve a useful role in providing input and advice to utilities in crafting effective communications strategies for target communities.

Finally, the Commission should use its authority to ensure that utilities are making every effort to encourage customers to comply with post-replacement flushing and filtration recommendations.

III. CONCLUSION

The Joint Commenters appreciate the opportunity to respond to the arguments raised by other parties in this proceeding, and urge the Commission to set clear guidelines and parameters for water utilities to follow in the design and implementation of comprehensive LSL replacement programming, consistent with our recommendations throughout this proceeding.

²⁷ See Joint Comments of CAUSE-PA, GHHI, and UNITED at 9-10; NRDC Comments at 3.

Respectfully Submitted

On Behalf of CAUSE-PA



John Sweet, Esq.
Elizabeth R. Marx, Esq.
Ria M. Pereira, Esq.
Counsel for CAUSE-PA
Pennsylvania Utility Law Project
118 Locust Street
Harrisburg, PA 17101
(717) 236-9486
pulp@palegalaid.net

On Behalf of NRDC



Valerie Baron, Esq.
Natural Resources Defense Council
1152 15th Street NW
Suite 300
Washington, DC 20005
202-717-8232
vbaron@nrdc.org

On Behalf of GHHI



Ruth Ann Norton, President & CEO
Jamal Lewis, Policy and TA Specialist
Green & Healthy Homes Initiative
2714 Hudson Street
Baltimore, MD, 21224
410-534-6477
ranorton@ghhi.org
jlewis@ghhi.org

On Behalf of Pittsburgh UNITED



Aly Shaw, Environmental Justice Organizer
Pittsburgh UNITED
841 California Ave
Pittsburgh, PA 15212
724-809-9014
aly@pittsburghunited.org