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February 13, 2020

Via Electronic Filing

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

Re: Sandra Lewis, A/K/A Sandra Sherred v. Pittsburgh Water and Sewer Authority
Docket No. C-2020-3016742

Dear Secretary Chiavetta:

Enclosed for electronic filing please find Pittsburgh Water and Sewer Authority's Notice to Plead and Preliminary Objections with regard to the above-reference matter. Copies to be served in accordance with the attached Certificate of Service.

Sincerely,



Lauren Burge

LB/mo
Enclosure

cc: Cert. of Service w/enc.

PA P. FEB 27 2020

ON

SECRET

FEB 27 2020

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

SANDRA LEWIS, A/K/A	:	
SANDRA SHERRED	:	
Complainant	:	
	:	Docket No. C-2020-3016742
v.	:	
	:	
PITTSBURGH WATER AND SEWER	:	
AUTHORITY	:	
Respondent	:	

NOTICE TO PLEAD

TO: Sandra Lewis, a/k/a Sandra Sherred
2434 Eiler Avenue
Pittsburgh, PA 15210

CC: John P. Corcoran, Jr., Esquire
Jones, Gregg, Creehan & Gerace, LLP
411 Seventh Avenue, Suite 1200
Pittsburgh, PA 15219

Pursuant to 52 Pa. Code § 5.101, you are hereby notified that an answer to the enclosed **Preliminary Objections** of The Pittsburgh Water and Sewer Authority ("PWSA") must be filed within 10 days of the date of service of the Preliminary Objections.

All pleadings, such as a Reply to Preliminary Objections, must be filed with the Secretary of the Pennsylvania Public Utility Commission with a copy served to counsel for PWSA and the Office of Administrative Law Judge.

File with:

With a copy to:

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
PO Box 3265
Harrisburg, PA 17105-3265

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Eckert Seamans Cherin & Mellott, LLC
600 Grant Street, 44th Floor
Pittsburgh, PA 15219

Shannon F. Barkley, Esquire
Corporate Counsel
Pittsburgh Water and Sewer Authority
1200 Penn Ave
Pittsburgh, PA 15222



Lauren M. Burge, Esquire

Date: February 13, 2020

Attorneys for
The Pittsburgh Water and Sewer Authority

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

FEB 27 2020
PA PUBLIC UTILITY COMMISSION
SECRETARY'S OFFICE

SANDRA LEWIS, A/K/A	:	
SANDRA SHERRED	:	
Complainant	:	
	:	Docket No. C-2020-3016742
v.	:	
	:	
PITTSBURGH WATER AND SEWER	:	
AUTHORITY	:	
Respondent	:	

**THE PITTSBURGH WATER AND SEWER AUTHORITY'S
PRELIMINARY OBJECTIONS**

Pursuant to 52 Pa. Code § 5.101(a), The Pittsburgh Water and Sewer Authority (“PWSA” or “Authority”) submits these Preliminary Objections to the Formal Complaint of Sandra Lewis, also known as Sandra Sherred (“Complainant”), which was served on PWSA on January 24, 2020. In support of these Preliminary Objections, the PWSA avers as follows:

I. INTRODUCTION

1. Contemporaneously with the filing of these Preliminary Objections, PWSA has filed an Answer to the Complaint, which is incorporated herein by reference. PWSA’s Answer denies the material allegations set forth in the Complaint.

2. Paragraph 5 of the Complaint requests that the Commission: (1) declare that PWSA has a legal obligation to perform remediation work on the stormwater line located on the Complainant’s property; (2) require PWSA to reimburse the Complainant for damage caused by flooding in her basement and yard; and (3) grant other relief, including but not limited to attorneys’ fees and costs.

3. PWSA submits, pursuant to 52 Pa. Code § 5.101(a)(1), that the claims and issues related to property damage, diminution of property value and/or monetary compensation, as well as those related to the award of attorneys' fees and costs, should be dismissed because the Commission lacks jurisdiction over those issues.

II. PRELIMINARY OBJECTIONS

A. Applicable Legal Standards

4. The Commission's Rules of Administrative Practice and Procedure permit the filing of preliminary objections.¹ The Commission's procedure regarding the disposition of preliminary objections is similar to that utilized in Pennsylvania civil practice. *Id.*

5. Under Section 5.101(a) of the Commission's regulations, preliminary objections must specifically state the legal and factual grounds relied upon and be limited to the following:

- (1) Lack of Commission jurisdiction or improper service of the pleading initiating the proceeding;
- (2) Failure of a pleading to conform to this chapter or the inclusion of scandalous or impertinent matter;
- (3) Insufficient specificity of a pleading;
- (4) Legal insufficiency of a pleading;
- (5) Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action;
- (6) Pendency of a prior proceeding or agreement for alternative dispute resolution; and
- (7) Standing of a party to participate in the proceeding.

6. The moving party may not rely on its own factual assertions, but must accept for the purposes of disposition of the preliminary objection, all well-pleaded, material facts of the

¹ 52 Pa. Code § 5.101(a)(1)-(7). *Equitable Small Transportation Interveners v. Equitable Gas Company*, 1994 Pa. P.U.C. LEXIS 69, Docket No. C-00935435 (July 18, 1994).

other party, as well as every inference fairly deducible from those facts.² However, the Commission need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations or expressions of opinion.³

7. In deciding the preliminary objections, the Commission must determine whether, based on the well-pleaded factual averments of the party, recovery or relief is possible.⁴

8. PWSA submits these preliminary objections pursuant to 52 Pa. Code § 5.101(a)(1), based on the lack of Commission jurisdiction over specific issues presented. The Commission lacks jurisdiction to grant any monetary compensation or attorneys' fees or costs to the Complainant, and therefore such issues and claims must be dismissed.

B. Dismissal Based on Lack of Commission Jurisdiction to Award Monetary Damages

9. Paragraph 5 of the Complaint requests that the Commission require PWSA to reimburse the Complainant for damage caused by flooding in her basement and yard.

10. Claims for property damage and/or diminution of property values⁵ are not determined by the Commission. The Commission's jurisdiction does not include actions that sound in either contract or tort. The powers of the Commission do not include the power to award

² *County of Allegheny v. Cmwth. of Pa.*, 490 A.2d 402 (Pa. 1985).

³ *Stanton-Negley Drug Co. v. Dep't of Pub. Welfare*, 927 A.2d 671, 673 (Pa. Cmwth. 2007).

⁴ *Department of Auditor General, et al. v. SERS, et al.*, 836 A.2d 1053, 1064 (Pa. Cmwth. 2003); *P.J.S. v. Pa. State Ethics Commission*, 669 A.2d 1105 (Pa. Cmwth. 1996).

⁵ The Commission has not been given authority under any other statute to assess damage to private property value caused by the activities of a public utility. *See Letter of Notification of Philadelphia Electric Company*, PUC Docket No. A-110550F055, Opinion and Order entered March 26, 1993; 1993 Pa. PUC LEXIS 32 (determination of damages due to alleged decreases in market value is not within the Commission's jurisdiction to hear and determine).

monetary damages,⁶ such as damages to property.⁷ It is well settled that the courts of common pleas have jurisdiction over suits for damages, including claims against public utilities.⁸

11. Therefore, PWSA respectfully requests that all issues and claims related to the award or monetary compensation be dismissed or stricken because of a lack of jurisdiction.

C. Dismissal Based on Lack of Jurisdiction to Award Attorneys' Fees and Costs

12. Paragraph 5 of the Complaint also requests that the Commission grant "such other relief as may be deemed just and proper under the circumstances including, but not limited to, whatever attorney's fees and costs as allowed by law."

13. It is well established in the courts of this Commonwealth that legal fees are not generally recoverable except where permitted by statute or other recognized exception to this general rule.⁹

14. The Commission lacks the statutory authority to award attorneys' fees and costs.¹⁰ Nothing in the Commission's statutes, regulations or orders gives the Commission the power to grant attorneys' fees in the factual setting of the present Complaint.

⁶ See, e.g., *DeFrancesco v. W. Pa. Water Co.*, 453 A.2d 595 (Pa. 1982); *Elkin v. Bell of Pa.*, 491 Pa. 123, 420 A.2d 371 (1980); *Feingold v. Bell Telephone Co. of Pa.*, 383 A.2d 791 (Pa. 1977).

⁷ The Commission possesses no jurisdiction over real property issues. See, e.g., *Leonard Kapel v Peoples Natural Gas Company LLC*, PUC Docket No. C-2010-2153364, Final Order (Act 294) entered October 6, 2011, adopting Initial Decision dated August 12, 2011; *David E. Stefanoski v. Pennsylvania-American Water Company*, PUC Docket No. C-20078219, PUC Opinion and Order entered September 22, 2008.

⁸ That being said, all local governments in the Commonwealth of Pennsylvania (including PWSA) are afforded sovereign immunity against third party claims for property loss damage under the Political Subdivision Torts Claim Act. Some exceptions do apply, but generally conditions are very specific for exceptions to be validated. This immunity generally applies to claims for property damage from sewage backup or flooding caused by a failure to properly maintain a sewer line. See, e.g., *McCarthy v. City of Bethlehem*, 962 A.2d 1276, 1278 (Pa.Cmwlth. 2008); *City of Washington v. Johns*, 474 A.2d 1199, 1202-03 (Pa.Cmwlth. 1984).

⁹ See, e.g., *Corace v. Balint*, 418 Pa. 262, 271 (1965); *Becker v. Borough of Schuylkill Haven*, 200 Pa. Super. 305, 312 (1963).

¹⁰ See, e.g., *Pa. Pub. Util. Comm'n v. Duquesne Light Co.*, 61 Pa. PUC 485 (1986).

15. Therefore, PWSA respectfully requests that all issues and claims related to the award or reimbursement of attorneys' fees and costs be dismissed or stricken because of a lack of jurisdiction.

D. Lack of Jurisdiction over Other Counts Raised in the Common Pleas Amended Complaint

16. As an attachment to the Formal Complaint, Ms. Lewis has provided a copy of the related *Amended Complaint in Civil Action Requesting Monetary and Injunctive Relief* filed on October 11, 2018 by the Complainant against PWSA and Birmingham Cemetery of Pittsburgh ("Cemetery") in the Court of Common Pleas of Allegheny County at Docket Number GD 17-8097 (hereinafter, "Common Pleas Amended Complaint"). The Complaint indicates that the action in the Court of Common Pleas has been stayed pending resolution of this Complaint before the Commission. In Paragraph 4, Ms. Lewis refers to the Common Pleas Amended Complaint in stating the reason for her complaint.

17. To the extent that the allegations in the Common Pleas Amended Complaint are considered to be incorporated by reference in this Complaint before the Commission, the Commission lacks jurisdiction over claims raised in the Common Pleas Amended Complaint.

18. The Common Pleas Amended Complaint includes counts of trespass, continuing trespass, negligence per se, private nuisance, public nuisance pursuant to the Stormwater Management Act,¹¹ and violations of the Stormwater Management Act.¹²

¹¹ 32 P.S. § 680.1, *et seq.*

¹² PWSA also notes that many of the allegations in the Common Pleas Amended Complaint appear to be against the Cemetery rather than PWSA.

18. The Commission, as a creation of the General Assembly, has only the powers and authority granted to it by the General Assembly contained in the Public Utility Code.¹³ The Commission must act within, and cannot exceed, its jurisdiction.¹⁴ Jurisdiction may not be conferred by the parties where none exists.¹⁵ Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy.¹⁶

19. The Commission has not been granted jurisdiction to decide claims related to trespass, negligence, nuisance, or violations of the Stormwater Management Act. Therefore, the Commission lacks jurisdiction over these counts raised in the Common Pleas Amended Complaint. To the extent that those counts are incorporated in the Formal Complaint by reference, the claims must be dismissed due to the Commission's lack of jurisdiction.

¹³ *Tod and Lisa Shedlosky v. Pennsylvania Electric Co.*, Docket No. C-20066937, Opinion and Order (May 28, 2008); *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791 (Pa. 1977).

¹⁴ *City of Pittsburgh v. PUC*, 43 A.2d 348 (Pa.Super. 1945).

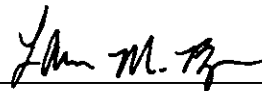
¹⁵ *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967).

¹⁶ *Hughes v. Pennsylvania State Police*, 619 A.2d 390 (Pa.Cmwlt. 1992), appeal denied, 637 A.2d 293 (Pa. 1993).

III. CONCLUSION

WHEREFORE, PWSA respectfully requests that this Commission (a) grant PWSA's preliminary objections; (b) dismiss the Complaint related to monetary compensation and attorneys' fees and costs; and (c) grant any other relief to PWSA that is deemed to be reasonable and appropriate.

Respectfully submitted,



Of counsel:

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Date: February 13, 2020

Attorneys for
The Pittsburgh Water and Sewer Authority

PA PUBLIC UTILITIES COMMISSION
SECRETARY'S OFFICE
FEB 27 2020

Verification

I, Rick Obermeier, am the Chief of Operations for The Pittsburgh Water and Sewer Authority ("PWSA" or "Authority"), and I hereby state that the facts set forth in the foregoing **Preliminary Objections** are true and correct to the best of my knowledge, information and belief and that I expect the Authority to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 (relating to sworn falsification to authorities).



Rick Obermeier
Chief of Operations
The Pittsburgh Water and Sewer Authority

CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of the foregoing **Preliminary Objections** upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

Via First Class Mail

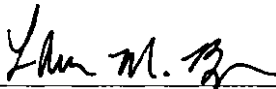
Sandra Lewis, a/k/a Sandra Sherred
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Pennsylvania Public Utility Commission
Commonwealth Keystone Building
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400 North Street
Harrisburg, PA 17120

PA PUBLIC UTILITY COMMISSION
FEB 27 2020
SECTION 101

Date: February 13, 2020



Lauren M. Burge, Esquire
Attorney for
The Pittsburgh Water and Sewer Authority

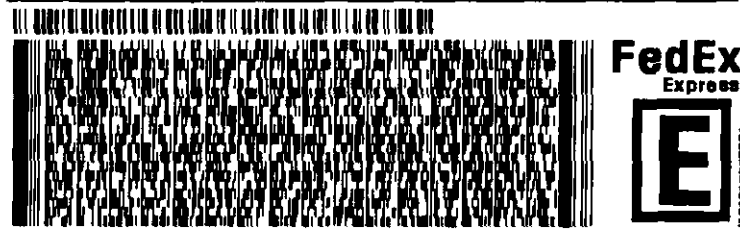
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600 GRANT ST. 45TH FLR.
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PITTSBURGH, PA 15219
UNITED STATES US

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PENNA PUBLIC UTILITY COMMISSION
400 NORTH STREET

HARRISBURG PA 17120

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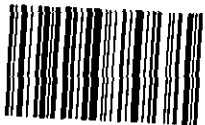
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